FEDERAL MEDIATION AND CONCILIATION SERVICE

Proceedings before

James M. Paulson, Arbitrator

In the matter of: **United Food & Commercial Workers, Local 7, Professional Health Care Div.,** and **Kaiser Permanente**	FMCS Case No. 050719-04733-7 Employee Discharge

DECISION

PRELIMINARY STATEMENT

John P. Bowen, General Counsel, appeared on behalf of United Food & Commercial Workers, Local 7, Professional Health Care Division.

Cheryl L. Kopitzke, Counsel, appeared on behalf of Kaiser Permanente.

Kaiser Permanente, hereinafter "Kaiser" or the "Company", and the United Food & Commercial Workers, Local 7, Professional Health Care Division, hereinafter the "Union", are parties to a collective bargaining agreement[1], hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. The parties agreed that the grievance[2] regarding the termination of Wound Care Nurse Elizabeth Employee was properly in arbitration. The parties further agreed that James M. Paulson was selected to arbitrate the matter and his decision would be final and binding as described in the Agreement.

On December 6, 2005 and January 26, 2006, hearings were held at corporate offices of

[1]Joint Exhibit No. 1.
[2]Joint Exhibit No. 2.

the Company in Denver, Colorado. At the hearings the parties were each permitted to present testimony and documentary evidence. Kaiser called as its witnesses Warry Go, Director of Advanced Wound & Foot Care; Holly Wolf, Nurse Manager; Jamie Simmonds, Medical Assistant; Amy Lasley, R.N; and Cardell Webster, Senior Employee Relations Consultant. The Union called as its witnesses the grievant, Elizabeth Employee, Wound Care Nurse; Lynn Smith, R.N. and Union Steward; and Joel R. Chapa, Clinical Psychologist and former Chief Steward.

At the conclusion of the hearing on January 26, 2006, the Arbitrator ruled that the Union would have until February 3, 2006 to indicate whether or not it wished to put in additional evidence regarding Employer's Exhibits No. 10 and 14. On February 2, 2006 Union Counsel submitted an offer of proof as to evidence it wished to produce regarding those exhibits. On Friday, February 10, 2006 Company Counsel submitted in response its offer of proof. Later that same day and following consideration of the positions of the parties, the Arbitrator ruled that he would accept the offers of proof of both parties as evidence provided such offers were subsequently supported by affidavits. The parties were to submit supporting affidavits by February 22nd. Union Counsel requested and received permission to late file the affidavit of one witness.

The Company submitted affidavits from Carol A. Kopitzke, Counsel; Francis Sincere, Vice President; Cardell Webster, Senior Employee Relations Consultant; Steve Trujillo, former Health Care Representative for UFCW, Local 7; and Barbara Deadwyler, Senior Project Consultant, Office of Management Partnership. The Union submitted affidavits from John P. Bowen, General Counsel; Ernest L. Duran, Jr., President of UFCW, Local 7R; Joan Heller, Chief Steward for the Professional Bargaining Unit, Local 7R; and Gary Hakes, former President UFCW, Local 7.

On February 23, 2006, the Arbitrator closed the hearing and ruled that briefs were to be postmarked on or before March 24, 2006. The Arbitrator received the briefs of both parties on March 28, 2006 and will issue his Decision and Award by postmark on or before April 28, 2006.

STATEMENT OF THE ISSUES

The parties stipulated to the following statement of the issues:

"Was Elizabeth Employee terminated on May 10, 2005 for good and sufficient cause? If not, what shall the remedy be?"

RELEVANT CONTRACT PROVISIONS[3]

ARTICLE 3. UNION AND EMPLOYER RESPONSIBILITIES

Section 1. Employer Rights.

The Union recognized that the Employer has the duty and the right to manage the facilities and to direct the working forces. This includes the right to hire, transfer, promote, demote, layoff, discipline and discharge employees subject to the terms of this Agreement.

ARTICLE 21. OTHER PROVISIONS

Section 8. National Agreement (see Appendix B)

The National Agreement shall become an addendum to the collective bargaining agreements of the parties. * * * The National Agreement and Local Agreements, by being signatory to the National Agreement, Kaiser Permanente and UFCW, Local 7 have not intended to eliminate or modify any superior wage, benefit or condition in their local agreement, and the national Agreement should not be interpreted to deprive the employees of such wages, benefit or condition or language.

ARTICLE 22. DISCIPLINE AND DISCHARGE

Section 1. General

E. The Employer shall not discipline any employee without cause.

Section 2. Performance Improvement Steps

In recognition of the professional status of the classifications covered under this Agreement, the following steps will be used to address performance issues:

A. Resolution Procedure

The Employer and Union agree that prior to the implementation of an Action . . . the parties involved shall attempt resolution through informal coaching and/or counseling so that further discipline may not be necessary. * * * Facts surrounding the performance issue(s) shall be presented reviewed and options discussed. Issues must be addressed within a reasonable period of time.

[3] The relevant contract provisions referenced in this section of the Decision are those appearing in Joint Exhibit No. 1. Matters which may be of contractual significance or a binding practice out side of the Agreement will be discussed later in this Decision.

Section 3. Discharge

A. The Employer shall not discharge any employee except for good and sufficient cause.

B. Any employee who is discharged shall be informed in writing, at the time of the discharge, of the reason(s) for discharge.

ARTICLE 23. RESOLUTION/GRIEVANCE PROCEDURE

Section 1. Overview

Any and all matters of controversy, dispute, or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement shall be examined and resolved by this Resolution/Grievance Procedure. * * * Any matters involving disciplinary action may go directly to Section 3, Grievance Procedure.

Section 4. Arbitration Procedure

E) The arbitrator shall be authorized to rule upon and issue a decision in writing on any grievance for arbitration, ... The decision and award shall be final and binding upon the parties to this Agreement. * * *

F) The arbitrator shall not be authorized to add to, subtract from, alter, amend, modify or project beyond its meaning any of the terms and provisions of this Agreement.

STATEMENT OF FACTS[4]

Background

Kaiser Permanente is a heath care organization, *inter alia*, providing health care services to the public in which patients may be treated for various aliments including wounds. In this regard, Kaiser employs registered nurses in the capacity of wound care nurses in its Advanced Wound Care Clinic.

The Grievant, Elizabeth Employee, R.N., was hired by Kaiser as a wound care nurse on October 28, 2002. Early in her employment with Kaiser Ms. Employee held a certification as a

[4] The following recitation is intended to describe undisputed facts giving rise to the grievance in an abbreviated fashion. Disputed facts and legal issues will be discussed, as may be necessary, later in this Decision.

Certified Wound, Ostomy and Continence Nurse (CWOCN). This certification qualified her to provide specialized care to patients with more serious and difficult wounds. In October, 2004, her certification expired and she did not renew her certification for the remainder of her tenure with Kaiser. There was no contention that maintaining a CWOCN certification was a condition of Ms. Employee's employment.

Certain of the Advanced Wound Care Clinic's patients were elderly and/or at high risk by being under treatment with anticoagulant medication. Anticoagulants, by retarding blood from clotting, complicate wound care in that bleeding becomes a more likely and serious problem. Wound care nurses must be careful to work closely with a patient's physician to avoid significant complications.

Apparently, Ms. Employee worked for Kaiser from her hire date through March, 2005 without incident or discipline of any kind. There is some indication that she may have had some friction with certain co-workers but none of these matters became serious enough to affect her employment.

Patient #1

In January, 2005, the Boulder Coroner's office made an inquiry into the death of an individual (known in these proceedings as Patient #1) who had been treated at the Advanced Wound Care Clinic. Patient #1 had bled to death. Ms. Employee's supervisor, Nurse Manager Holly Wolfe was contacted by the Coroner's office regarding the treatment of Patient #1. In March, 2005, the wife of Patient #1 wrote a letter to Ms. Employee which she, in turn, gave to Ms. Wolfe. In the letter the wife suggested that Patient #1 should not have been told to change his own dressing, but, rather, it should have been done by a home care nurse. This letter caused Ms. Wolfe to review Patient #1's medical chart. She concluded that in treating Patient #1, Ms. Employee in at least one instance should have immediately consulted a physician about the patient's condition rather than make her own judgment that the patient could go home and then see his vascular physician in seven days. Ms. Wolfe and Charge Nurse Blum then spoke with Ms. Employee about Ms. Wolf's conclusions.

Suspension

Approximately one week after her counseling, Ms. Employee saw a patient (Patient #2) regarding her condition which was diagnosed as an acute hematoma. Patient #2 was taking anticoagulants. Ms. Employee debrided an area around the hematoma. This caused some bleeding. Eventually, Ms. Employee applied a pressure dressing and sent the patient home to return to the clinic in one week. She did not refer simultaneously Patient #2 to a physician. Ms. Employee did mention the situation to Ms. Blum, who, in turn, told Ms. Wolfe. Ms. Wolfe decided that Ms. Employee should contact the patient's physician immediately. She did so. Patient #2's physician ordered the patient to the emergency department for follow-up.

Kaiser management concluded that Ms. Employee's care of Patient #2 was substandard

and unsafe. As a result, Director Warry Go suspended Ms. Employee with pay, pending a full investigation of her patient care.

Investigation

As a result of the investigation, several other matters came to the attention of Kaiser which caused it concern. First, Mr. Go learned of an incident involving a Patient #3 where Ms. Employee had treated the patient for some months for a "sore" on her chest or neck. Upon subsequent examination by a physician it turned out that the "sore" was skin cancer. The patient's daughter complained about Ms. Employee's treatment of her mother as well as the canceling of visitation by the patient's home care nurse and Ms. Employee's rude behavior.

Second, Kaiser learned of Patient #4 which Ms. Employee had treated for a foot wound. Mr. Go and others concluded that Ms. Employee had sent this patient home when she should have consulted a physician.

Third, it came to the attention of Kaiser that a co-worker had reported seeing photographs of patient's wounds on Ms. Employee's home computer. Ms. Employee had taken pictures of certain patient wounds and placed them on the hard drive of her home computer. Kaiser concluded that this action violated its own policy as well as HIPPA.[5]

Discovery[6]

Acting pursuant to the Issue Resolution and Corrective Action Policy[7], Kaiser conducted several "discovery" meetings with Ms. Employee, various Union officials and various management personnel. During the course of these meetings, some dialogue was had and information exchanged between the parties. The Union believed that these meetings were intended to be in the nature of counseling sessions whereby Ms. Employee would be helped to improve her performance if that was necessary. Kaiser believed that meetings were intended to give Ms. Employee an opportunity to explain her understanding of various incidents and also to judge whether Ms. Employee was competent as a nurse. Kaiser treated the meetings as a means of gathering further information so that it could make a determination as to what level of discipline Ms. Employee would receive. The Union objected to the conduct of Kaiser at the meetings in that, *inter alia*, it felt that a determination had already been made to terminate the employment of Ms. Employee and that Kaiser was not adhering to the purpose of "discovery."

Termination

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[5] The Health Information Portability and Accountability Act.

[6] "Discovery", as that term is used by the parties, *appears* to be a procedure whereby an employee, the Union and the Company discuss situation or situations from which corrective action or discipline may result.

[7] The contractual or binding nature of this Policy will be discussed later.

Having consulted with Human Resource and other management officials, at a meeting on May 10, 2005, Mr. Go informed Ms. Employee that her employment was terminated because of violations of company rules in two primary ways. First, she had violated Kaiser's confidentiality policy and rules related thereto by photographing patients' wounds and displaying them on her computer. Second, and most importantly, she had demonstrated negligence in patient care by her failure to appropriately involve physicians when required by what Kaiser believes are normal health care standards as well as other behavior relating to treatment decisions. On May 11, 2005, the Union filed a grievance protesting the "unjust termination" of Ms. Employee and further claiming that her termination was "disparate and discriminatory" as well as not in compliance with the procedure outlined in the Agreement.

CONTENTIONS OF THE PARTIES[8]

Company Contentions

Corrective Action Procedure and Past Practice

Kaiser begins its argument by pointing to a basic principle in the Agreement between the parties that the "foremost objective and obligation" of it and the employees is to provide professional health care "which meet the highest standards associated with each health care profession represented by this Agreement." The Company also mentions its management right to discipline employees as well as the Agreement's reference that its "operations are different from other industries because of the medical care provided to the community."

While Kaiser acknowledges that the good and sufficient cause language in the Agreement sets the general standard reviewing its action, it goes on to argue that through national negotiations the parties have agreed to the Issue Resolution and Corrective Action Procedure.[9] Kaiser contends that this procedure is a part of the collective bargaining agreement. This procedure was what the Company followed in deciding to terminate Ms. Employee.

The Company next points to the grievant's signing of its confidentiality agreement during her tenure. This includes a reference that a violation of HIPPA is grounds for discipline, up to and including discharge. Finally, Kaiser argues that its Company Rules[10] have been incorporated in the parties' agreement through past practice.

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[8] As the hearings proceeded, a major issue developed beyond that typically presented in a discharge case. The Union contended that the arbitrator's determination of whether there was "good and sufficient cause" to terminate the grievant should be based solely on the language in the Agreement and without reference to Kaiser Permanente Company Rules, other agreements of the parties or past practice. This recitation of the parties' positions shall include the respective positions on that contention.

[9] Employer Exhibit No. 16.

[10] Employer Exhibit No. 10.

Position on the Facts

Kaiser first emphasizes that the nature of the position of wound care nurse is such that she is handling many patients who are elderly or otherwise at high risk and, accordingly, she must exercise a very high degree of care to make sure that patient safety is protected. This requires the nurse to report a potentially serious situation to a physician.

A major point for the Company was that with Patients #1 and #2 Ms. Employee failed to refer these patients to their physicians or the emergency department when she should have. These situations ranged from not reporting her observations to the patient's physician as well as sending a bleeding patient home. To establish that the grievant was negligent, Kaiser put on the testimony of Director Go, Nurse Manager Wolfe and Wound Care Nurse Lasley. Besides his own experience, Mr. Go referenced that he had discussed the actions of Ms. Employee with physicians, who agreed with his assessment of her failure to refer the patients to their physician or the emergency department.

Kaiser emphasized that Ms. Employee took a position that she knew what she was doing and it was within her expertise to determine whether or not a physician needed to be called in. It was argued that only one week after being counseled to refer patients with serious conditions to a physician, she failed to do so with Patient #2. From this conduct as well as her testimony, Kaiser argues that Ms. Employee will not and can not be taught to make a proper decision as to when to refer a patient to a physician. Additionally, Kaiser focused on discrepancies between the testimony of Ms. Employee and that of others as well as records regarding the length of time of bleeding Patient #2 experienced. The inference was that the grievant's testimony, at least in part, was not credible.

The Company also found improper behavior by Ms. Employee in photographing patient's wound and then down loading them on her personal computer. Kaiser presented the testimony of Medical Assistant Simmons that Ms. Employee had no written authorization to take the photographs and that Ms. Simmons had observed these photos being used by the grievant as "screen savers" on her personal computer. It was contended that these actions violated Company Rules as well as federal law.

Investigation/Discovery Due Process

In response to the Union argument that Kaiser acted improperly in the investigation/discovery phase of the disciplinary process, the Company contended that the facts show that the basic purpose of "discovery" was maintained; that is, Ms. Employee was given adequate notice of the factual situations which were being considered as grounds for discipline as well as an opportunity to present her position on those situations.

Validity of Company Rules

Responding to the Union argument that the Company Rules were not enforceable, Kaiser presented several arguments: First, basic arbitral principles hold that an employer may establish reasonable rules and regulations not inconsistent with a collective bargaining agreement under the authority of a management rights clause. Second, in the present situation the Company Rules have been in existence for twenty-five years and have been acknowledged and recognized by the Union so as to become a binding past practice. Third, there is no language in the Agreement limiting the right of the Company to unilaterally establish reasonable work rules. Fourth, the rules are reasonable.

Gross Negligence and Breach of Patient Confidentiality

The Company contends that even if its rules are unenforceable, the gross negligence and breach of patient confidentiality committed by the grievant warrants the sustaining of her discharge. Kaiser stresses that Ms. Employee's testimony was not credible in that in many regards it conflicted with corroborated testimony of others as well as documents.

Compliance with Corrective Action Policy

Kaiser asserts that the parties have agreed as part of national negotiations to the Corrective Action Policy and therefore it is an enforceable agreement. The Policy, in turn, references the Toolkit, which provides that the Company can immediately terminate an employee in cases of gross negligence or gross misconduct. The Company argues that Ms. Employee's behavior amounted to gross misconduct.

Union Contentions

Factual Overview

In general, the Union contends that there is no valid basis for either of the two reasons proffered by Kaiser for the discharge of Ms. Employee; that is, the evidence does not support the Company's conclusion that the grievant engaged in substandard and unsafe patient care or violated the Company policy on confidentiality or HIPPA regarding her photographing and displaying on her computer pictures of patient wounds. The Union then examines the evidence relating to each of the reasons.

Claim of Substandard Care

The Union points out that with respect to Patient #1 the only review done by Kaiser was to look at the patient's chart and observe that the patient should have been immediately referred to a physician. The Union observes that the chart shows that on several occasions a physician reviewed the entries of Ms. Employee and in no instance did they question her entries or her

judgments on patient care. It is concluded that the only apparent reason that the grievant's treatment of Patient #1 was subject to such scrutiny is the fact that the patient died.

With respect to Patient #2, the Union notes that the grievant's explanation of the process that she used was not challenged by Kaiser. Ms. Employee explained that nothing out of the ordinary occurred with respect to the debriding and subsequent bleeding of Patient#2's wound. The Union discounts the opinion of Company witness Lasley because she did not see the patient's wound until a week later and because her only quarrel with the grievant's chart entries was that they did not meet Ms. Lasley's standards. The Union then disagrees with the Company's criticism regarding her determination not to refer the patient to a physician and her belated of calling the physician. It is noted that Ms. Employee did call the physician, who was not critical of the timing of the grievant's call. Moreover, Ms. Employee was not insubordinate, as implied by the Company. Finally, the Union contends that the offense, in any event, was not severe enough to warrant termination as opposed to the corrective action process set out in the Agreement.

The Union also find fault with the evidence presented by Kaiser regarding Patient #3. It is urged that the contents of the letter to Charge Nurse, Holly Wolfe, from the daughter of Patient #3 is hearsay. Moreover, it is noted that the letter is dated January 5, 2005. The Union points out that the Company waited until April, 2005 to find fault with the grievant's performance month's earlier. It is also urged that the canceling of home visits by nurses by the grievant was logically explained by the uncontested testimony of Ms. Employee that Patient #3 was not eligible for home nurse visits under Colorado law. The fact that the grievant was not disciplined in any way in January, 2005 indicates that Kaiser did not consider the matter as an appropriate basis for discharge.

Requirement of Progressive Discipline

The Union contends that, at best, the complaints against Ms. Employee can be described as negligence or carelessness. Under these circumstances arbitrators require progressive discipline before discharge. Wanton or reckless disregard of the consequences of one's actions are required for immediate discharge. Finally, the Union urges that Kaiser failed to show that anyone was endangered by the grievant's actions or that she could not be counseled to correct her performance problems. Accordingly, the Company failed to show that termination was necessary.

HIPPA/Confidentiality Violation

The Union first notes that HIPPA only protects "individually identifiable health information". It then points out that it is undisputed that the pictures of wounds could not be identified to any individual patient. Accordingly, Ms. Employee did not violate HIPPA.

The Union goes on to observe that the grievant's testimony that she was merely following a practice was not rebutted by Kaiser. The Union concedes that the photos should not have been

taken from the workplace, however, since the patients could not be identified, not harm was done. While the action of the grievant may have been technically contrary to the unilaterally imposed Company rules, there is nothing in Ms. Employee's behavior that could not be remedied by lesser discipline.

Investigation

The Union argues that Kaiser did not treat the investigation/discovery process as it was intended; that is, the Company merely tried to gather evidence from the grievant to justify is decision to discipline her rather than work with her to help her improve her performance. The Union points out that the disciplinary process that should have been applied to Ms. Employee is set forth in Article 22 of the Agreement. The Union then recites the specific steps provided in Article 22 that were not followed in this instance.

Due Process

The Union cites what it contends are the due process requirements for discipline which are well-established by arbitral law. The Union also notes that a proper investigation is a due process requirement. It goes on to claim that the Company failed to establish precisely what it was relying on to terminate the grievant. The Union urges that Kaiser's reliance on after-the-fact and hearsay information to justify their decision to discharge Ms. Employee interfered with her ability to defend herself. Accordingly, the due process violation itself requires that she be reinstated.

FINDINGS

Relevant Arbitral Principles

Company Rules

The Arbitrator agrees with Kaiser's contention that an employer has an inherent right under a management rights clause to establish and enforce reasonable work rules which are not inconsistent with other provisions in the contract.[11] It must be kept in mind, however, that a contractual requirement for progressive discipline could amount to an inconsistent provision of the agreement where the work rule calls for the penalty of immediate discharge.

Past Practice

The Arbitrator also agrees with the Company that appropriate past practice may raise its Rules and Corrective Action Policy to the level of binding significance if the requisite elements are established. Arbitrator Mittenthal's formulation of factors to establish a binding practice has

[11] Company Post Hearing Brief, pp. 16-19 and cases cited therein.

been described as "the most authoritative treatment" and is now "generally applied by arbitrators".[12] The factors are:

(1) Clarity and consistency of the pattern of conduct,
(2) Longevity and repetition of the activity,
(3) Acceptability of the pattern, and
(4) Mutual acknowledgement of the pattern by the parties.[13]

It is also important to examine how past practice is being utilized; that is, does the practice stand outside the contract language completely, does the practice interpret ambiguous contract language or does the practice contradict clear contract language. In general: A practice standing outside the contract language must be very strong to be binding. A practice which interprets contract language and satisfies the Mittenthal standards will be enforced. A practice which contradicts clear contract language normally will not be enforced.

Just Cause and Discipline Cases[14]

This Arbitrator also agrees with the standard set forth in the Decision of Arbitrator Bosland[15] involving the discharge of employee Krumpholz that in a discipline case the employer must show: "(1) the existence of a valid rule; (2) Grievant was aware of the rule; (3) Grievant violated the rule; (4) there was a full, complete and impartial investigation; (4) the discipline imposed was not excessive; (5) and employees who engaged in similar conduct were treated similarly."[16]

As to the appropriateness of a particular level of discipline, two principles within the concept of just cause are applicable to the instant case. The first is reasonable proportionality between the offense and the penalty; that is, the level of discipline must include consideration of several factors, including the "nature and consequences of the employee's offense", the "clarity of the rules" allegedly violated, and the "length and quality of the employee's work record." The second principle is the concept of progressive discipline; that is, discipline for all but the most serious misconduct "must be imposed in gradually increasing levels."[17]

It is well established that an employer has the burden of proof in a discipline/discharge case. In essence there are two proof issues. The first is to prove the existence of the misconduct providing just cause for discipline. The second, assuming that the first is established, is to prove

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[12] National Academy of Arbitrators, *The Common Law of the Workplace—The Views of the Arbitrators*, 2nd Ed., (BNA 2005), §2.20, p. 89.

[13] *Ibid*, pp. 89-90.

[14] There is no reason to assume that "good and sufficient cause" is in any way different than "just cause."

[15] Employer Exhibit No. 21.

[16] p. 18 (citations omitted).

[17] *The Common Law of the Workplace*, §6.7, p. 184.

that the penalty of discharge was warranted. Where the misconduct alleged is something less than criminal behavior, as here, the burden of proof is a "preponderance of evidence" standard; that is, the employer must establish that it is more likely than not that the factual events are as it asserts.[18] Where the employer has the burden of proof, any gap in or lack of evidence on a necessary factual issue means the employer has not met its burden of proof as to that matter.

Credibility and Weight of the Evidence

A determination of whether or not Ms. Employee engaged in misconduct and/or gross negligence may depend, in part, on the credibility of the grievant as contrasted with Company witnesses. To the extent the case can be decided without making credibility judgments, this Arbitrator will do so. Arbitrators have expressed many different approaches to resolving matters of credibility.[19] This Arbitrator makes the assumption that all witnesses are truthful until there is reason to believe otherwise. Factors such as consistency with other evidence, interest in the outcome of the proceedings, clarity of memory, and first hand knowledge of events affect credibility resolutions. If a preponderance of the evidence on the matter does not resolve a credibility conflict, the party with the burden of proof does not prevail in proving their witnesses' version of events.[20]

Contractual Just Cause, Rules, Policies and National Negotiations

An initial question raised by the Union that must be resolved before examining the facts is whether Kaiser has the right to discharge any employee under the collective bargaining agreement without first exhausting the steps in progressive discipline. For the reasons set forth below, this Arbitrator finds that the Company does have such a right in certain circumstances and with certain limitations.

Analysis of Article 22. Discipline and Discharge

Article 22. Section 1. of the Agreement provides that Kaiser may do one of three things under its authority to "discipline and discharge" employees: (1) issue an Action Plan; (2) issue a Performance Improvement Plan; or (3) issue Formal Disciplinary Action. Paragraph D., which is entitled "Formal Disciplinary Action (Step 3)" only references "Final Warnings and/or Suspensions" Here, the Company meted out the discipline of discharge. While a cursory review of the sequence of the Sections in Article 22 may lead one to conclude that all discipline must go through steps 1, 2 and 3 before discharge, a careful review shows that "Section 3 Discharge" is not subordinate to "Section 2. Performance Improvement Steps." It stands as a separate

[18] See generally, Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., (BNA 2003), pp. 948-949.

[19] See generally, Elkouri & Elkouri, *supra*, pp. 413-417.

[20] "Sometimes the burden-of-proof concept becomes of critical significance when severe conflict exists in the evidence." Elkouri & Elkouri, s*upra*, p. 415, n. 383 (citation omitted).

disciplinary concept. Accordingly, the intent of the parties is that discharge may occur in certain cases without an employee first going through performance improvement steps. In other words, the Agreement does not require any discharge can only occur after progressive discipline has been utilized, as urged by the Union.[21]

Validity of the Company Rules and Corrective Action Policy

This Arbitrator finds that Kaiser Permanente Company Rules[22], its Corrective Action Policy and Corrective Action Policy User Guide and Toolkit[23] are of binding significance and may, under appropriate circumstances, be enforced consistent with the concept of "good and sufficient cause" in the Agreement. There are several reasons for this conclusion.

First, the Company has the general authority under its management rights clause to issue and enforce reasonable work rules which are not inconsistent with other provisions of the Agreement. There appear to be no provisions in the Agreement which are inconsistent with the Rules or the Corrective Action Policy referenced in the instant case.

Second, the Company put forward evidence showing that its rules or precursors thereto have been in existence and enforced during the entire collective bargaining relationship with the Union since 1980. The Union has never challenged the existence or enforceability of the Company Rules. [24] In fact, the Union has acknowledged the existence of these Rules in grievance and arbitration proceedings.[25] These rules have been published to the employees. The Agreement contains no provision restricting outside agreements or prohibiting practices of the parties being of binding significance. The Rules appear to be a binding practice under the Mittenthal standard recited above. While the Union has presented substantial evidence[26] that it has not agreed to the Rules and that the Rules are not part of the Agreement, such agreement is not required in order for the Company to apply the Rules. Clearly, if a particular Rule or its application violated the concept of "good and sufficient cause" in the Agreement, the Rule would

[21]On the other hand, Section 3 clearly requires that "[a]ny employee who is discharged shall be informed in writing, at the time of the discharge, of the reason(s) for the discharge." Mr. Go testified on cross-examination that he did *not* give Ms. Employee a letter stating the reasons for her discharge. While the stipulated issued does not require the Arbitrator to decide whether this provision of the Agreement was violated, the Company should be mindful of this requirement in the future. Nothing in the National Agreement or procedures negotiated on a national level appears to absolve Kaiser from this obligation.

[22] Employer Exhibit No. 10.

[23] Employer Exhibit Nos. 14 and 16. The Corrective Action User Guideline and Toolkit was apparently implemented in April, 2004 at least under the right to implement reasonable work rules under the management rights clause and subsequently agreed to in negotiations by the Union in September, 2005. Employer Exhibit No. 15.

[24] Sincere Affidavit, ¶ 3; Trujillo Affidavit, ¶¶ 2 & 3.

[25] Kopitzke Affidavit, ¶3; Webster Affidavit, ¶ 2.

[26] Bowen Affidavit, ¶4; Duran Affidavit, ¶4; Heller Affidavit, ¶11; Hakes Affidavit, ¶4.

not be enforceable in such case.[27]

Third, it is significant that in 1993 Arbitrator Daly upheld the discharge of an employee for violating the Rules:

> "The final issue for consideration is whether Grievant's summary termination is justified by his actions in violation of the Employer's work rule. The Union contends that just cause requires progressive discipline before termination can occur. The Employer counters that Grievant's conduct was a flagrant rule violation involving a pattern of dishonesty and is not deserving of any leniency. For the reasons expressed below, the penalty of discharge imposed by the Employer will not be disturbed.
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> "The Employer has promulgated a list of 28 rules applicable to all of its employees. It must be noted that these rules do not supersede the Agreement and must be applied in conformance with its good and sufficient cause standard. The rules are divided into two classes: offenses the Employer considers serious enough to be grounds for immediate discharge, and those lesser offenses which are considered just cause for disciplinary action up to and including discharge. The Employer's categorization of these rules is not to be taken lightly."[28]

An argument could be made that because the decision of an arbitrator is "final and binding" on the parties under the Agreement, the Rules are now of contractual significance.[29] Whether or not this is so, clearly the union was put on notice after the Daly award that an arbitrator had applied and enforced a portion of the Rules. If the Union objected to the enforcement of the Rules by Arbitrator Daly, it could have sought a provision in subsequent contract negotiations to negate the effect of that decision. Apparently, the Union has not done so—at least successfully.

The National Agreement, National Negotiations and Corrective Action Plan

In essence, the Agreement provides in Article 21 that while the national agreement is an addendum to the local agreement, it is not "intended to eliminate or modify any superior . . . condition in [the] local agreement" or "to deprive the employees of such . . . condition or language." There does not appear to be any provision in the local agreement applicable to the

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[27] "Company-issued booklets, manuals, and handbooks that have not been the subject of negotiations or agreed to by the union have been found by arbitrators to constitute 'merely a unilateral statement by the Company and [are] not sufficient to be binding on the Union.' However, policy manuals may have a binding effect if they are within they are within the scope of management's right to promulgate reasonable rules. Unilaterally promulgated company policies that conflict with the terms of the parties' collective bargaining agreement are, of course, nonbinding." Elkouri & Elkouri, *supra*, pp. 464-465 (citations omitted).

[28] Employer Exhibit No. 22, pp. 18-19.

[29] For a lengthy discussion of the precedential value of arbitration awards see Elkouri & Elkouri, *supra*, Chapter 11. Precedential Value of Arbitration Awards, pp. 567-603.

instant matter which is "superior" to the national agreement.

As argued by Kaiser, the National Agreement provides for a "Corrective Action Plan" which has five levels—with the fifth level being "Termination". It also calls for an implementation of the procedure "no later than April 1, 2002." Furthermore, "[t]he procedure *must be implemented* simultaneously throughout an entire . . . region after all the required training and orientation has been accomplished." (emphasis added). The Corrective Action User's Guide and Toolkit[30] are the result of negotiations with the necessary "training and orientation" called for in the National Agreement.[31]

The Corrective Action Procedure User Guideline and Toolkit agreed to by the parties[32] contains the following provisions:

> "When incidents occur which are judged by management to constitute gross negligence or misconduct, and require that an employee be removed from the workplace pending investigation, the employee will be placed on paid suspension.
>
> "• After a paid suspension, Corrective Action may be initiated at the appropriate level in the procedure (**Level 1, 2, 3, 4, or 5**) commensurate with the seriousness of the issues revealed by the investigation.
>
> "• The determination of gross negligence or misconduct is obviously a judgment call, and is subject to challenge through the grievance procedure."[33]

Based on the foregoing, this Arbitrator finds that the *procedure* used by Kaiser in the instant matter was valid and pursuant to an agreement between the parties.

Appropriateness of the Penalty of Summary Discharge

Kaiser contends that Ms. Employee's behavior amounted to "gross negligence or misconduct" and, therefore, immediate termination is appropriate. The Union contends that Ms. Employee engaged in no misconduct or, at worst, only ordinary negligence and that either no discipline or, at most, progressive discipline should have been utilized. In sorting out these differences, it is important to analyze the positions of the parties to the standards referenced earlier by Arbitrator Bosland in the Krumpholz discharge case.

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[30] Employer Exhibit No. 16.
[31] Deadwyler Affidavit, ¶ 2; Webster Affidavit, ¶¶ 4-7.
[32] Employer Exhibit No. 16.
[33] Employer Exhibit No. 16, p. 71.

Validity of the Rules

Rules 4 (confidential patient records) and 8[34] (negligence in the performance of duty), as analyzed earlier in this Decision, are valid rules except as they may be modified by negotiated policies or modified in application by the requirement of "good and sufficient cause". Indeed, the concepts are repeated in the Confidentiality Agreements (HIPPA) signed by Ms. Employee as well as the Corrective Action Procedure User Guideline and Toolkit (gross misconduct and/or gross negligence) which has been negotiated by the parties.

Grievant Awareness of the Rules

Ms. Employee acknowledged that she was aware of the requirement of authorization before taking photographs of patient's wounds and that she could not remove confidential patient information from Kaiser premises without authorization.

While the grievant probably was aware in a general sense that she could not engage in gross negligence or gross misconduct, it is not clear that conduct which may constitute a general concept like gross negligence or gross misconduct is always readily apparent to an employee. Indeed, during the hearing the Arbitrator raised the matter of how long the bleeding of Patient #2 would have to continue before the failure to refer her to a physician would constitute gross negligence or misconduct. This matter was never clarified. Kaiser did, however, point out in its Post-Hearing Brief[35] that if the bleeding had only gone on for the amount of time testified by Ms. Employee, it would not have been a problem. In this sense, the "rule" may not have been clear to the grievant in that it can not be known with certainty when the rule is breached in every specific situation.

Grievant's Alleged Violations of the Rules

While not explicitly stated, the Company's position is that no one single incident was sufficient to justify Ms. Employee's summary discharge. It must be kept in mind that progressive discipline was an option that was rejected. Mr. Go clearly came to his "lost confidence" in the grievant opinion after completing the entire investigation. It apparently is the cumulative effect of the alleged rule violations uncovered in the investigation after the incident with Patient #2 that justified summary discharge. A difficulty presented by this approach is that the Arbitrator does not know if anything less that a finding for the Company on all of the incidents is necessary to sustain its position. The gravity of each alleged infraction by itself is not described so as to permit the Arbitrator to find in the Company's favor on a particular

[34] It appears that Kaiser's rule about mere "negligence" in the performance of duty constituting possible grounds for immediate termination has been superseded by the negotiated Corrective Action Policy User Guideline and Toolkit which provides for immediate termination only in cases of "gross negligence or misconduct." Based on the analysis in the Company Post-Hearing Brief, Kaiser does not appear to be arguing otherwise.

[35] p. 9.

incident and uphold the summary discharge on that incident alone. Accordingly, should the Company fail to sustain its burden on any incident which it appears to identify as material, the discharge can not be upheld.

Quality of Care Incidents

Kaiser places a great deal of weight on the incident with Patient #1 as establishing both an example of gross negligence and a counseling session to Ms. Employee to "not do it again." The Company did not establish by a preponderance of the evidence that the failure of the grievant to refer Patient #1 to a physician was gross negligence or misconduct. As emphasized by the Union in cross examination, no generally recognized standard of medical care (other than the opinion of certain members of management) was put forward against which to measure the significance of what Ms. Employee did.[36] Moreover, as the Union also emphasized, no other person examined Patient #1's wound. Ms. Employee, not considering any matters of credibility, was a bright, knowledgeable person. Her description of her actions was detailed and precise. As the Union also pointed out, Patient #1 was seen by a physician after he was seen by the grievant and, yet, no critical remark was made of her decision not to immediately refer the patient to a physician. The opinion of management persons was not sufficient to offset that of Ms. Employee by a preponderance of the evidence.[37]

Even though Ms. Employee testified that she did not believe that she was being counseled, the weight of the evidence does establish that in some fashion management persons did tell the grievant during the meeting on Patient #1 that should a similar situation occur in the future, she should refer the patient to a physician. This counseling, even by Kaiser's version, did not include a communication to Ms. Employee as to the *consequences* of a further incident of failing to properly consult a physician.[38] Additionally, this guidance was, in effect, only a general instruction. The vagueness of this direction should be contrasted with the action of

[36] Ms. Lasley was a very credible witness as to her opinion relative to various matters that she reviewed. However, her opinions were relative to a few limited situations and can not be viewed a presenting an overview opinion of Ms. Employee's quality of care in the incidents complained about by Kaiser against a generally recognized standard. Arbitrator Bosland agreed with the Union and came to a similar conclusion in the Krumpholz case. Employer Exhibit No. 21, p. 18. It was the use of progressive discipline that caused Arbitrator Bosland to uphold the discharge of Mr. Krumpholz.

[37] It should be noted here that witnesses on both sides had a motivation to view the significance of the facts as they did. Company witnesses (who indicated that the first thing that they did was to call risk management) were concerned about litigation from the patient's survivors. Ms. Employee was concerned about disciplinary action against her. To some extent, these motivations are off-setting.

[38] "[A] rbitrators are likely to set aside or reduce penalties when the employee had not previously been reprimanded and warned that his or her conduct would trigger discipline. * * * Even when misconduct is of a serious nature, the employee must not be lulled into believing that he or she will not be subject to sanction." Elkouri & Elkouri, *supra*, p. 966.

Kaiser in the Krumpholz case where the employee (a Crisis Clinician)[39] failed to properly perform a consult on "a patient with a prior history of drug abuse, mental illness, and serious suicide attempts, . . ." In that instance, the employee was given an action plan where he was to "refrain from 'over-the-shoulder' consults, to review charts of patients he would assess, to note in his charting the presence or absence of risk factors as well as detailed planning to manage any present risk factors, and to chart in a clear, concise manner." [40] Was Ms. Employee's conduct with Patient #1 gross negligence or misconduct, one would expect that she would be at least given a specific counseling direction similar to that received by Mr. Krumpholz. Significantly, Ms. Employee was not put on notice even by Kaiser's version of the counseling session that the consequences of her failure to refer a patient to a physician under similar circumstances in the future could lead to her discharge. It is basic industrial due process that for a warning/counseling to be a precursor to further discipline, the employee must be made aware of the consequences of further poor conduct.

Without question, the incident upon which Kaiser places the greatest emphasis is the situation surrounding the grievant's treatment of Patient #2. The Company contends that Ms. Employee "drained the hematoma" of Patient #2; that the hematoma bled for at least 45 minutes; that the patient was sent home while still bleeding; and she was not referred to a physician when she should have been. The Union contends that the grievant only debrided dried blood along side the hematoma; the debrided area bled for only about 7 minutes; the bleeding stopped before the patient was bandaged and sent home; and there was no immediate need to refer the patient to a physician.

Kaiser has acknowledged that if the facts are as testified to by Ms. Employee, there would have been no cause for alarm. Most dramatically, the Company focuses on the discrepancy in the time of the bleeding. Based on what Kaiser management knew at the time, it was justified in concluding that the bleeding lasted at least 45 minutes. There was no indication to the contrary. On the other hand, emphasis was also placed on the belief that the grievant "drained the hematoma". This factor appeared to be very important to Director Go—who made the decision to suspend and ultimately discharge Ms. Employee. However, the evidence to support this point is based on hearsay. Patient #2 did go to the emergency department within hours of the treatment by the grievant where a physician examined her. Ms. Employee's testimony that she talked with the physician who apparently endorsed her treatment of Patient #2 was unchallenged. Indeed, there is no indication that Kaiser management sought out the physician independently at the time of the incident to get her view of Ms. Employee's treatment of Patient #2. It would seem that if Ms. Employee's treatment of Patient #2 was "gross negligence or misconduct", a physician witness would have confirmed it as such. Additionally, Ms. Employee's testimony on the treatment of Patient #2 was very clear, precise and

[39] Based on a reading of Arbitrator Bosland's Decision, this Arbitrator can not see any difference in the significance of the responsibilities of a Crisis Clinician and a Wound Care Nurse. Whether a patient unnecessarily but successfully commits suicide or unnecessarily bleeds to death is equally tragic and significant.

[40] Employer Exhibit No. 21, pp. 5-6.

unequivocal. There were no witnesses to her treatment of Patient #2 except the patient and her daughter. Their recorded recollections do not indicate whether the bleeding came from the hematoma itself or along side the hematoma. The entries in the patient's chart are inconclusive on this point. Kaiser did not claim that Ms. Employee was acting outside the scope of her practice if all she did was to debride dried blood by the side of the hematoma. Based on the foregoing, the Arbitrator finds that the bleeding probably did last the length of time asserted by the Company but that Kaiser did not carry its burden of proving that Ms. Employee drained the hematoma. The alleged draining of the hematoma was a material part of part of the Company's conclusion that the grievant acted inappropriately.

With respect to Patient #3, Kaiser emphasizes the failure of Ms. Employee to diagnose or chart skin cancer on a patient for several months as well as canceling home visitations by nurses for wound treatment. First, there was no evidence presented by the Company or the Union as to whether or not it was within the expected skill of a nurse such as the grievant to diagnose skin cancer. If it was not, Ms. Employee can not be faulted for both failing to diagnose and failing to chart the matter. Kaiser did not meet its burden of proof as to this matter. As to Ms. Employee's canceling of home visitations, the Arbitrator is satisfied that she applied her understanding of Colorado law to each situation. Indeed, her testimony was detailed and compelling on this point.

While Kaiser presented other matters uncovered in its investigation regarding the quality of care area, they have not emphasized them as material in the decision. Based on earlier findings by the Arbitrator in this area, it is not necessary to discuss these matters.

Confidential Information Incident

The Arbitrator finds that Ms. Employee's taking and storing of pictures of unidentifiable patient's wounds does not warrant summary discharge or possibly even any discipline.

First, it is not clear that the grievant did any thing wrong. She testified that she understood that patients had to give their consent/authorization to have their picture taken in each instance. She further testified that she thought that all patients had given their consent/authorization either when they signed intake papers or specifically in each instant. Kaiser did not rebut this testimony by a preponderance of the evidence.

Second, Ms. Employee explained that she took pictures, as did two other nurses, for very good reasons: patients sometimes could not see their wounds; to document changes in a wound by picture over time; and for teaching purposes. She used her camera because Kaiser did not always have a digital camera available for use. She put the pictures on her home computer because the Company would not allow any software on its computer without specific authorization. Accordingly, the pictures could not be presented on Kaiser's computer for review.

Third, the Arbitrator credits Ms. Employee's testimony that she did not use the wound pictures as a screen saver on her personal computer.

Fourth, the Arbitrator agrees with the Union that HIPPA does not prohibit the use of unidentifiable patient information. It is undisputed that from the pictures taken by Ms. Employee of wounds, patients can not be identified.

Appropriate Level of Discipline and Evenhanded Treatment

Whether or not the discipline was excessive turns not just on the Rules calling for discharge in certain cases, but on how Kaiser has treated behavior similar to that engaged in by Ms. Employee in other cases. While, surprisingly, neither party elected to make arguments from situations where other employees engaged in similar behavior to that of the grievant, the Arbitrator finds the discharge case of employee Krumpholz is a valid comparison. In that case, Kaiser elected to discharge the employee only after utilizing progressive discipline as provided for in the negotiated Corrective Action Policy. As the Arbitrator has already noted, there appears to be no material difference in the significance of the responsibilities of a Crisis Clinician and a Wound Care Nurse. Both positions can involve life and death consequences to patients and both can substantially affect the liability of the Company. For no reason apparent to the Arbitrator, Kaiser treated Ms. Employee differently than Mr. Krumpholz.

Kaiser stresses in its brief that Ms. Employee was so arrogant in her belief that she knew best, progressive discipline would not cause her to change her ways. The Arbitrator is not convinced that this is so. The grievant certainly was confident of her position on matters, but that does not mean that she would not change her methods if requested to do so by the Company. Indeed, she did report her treatment of Patient #2 to management. When she was required to refer Patient #2 to her treating physician, she did so. This does not show a recalcitrant attitude.

CONCLUSION

For the reasons set forth above the Arbitrator finds that Kaiser did not have good and sufficient cause to discharge Elizabeth Employee. The Grievant is to be reinstated and made whole for any lost wages or benefits.[41] No interest is to be awarded on the back pay.[42] The Arbitrator retains jurisdiction of this matter for two months after the date of this decision in the event the parties can not reach agreement on the calculation of the make whole order.

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James M. Paulson, Arbitrator

April 26, 2006

[41] The Arbitrator does not accept the Company argument that Ms. Employee's back pay should be reduced for any period that she was not certified. Kaiser presented no evidence that a certification was required for her position and took no action against her when her certification lapsed.

[42] Although a serious consideration, the Arbitrator will not award interest unless special circumstances compel it. See generally, Elkouri & Elkouri, *supra*, pp. 1218-1221. It is noted that the parties did not accept the Arbitrator's offer of earlier hearing dates.