

• Please note that in the beginning of the film there is a slow fade in. There is nothing wrong with your DVD.

Thank you

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With Special Thanks to

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Cast:

Walt De Treux	Arbitrator
Doreen Davis	Management Counsel
Prof. Paul Whitehead	Union Counsel
Kevin Hyer	Grievant
Olivia Guevara Quijano	Nurse Supervisor
Lanik Lowry	Senior VP HR
Aleesha Barber	Nurse

Introduction

A Labor Arbitration Case Study: The Suspension of Nurse Kevin, a film produced by the Pennsylvania State University School of Labor and Employment Relations and funded by the National Academy of Arbitrators Research and Education Fund, follows the presentation of an arbitration case from opening statements through to closing arguments. The creation of the film grew from the desire of students in collective bargaining and dispute resolution classes who wanted to witness a “real” arbitration proceeding. While the factual scenario presented in the film is fictional, the issues raised in the case are those issues faced everyday by employers, unions, advocates, and arbitrators.

The film represents an opportunity to educate students, union representatives, management and supervisory personnel, and new advocates and arbitrators in the grievance and arbitration process in an engaging and interactive setting. The film is segmented in four parts: Introduction and Opening Statements, The Employer’s Case, The Union’s Case, and Closing Arguments. The film can be viewed in its entirety (total length – 1:06) in one sitting, or it can be spread out over several classes.

The purpose of the film is to prompt discussion of both the substantive issues presented in the case and of the procedural aspects of arbitration. There is no one right way to present an arbitration case or to arbitrate. Viewers are encouraged to challenge the parties’ presentation and strategy or question the arbitrator’s evidentiary rulings (a chance you won’t get to do in a real arbitration). This guide is intended to aid those discussions.

The Facts of the Case

Kevin Hyer is a nurse at Nittany Regional Hospital. He works on a surgical ward prepping patients for surgery and looking after them in recovery. During the course of his day, many patients have to be lifted on and off gurneys and in and out of their beds. Citing back problems, Kevin often tries to avoid lifting patients. With the supervisor's knowledge, he sometimes recruits a co-worker to perform the task for him.

Olivia is the head nurse on Kevin's floor. On several occasions, she has directed Kevin to lift the patients as required. She believes that Kevin, who serves as union steward, had questionable work habits, and she had held several discussions regarding the quality of his work in the past.

The incident giving rise to this case occurred when Kevin was assigned to a large patient who had to be lifted from his gurney after returning from surgery. Kevin refused to do so, claiming his back was hurting. As Kevin was unable to find another employee available to assist, Olivia ordered Kevin to lift the patient. He refused her repeated directions to do so. Olivia directed Kevin to lift the patient or leave the hospital. Kevin chose to leave.

Olivia reported the incident to hospital management, and Kevin was issued a one week suspension without pay. Kevin filed a grievance challenging the suspension. The parties were unable to resolve the grievance, and it now comes to arbitration.

Discussion Points on Arbitration Procedure

Selection of the Arbitrator. At the start of the hearing, the Arbitrator states that he is a neutral appointed to hear the case. Students should understand that the arbitrator is mutually selected by the parties, either from a list provided by an administrative agency, a permanent panel, or an *ad hoc* appointment by the parties. The instructor may want to discuss the processes by which an arbitrator is selected from an agency list (i.e., alternate strikes, ranking, etc.)

Pre-hearing Discovery. The Arbitrator states that he comes without prior knowledge of the case. There is no discovery in arbitration as there is in litigation before the courts. Rather, the parties are expected to share and learn information through the grievance process. Instructors and students may discuss the importance of the grievance process and the legal duty to produce information necessary for the processing of the grievance.

Joint Exhibits. The parties mark joint exhibits, documents that both sides agree are relevant to the case and should be included in the record. The introduction of joint exhibits may eliminate or minimize the need for testimony on the authenticity and relevancy of the documents. The collective bargaining agreement is almost always the first joint exhibit. Instructors and students may want to discuss other types of documents that are generally treated as joint exhibits.

Framing the issue. An Arbitrator's decision is limited to the issue placed before him/her. An Arbitrator encourages the parties to stipulate to the issue. Instructors and students may discuss the arbitrator's authority to frame the issue when the parties cannot agree.

Burden of Proof/Order of Presentation. In a discharge case, the Employer presents its case first. In a contract interpretation case, the Union presents first, assuming it filed the grievance. In both situations, the party with the burden of proof is the first to put on its case. The instructor and students may want to discuss the burden of proof standard in discipline and contract interpretation cases, i.e., beyond a reasonable doubt, clear and convincing evidence, a preponderance of the evidence?

Opening Statements. The party presenting its case second may defer an opening statement until after it has heard the other party's case. What are the advantages and disadvantages of doing so?

Closing Arguments. The parties elected to close their case with oral argument. They had the option to file written briefs. The instructor and students may discuss reasons parties may want to close orally or in writing.

Discussion Points on Evidentiary Issues

Application of the Rules of Evidence. The rules of evidence do not strictly apply in labor arbitration. Should an arbitrator let in any evidence that parties want to offer? Discuss the type of evidence that should be admitted and that which should be excluded.

Calling the Grievant as a Witness. The Hospital attempts to call the Grievant as a witness in its case. The Union objects, and the Arbitrator sustains the objection, indicating that he will only allow it if the Union does not call the Grievant during its case. Why should the Hospital be precluded from calling the Grievant as a witness? Is the Arbitrator correct, or is he hindering the presentation of the Employer's case? How would you rule?

Introduction of Medical Records. The Union wants to introduce the Grievant's medical records to document his back injury. The Hospital objects, and the Arbitrator rules that the medical records are excluded without the doctor present to testify. The Union claimed that the doctor was unavailable to testify, and his deposition charge was too costly. Did the Arbitrator rule properly? Should the Union be able to introduce the records without a doctor's testimony? What are the reasons supporting the Arbitrator's ruling?

Subpoenas. The parties will often have the arbitrator sign a subpoena prior to the hearing for witness testimony or document production. The instructor and students may discuss the other party's right to challenge the subpoena and the issuing party's ability to enforce the subpoena.

Discussion Points on Substantive Issues

Grievant's Role as Steward. The Nurse Supervisor expresses displeasure with the time Kevin spends on union business. The instructor and students may discuss Kevin's ability and authority to conduct union business during work time. They may further discuss Olivia's authority over Kevin in his role as an employee compared to his role as a steward.

Prior Discipline/Counseling. The Hospital maintains that it has issued progressive discipline prior to Kevin's suspension. But the testimony raised an issue as to whether the discipline followed the progression contained in the contract and the Hospital's policy. Discuss whether the Hospital has properly discipline Kevin for incidents prior to the one that led to his suspension.

“Obey Now, Grieve Later”. The Hospital argues that Kevin was obligated to follow the Nurse Supervisor’s direction, and he had the right to grieve it later. The Union counters that following the directive would have subject Kevin and/or the patient to potential harm. Discuss the safety exception to the “obey now, grieve later” principle. Does the safety concern have to meet an objective or subjective standard?

Past Practice/Prior Accommodation. Kevin claims that the Hospital has allowed him to avoid lifting patients in the past by getting a co-worker to do the work. Has the Union demonstrated a past practice? Can the Hospital’s actions be considered an accommodation of Kevin’s injury that cannot be discontinued? Discuss the concepts and elements of past practice and prior accommodation.

Decision Analysis

There are three basic outcomes for the Arbitrator’s decision in this case:

1. “Grievance sustained” – He sustains the grievance and finds for the grievant. The discipline is removed from his file and he is paid back pay for the wages lost during the unpaid suspension.
2. “Grievance denied” – The grievance is denied, and he finds for the hospital. The discipline would stand as administered.
3. “Grievance sustained in part and denied in part” – He may reach a mixed verdict compromise, such as:
 - a) He finds that some discipline is warranted here but not at the level of a one week suspension. Some level of lesser discipline, such as a written warning, would be substituted. In that case, the suspension would be converted to a reprimand (verbal or written) and backpay covering the period of suspension would be awarded;
 - b) Same as a) but the arbitrator could decide under all of the circumstances here, not to award back pay. In this compromise decision, the suspension would be officially taken out of Nurse Kevin’s file and could not be relied on in determining any future discipline, and some lesser form of discipline would substituted (as in a above) but Nurse Kevin still would lose the week’s pay.
 - c) He could decide to support the issuance of a suspension but decide under all of the circumstances here to reduce its impact by awarding back pay. While that is a less likely compromise, in such a case, the suspension would remain in Kevin’s file and could be

considered in the administration of future discipline under the progressive discipline system, but Nurse Kevin would be "made whole" in terms of pay.

What is the Arbitrator's thought process in analyzing this case and reaching his decision?

The Arbitrator could find for the grievant based on one or more of the following theories:

1. He concludes that Nurse Kevin sincerely believed moving this obese patient with his (Kevin's) sore back was a safety risk to either Nurse Kevin or the patient, and Nurse Kevin's belief was reasonable under all of the circumstances, or
2. Based on past practice or prior accommodation, the hospital had effectively waived its right to demand that Kevin move the patient by himself. He should have been allowed to get help as he had been permitted to do in the past, or
3. It was clear that the Supervisor's anti union animus was a determining factor in her decision-making and Kevin's discipline was based on his strong advocacy as union steward and not based on the facts of the actual incident.

The Arbitrator could find for the Hospital based on one or more of the following theories:

1. He agrees it was Nurse Kevin's duty to move the patient and Kevin was unreasonable in refusing to follow his supervisor's lawful instruction, or
2. Kevin should have done as he was asked to do and then filed a grievance if he felt the instruction to move the patient violated the contract, or
3. Based on the supervisors discussion with Kevin a few weeks earlier, she reasserted the hospital's expectation that Nurse Kevin was to move patients by himself when so instructed by supervisor (the right had not been waived), and/or
4. Any animus by the supervisor was not a factor in her decision-making. This was a clear patient care obligation, clean and simple, and,

5. The progressive discipline steps were pursued in spirit and/or the hospital has the contractual right to skip steps in serious infractions such as this.

The Arbitrator may reach a mixed verdict based on the following factors.

1. Moving a patient is a fundamental job duty of a nurse and is basic patient care. That cannot/should not be easily ignored, but under all the circumstances here, an unpaid suspension, the step just short of termination is unduly harsh. The punishment does not fit the "crime."
2. The hospital had the right to discipline here but with the poorly documented prior disciplinary "history" here, this incident should be treated as a first offense.
3. While perhaps not rising to the legal equivalent of a full waiver, accommodation or past practice, the supervisor's past habit of "looking the other way" when Nurse Kevin often sought help in moving patients, created reasonable questions about what Kevin was permitted and not permitted to do or what he should perceive his obligations to be.
4. Clearly the supervisor was irritated by Nurse Kevin's union activity, and this was obviously a factor in her losing her patience with him that day.
5. While basic patient care is a fundamental duty of a nurse, the supervisor's attitude here, escalating the situation to an almost immediate confrontation, was unreasonable and unsupportable given all of the circumstances and history here.

Transcripts

Arbitration:

The Suspension of Nurse Kevin CAPTIONING

Walter De Treux, arbitrator

Paul Whitehead, counsel for the union, representing the grievant

Doreen Davis, attorney for Nittany Regional Medical Center

Olivia Martinez, supervising nurse at Nittany Regional Medical Center

Lanik Richards, senior vice president of HR at Nittany Regional Medical Center

Kevin Hyer, the grievant

Aleesha Barber, co-worker of the grievant

[NARRATOR] Labor arbitration is the process by which unions and employers resolve workplace disputes. Rather than resort to expensive and time-consuming litigation or costly work stoppages, most collective bargaining agreements contain a grievance and arbitration procedure. The process starts when an employee or a union files a grievance protesting an alleged contract violation.

The union and the employer try to resolve the grievance through meetings with various levels of union leadership and management representatives. If the parties cannot reach an agreement, they turn to binding arbitration. The parties mutually select an impartial arbitrator who, after hearing evidence and argument, will issue a final and binding decision.

This film depicts one such arbitration case. The issues presented here typically arise in many arbitration cases. It also follows the normal sequence of an arbitration hearing.

Some hearings extend far longer than the one you will see. Cases can take a half day, a full day, or sometimes multiple days. However, the goal of arbitration is to provide unions, employees, and employers with an expedited and efficient method of dispute resolution which allows for minimal disruption in the workplace. Today's case focuses on a grievance filed by the union on behalf of a nurse in a local hospital. The hearing is about to start.

[WHITEHEAD] Good morning.

[De Treux] Hi. Good to see you again.

[WHITEHEAD] Good to see you.

Thanks for being here.

[De Treux] Sure. Sure.

[WHITEHEAD] You came in OK?

[De Treux] They had a great dinner last night.

[WHITEHEAD] Yeah?

[De Treux] Yeah, good company.

[WHITEHEAD] Any traffic jams on the way here you had to deal with?

[De Treux] No, not at all. No, it was fine.

[WHITEHEAD] Good.

[De Treux] Why don't we get started with the arbitration, all right?

[DAVIS] OK.

[De Treux] OK, thank you.

All right, I see from the grievance that this is a suspension case. Can the parties agree that the issue will be--was the grievance suspended for just cause? If not, what shall be the remedy?

[DAVIS] So agreed.

[WHITEHEAD] Correct.

[De Treux] All right, thank you. Then, at this point in the case, it's the employer's burden. And the employer will go first. So, when you're ready to make an opening statement, feel free.

[DAVIS] I'm ready.

[De Treux] OK.

[DAVIS] Good morning. My name is Doreen Davis. And I am the attorney for Nittany Regional Medical Center. The case that's before you today involves a one-week suspension of the grievant, Kevin Hyer. He was suspended about February 15.

He's been employed at the Nittany Regional Medical Center for about three years. And he is a registered nurse. And, of course, the Nittany Regional Medical Center is an acute care hospital.

The grievant worked on a post-operative floor where patients come after having serious surgeries.

The case involves two separate violations by the grievant. The first is that he refused a lawful and direct order from his immediate supervisor to move a patient from a gurney to a bed following an operative procedure. On this particular day, and this particular patient, the RN in question, the grievant here, absolutely refused to move that patient and, instead, decided to punch out and go home.

The second violation, in the hospital's mind, is the fact that he neglected this patient. The patient was, as I said, lying on a gurney in a hallway trying to, of course, get back to the room. And, because of the antics of this grievant, the patient had to sit for an inordinate amount of time and wait to be put back into his bed.

It's the hospital's position that either of these violations, let alone both combined, do constitute just cause for what became a five-day suspension. In fact, truth be known, we believe that it could have justified even higher discipline, such as termination. But the hospital determined to give him only a five-day suspension.

Why did the grievant refuse to do this particular duty, which everyone acknowledges is a legitimate duty for RNs? Not only the grievant, but the other RNs on the floor, on a daily basis, do this many times a day. We don't know. We suspect he was trying to make a statement of some sort. You'll hear that he was a shop steward on the floor.

But we do know that he left a patient terribly uncomfortable, writhing in pain, on a gurney, which is totally unacceptable and, obviously, goes right to the core mission of the Nittany Regional Medical Center. We simply cannot allow our health care professionals to treat patients in this manner. And we cannot allow them to refuse direct orders of their supervisor. We're confident, after you've heard all the evidence, that you will agree with us and that you will deny the grievance. Thank you.

[De Treux] OK. Thank you, very much.

Does the union want to make an opening statement at this time?

[WHITEHEAD] Yes, thank you. My name is Paul Whitehead. I'm counsel for the union, representing the grievant, Kevin Hyer.

He's been a nurse for seven years, three of them at this employer, Nittany Regional. And, in addition to being a nurse on the surgical ward, he's also the union steward: the person in charge of enforcing the contract, filing grievances, et cetera, on this ward.

As you've heard, his job involves lifting. And the hospital treats this case like there's some sort of mystery about why the incident on February 15 occurred. And we're quite surprised by that.

Mr. Hyer suffers from a back problem. And it affects his ability, from time to time, to lift patients. Now, before we get to the key day in question, about Mr. Hyer generally, I'd like you to note you're probably going to hear the hospital say some very critical things about him.

We want to be real clear, as the union: We believe that his disciplinary record up to the date of February 15, the key day in question, was absolutely clean. You're going to hear conflicting testimony about this. Please expect that.

The hospital contends that they had given him, in what is known as the "progressive discipline system" in our labor agreement, an oral warning and a written warning on events that came along well before February 15. We contest that. We say he did not receive those. And that suddenly, in his first case, he's at the third step of a four-step progressive discipline case facing a five-day suspension. But here we are.

What about the mystery of that day? There was no mystery. Kevin's back was acting up. There was a very large patient-- it's undisputed this was a rather obese person-- who needed to be moved. He wasn't neglecting his duties. He was looking for someone to assist.

And please remember in considering the evidence that, on past occasions, his supervisor, Nurse Martinez, the supervising nurse, had allowed him to look for help on prior occasions; people helping where the two of them would lift or where another person did all of the lifting on one of these days. So, we ask you to bear that in mind.

A couple of other things: One, the labor agreement here contains an important provision that says the hospital shall not require employees to perform unsafe work. We ask you to bear that in mind in determining whether the order that Nurse Martinez gave was reasonable or, perhaps to put it differently, whether Mr. Hyer's politely declining to do it all by himself at risk of injury to his back, whether that was unreasonable. We submit it was not. And therefore, there isn't just cause here.

The other point we want to alert you to is that Kevin is the steward. And his supervisor, Ms. Martinez, makes no secret of her dislike of the union. She finds Kevin's actions in the weekly meetings to discuss grievances to be a waste of time. Now, we don't know what went through her mind on the morning of February 15, but we know she didn't like the union. And then we know that Kevin was the face of the union on this surgical ward.

And when she finally drew the line and said, "Lift this patient or punch out," she confronted him with a choice. And we think she wasn't really looking for a solution, but was looking for a confrontation. So we're going to ask you, in this case, please, Mr. Arbitrator, to find that there wasn't just cause.

But even if you think there was just cause, to look at the progressive discipline issue and conclude they have jumped, if not one, two steps in the progressive discipline system and that the grievance should be sustained for that reason as well. Thank you.

[De Treux] Thank you, very much.

OK, we're ready for the employer's case. Are you prepared to call your first witness?

[DAVIS] I am. The hospital would like to call the grievant, Kevin Hyer.

[WHITEHEAD] I object, Mr. Arbitrator. You said at the start of this that it's their burden. They have management witnesses. Let them put on their case. I think it's wrong to use the grievant as part of their case against the grievant.

[De Treux] Any response to that?

[DAVIS] Yes. He's here. He's obviously available and able to testify. I get to determine the order of my witnesses and how to present my case. And there's nothing to prevent the union from calling him again in their case, if I don't cover what they were going to cover with him.

[De Treux] Well, let me ask you a question. Is the union prepared to call the grievant as a witness in this case?

[WHITEHEAD] Yes.

[De Treux] Well, here's what we'll do. And I'm not going to allow the hospital to call the grievant as a witness in their case-in-chief. But if the union doesn't call him as a witness when they present their case, you'll have the right to do so.

[DAVIS] OK, Mr. Arbitrator.

[De Treux] All right? Let's proceed with your first witness.

[DAVIS] Yes. The employer would like to call Olivia Martinez.

[De Treux] Up here, please, Ma'am.

We're going to swear you in, if you'll raise your right hand. Do you swear and affirm that the testimony you are about give is the truth, the whole truth, and nothing but the truth?

[MARTINEZ] Yes, I do.

[De Treux] Thank you. And then, state your name, please.

[MARTINEZ] My name's Olivia Martinez, M- A- R- T- I- N- E- Z.

[DAVIS] And Ms. Martinez, by whom are you employed?

[MARTINEZ] Nittany Regional.

[DAVIS] And in what capacity?

[MARTINEZ] I am the charge nurse for the surgical unit on 4 East.

[DAVIS] And is 4 East where the grievant works?

[MARTINEZ] Yes.

[DAVIS] And how long you've been a supervisor on 4 East?

[MARTINEZ] I have been Kevin's supervisor for two years now.

[DAVIS] OK, and during those two years that you've been Kevin's supervisor, has he, on a regular basis, been called upon to move patients from gurneys to beds?

[MARTINEZ] Yes, it's a daily occurrence on 4 East. We do it all the time.

[DAVIS] So when you say we, does that include both the grievant and the other registered nurses on the floor?

[MARTINEZ] Correct. Yes.

[DAVIS] OK. Before February 15, was there ever an occasion where Kevin refused to move a patient?

[MARTINEZ] Yes. He oftentimes complains about his back, so he's always looking for someone to move a patient for him.

[DAVIS] OK. And when he complains about his back, what, if anything, have you done in response to those complaints?

[MARTINEZ] Well, because of his considerable complaining and whining about his back, he usually asks me if he can find someone else to move a patient. If he can do it relatively quickly, I have no problem. However, if he doesn't do it in a timely manner, I really redirect the work.

[DAVIS] Has he ever provided you with any documentation from a doctor: a doctor's note, doctor report, or anything concerning his alleged bad back?

[MARTINEZ] No, I've never received anything like that.

[DAVIS] And has he ever processed through you or any other management personnel at the hospital any request for an accommodation to an alleged back condition?

[MARTINEZ] I've never received or known that he's done anything formally. Like I said, he just informally requests for another co-worker or peer of his to do the work for him.

[DAVIS] OK. Before the incident that leads us to be here today, which occurred, as I understand it, on February 15, did you ever have an occasion to discipline the grievant for his work performance?

[MARTINEZ] Prior to this incident, in the past two months, I have verbally counseled him on two occasions for two incidents, the first being that he takes overly long breaks and the second on not completing his assignments in a timely manner.

[DAVIS] All right, tell us first about the overly long breaks, what was involved and about your discussion with him, too.

[MARTINEZ] Sure. With overly long breaks, we in the unit usually take 10-minute breaks. Kevin seems to think that that doesn't apply to him and that he can take breaks as long as he wants.

And he takes very many in a day. Oftentimes, when he's taking these breaks, he's stopping in the middle of an assignment that he's doing. And he's off in corners joking and socializing and laughing with his peers.

[DAVIS] OK. Now he's the shop steward for your floor, correct?

[MARTINEZ] Yes, he is.

[DAVIS] And how can you tell that he's not engaging in union activity when he's taking these overly long breaks?

[MARTINEZ] Well, I just feel that, if he really was doing that, that he wouldn't be laughing. He wouldn't be giggling. And he would do it in downtime, not when we're in the middle of something. It would be legitimate.

[DAVIS] And you don't have any animosity toward Kevin because of his position as a union steward, correct?

[MARTINEZ] You know, I may not like unions, but I would really never do anything illegal to interfere with them.

[DAVIS] On that first occasion, did you have an opportunity to discuss that with Kevin?

[MARTINEZ] Yes, I did. I did pull him aside and I told him what the rules were here in the unit and about his breaks. And I told him that this was unacceptable.

[DAVIS] And did you consider that a step in the disciplinary process?

[MARTINEZ] Yes, I did, because I verbally warned him.

[DAVIS] OK. Now let's turn our attention to the second incident involving not completing work in a timely manner. Approximately, when did that occur?

[MARTINEZ] This was about three weeks ago. We had a patient who was in a very narrow gurney that needed to be moved immediately. And, again, I saw him running all over the place looking for someone to move the patient for him. And so I told him, once again, to move that patient.

[DAVIS] OK. And as a result of that incident, did you have an occasion to discuss that with Kevin?

[MARTINEZ] Yes, I did.

[DAVIS] And did you make any notes of that discussion?

[MARTINEZ] Yes, I did. I made my own notes while I was verbally counseling him.

[DAVIS] OK. I have what I've marked as Employer Exhibit 1. Can you identify that, please?

[MARTINEZ] Yes, these are the notes that I took from three weeks ago.

[DAVIS] OK, about your discussion with Kevin?

[MARTINEZ] Correct.

[DAVIS] OK. I move the admission of Employer Exhibit 1.

[De Treux] Any objection?

[WHITEHEAD] No, let's admit it.

[DAVIS] And did you issue him an actual written warning for that incident?

[MARTINEZ] I did take my notes. I told him that I was taking notes. He knew when I was counseling him I actually meant for it to be a second step, since I had had a previous discipline discussion with him two months ago. So yes, I did mean for it to be that.

[DAVIS] OK. Now I'm going to direct your attention to the day of February 15. Can you tell the arbitrator what happened that day with regard to the grievance?

[MARTINEZ] Sure. I was coming down from a charge nurse meeting. When I came down onto the floor, I noticed that Kevin was running up and down the hall looking for someone to move his patient.

Now his patient was a very large patient. It was a patient who had just come down from the OR from a post-lap band procedure. And the patient needed to be moved immediately because I did receive a page letting me know that they needed all the gurneys back in the OR.

So when I had asked him to move that patient, again, with lots of complaining and moaning and whining, he said that he didn't want to move the patient and that he was looking for someone to move the patient for him. And so I, again, asked him to move that patient now, that we were wasting time and this has to be done now.

[DAVIS] Did you tell Kevin the consequences if he did not move that patient?

[MARTINEZ] Yes, I did. You know, at that point, I was very frustrated. We were short-staffed. When I just said, "Listen, you're either going to move that patient or take a five-day suspension."

[DAVIS] And what was his response to that?

[MARTINEZ] Well, he felt that his safety was in danger; that he didn't want to do it. And so he decided to clock out instead. And he told me that he would go through the union process to do what he needs to do. And I said that was fine, that all we need to care about is patient care. And if that's his response, then he can leave.

[DAVIS] So he did not move the patient. And, in fact, he punched out and went home. Is that right?

[MARTINEZ] Yes.

[DAVIS] OK. Now, as a result of that incident, did you make a recommendation to human resources about what level of discipline you thought was appropriate for the grievant in that situation?

[MARTINEZ] Yes, I did. And now that I think about the situation and how things really played out, it should've been a termination. I mean, he clearly did not follow my direction as his charge. And because of that, he should have been terminated.

[DAVIS] But you recommended a five-day suspension?

[MARTINEZ] I did.

[DAVIS] And that's, in fact, what the grievant received, correct?

[MARTINEZ] Yes, correct.

[DAVIS] No further questions.

[De Treux] All right. Cross-examine?

[WHITEHEAD] Thank you. Ms. Martinez, I'm Paul Whitehead, counsel for the union. You don't like unions, do you?

[MARTINEZ] Well, it's not that I don't like unions, I just feel that they don't belong in a health care setting. I mean, the nurses are here to deliver top-quality patient care and not to worry about some silly little rules in a book.

[WHITEHEAD] Well, if you don't like health care unions, who in your ward represents the union that you think doesn't belong there?

[MARTINEZ] Well, Kevin does.

[WHITEHEAD] Uh-huh. And I believe, on direct, you said that Kevin has a little union process by which, I think, you meant the grievance procedure. Are you required to meet with Kevin in the grievance procedure?

[MARTINEZ] Yes, we have weekly meetings where Kevin comes in and gives me a list of a million and five complaints he has. And, you know, don't get me wrong, two or three are legitimate. But it's really a waste of time. I mean, we should be on the floor.

[WHITEHEAD] So you actually resent his activities as a union steward.

[MARTINEZ] No, I don't resent the time. I just feel that we could better use our time on the floor dealing with our patients, not in a room talking about his complaints.

[WHITEHEAD] I see. Let's turn to his back. You've known for a long time that he has, occasionally, a bad back, correct?

[MARTINEZ] Right. So he says.

[WHITEHEAD] So he says? Have you had any occasion to disbelieve him?

[MARTINEZ] Well, it's not that I don't believe him. I just feel that Kevin really uses that as an excuse to get out of work. I mean, I've been working with him for two years now. And I think I can tell at this point when he doesn't want to do the assignments I give him to do.

[WHITEHEAD] Well, other than the two alleged disciplines, which we'll come to in a minute, have you ever written him up for faking a back injury?

[MARTINEZ] I've never written him up. But, like I said earlier, I did verbally counsel him on not completing assignments in a timely manner.

[WHITEHEAD] We will come to that. Have you ever asked for medical documentation from him?

[MARTINEZ] No, he's never given me anything.

[WHITEHEAD] Let's look at each of those two alleged prior disciplines. The first was called a "verbal counseling," I believe, for an excessive break, right?

[MARTINEZ] Yes.

[WHITEHEAD] Do you know whether you gave anything in writing to Kevin to the effect that, you have received a verbal warning?

[MARTINEZ] No, because I verbally counseled him.

[WHITEHEAD] And is there anything that you put in his personnel file to the effect that he had received a verbal warning, step one?

[MARTINEZ] No, I don't think I did.

[WHITEHEAD] Let's go to the second alleged prior discipline. That was the subject of Employer's Exhibit 1, I believe.

[MARTINEZ] Mm-hm.

[WHITEHEAD] And it had to do with a lifting situation. I believe, in your testimony, you said this was what you gave to the grievant. But Exhibit 1 wasn't given to the grievant, correct?

[MARTINEZ] No, I don't think I did.

[WHITEHEAD] OK. Well, we've looked in his personnel file. Would it surprise you to know that there is nothing in his personnel file, not a word, about either one of the two alleged prior disciplines? Can you confirm that?

[MARTINEZ] I don't know. But he knew I was disciplining him. He knew I was counseling him. And I took my notes. And he saw me taking notes.

[WHITEHEAD] Mr. Arbitrator, the union requested his personnel file before this began. Could I ask for an agreement from counsel for the hospital that there is no record in the personnel file of either of these two disciplines?

[DAVIS] That's true.

[WHITEHEAD] Thank you.

[De Treux] OK, thank you.

[WHITEHEAD] Thank you. Now, the day of the incident, let's turn to February 15. He did tell you, did he not, when you asked him to lift that very heavy patient by himself, that he had a concern for his back and an injury?

[MARTINEZ] Yes, he did.

[WHITEHEAD] Did he not also say that he felt you were riding him for being union steward?

[MARTINEZ] He always says that. Every time I give him a problem and ask him to do the work again, he says I'm picking on him because he's a union steward. No, I'm not. I'm telling him to do the work because it needs to get done.

[WHITEHEAD] But in the case of other nurses, not Kevin, you've permitted other nurses to get help when they need help, haven't you?

[MARTINEZ] I do.

[WHITEHEAD] OK. After you directed Kevin to go home, who actually did move this patient, please?

[MARTINEZ] Aleesha Barber.

[WHITEHEAD] OK. Thank you, very much. That's all I have.

[De Treux] Any redirect?

[DAVIS] None.

[De Treux] Thank you, ma'am.

[MARTINEZ] Thank you.

[De Treux] Is the hospital ready to call its next witness?

[DAVIS] Yes. We would like to call Lanik Richards.

[De Treux] Raise your right hand please. Do you swear and affirm the testimony that you're about to give is the truth, the whole truth, and nothing but the truth?

[RICHARDS] Lanik, L- A- N- I- K, Richards, R- I- C- H- A- R- D- S.

[De Treux] Thank you.

[DAVIS] Yes, by whom are you employed?

[RICHARDS] I'm employed with Nittany Regional Hospital.

[DAVIS] And in what capacity?

[RICHARDS] I am the senior vice president of HR. And I'm responsible for all HR departments, including Labor Relations.

[DAVIS] OK. And in your capacity as the senior vice president for HR, are you familiar with the training that the hospital provides to registered nurses?

[RICHARDS] Yes, I am. All of our nurses, during new-hire orientation, go through training. And we offer refresher training after subsequent months or years, as determined by the hospital.

[DAVIS] OK, and does that training include how to move a patient without injuring one's back, by using legs and other things?

[RICHARDS] Yes. We actually give training with regards to the proper lifting technique that our nurses should be able to utilize when lifting their patients.

[DAVIS] OK. And did the grievant here, Kevin Hyer, do you know whether or not he had that training?

[RICHARDS] Yes, he's gone through the training. He went through the training when he was first hired about three years ago. And then he went to the refresher roughly three months ago.

[DAVIS] OK. Now, does your HR department have any particular process for an employee who claims to have a disability and is requesting an accommodation for that disability?

[RICHARDS] Yes, we do. Our process in HR is that, if an employee has an injury or an issue that needs to be brought to our attention that would require us to provide them with any accommodations, we have them come to us, provide us with that information. We may make requests for additional medical information that supports that claim.

We review that information with the appropriate parties that need to be pulled into that. And then we make a decision. And we make sure that that information is then communicated back to the employee.

[DAVIS] And have you ever received any request for an accommodation or any type of paperwork about an alleged disability from Kevin Hyer?

[RICHARDS] No, I have not received anything.

[DAVIS] OK. Are you familiar with the February incident that brings us to the arbitration here today?

[RICHARDS] Yes, I am. Nurse Martinez informed me of those events on February 15.

[DAVIS] And did Nurse Martinez make a recommendation to the HR department about what level of discipline, what's appropriate for the February 15 incident?

[RICHARDS] Yes, she did. She recommended suspension. And I supported that recommendation.

[DAVIS] Now were you aware that the grievant was making some sort of claim about safety being involved in having to move this very large patient?

[RICHARDS] Yes, I am aware. The training covers that, which is to show the proper techniques in which to lift our patients.

[DAVIS] And does it include very large patients as well? How to move them?

[RICHARDS] Yes. Yes, it does. It talks about the proper way-to use your legs in lifting a patient as well as devices to assist with that, if necessary.

[DAVIS] Now, during the grievance process, the grievant claimed that this discipline, really, he received it as a result of his activities as a union steward. And that it was for that reason and not because he did anything wrong.

[RICHARDS] That is absolutely absurd. Let me just be very clear and frank. He received this discipline because he, essentially, negated to do what is routine, that he has consistently done in the past. And this has no bearing on nor is associated with the fact that he is a shop steward. That's just a false statement.

[DAVIS] Now and you're also aware, you've been here and you've heard Mr. Whitehead's opening statement. And you know that the union is claiming that the hospital did not follow the progressive disciplinary steps with regard to Mr. Hyer's suspension. Are you familiar with the progressive disciplinary process that's contained in the collective bargaining agreement?

[RICHARDS] Yes, I am.

[DAVIS] And are you aware whether or not Kevin Hyer received any prior discipline prior to the February 15 incident?

[RICHARDS] Yes, we did talk to Mr. Hyer about his performance. If you want to get technical, there was a written notice. Was it a true written notice? No, it was not. However, in the past, we have skipped steps, depending on how serious the infraction.

[DAVIS] OK. So you are aware that there was a verbal counseling that Ms. Martinez testified to.

[RICHARDS] Yes.

[DAVIS] And then there was a second counseling which she wrote down.

[RICHARDS] Took notes.

[DAVIS] Yes.

[RICHARDS] That's correct. Yes.

[DAVIS] OK. And has the hospital ever skipped disciplinary steps before?

[RICHARDS] Yes, we have. I want to say it was roughly four or five years ago. We had two orderlies who were fighting on the floor.

And we did. We skipped steps in that particular case. So yes, we do have a past practice established with regards to skipping steps. Yes.

[DAVIS] And the collective bargaining agreement allows the hospital to skip steps in the progressive disciplinary process if it is a serious offense, correct?

[RICHARDS] The contract, I'm going to be quite frank, is kind of vague when it comes to discipline and skipping steps. However, our practice has been that, if it's serious enough, we do skip steps. Yes.

[DAVIS] OK, no further questions.

[De Treux] Cross-examine.

[WHITEHEAD] Ms. Richards, just several questions. You testified that Kevin never reported any back problems to the hospital and never requested an accommodation. Is that correct?

[RICHARDS] That is correct.

[WHITEHEAD] Well, were you here in the room when Supervisor Martinez testified that on many prior occasions when Kevin complained of back problems she allowed other nurses to help lift patients?

[RICHARDS] Yes, I heard her testimony. Yes.

[WHITEHEAD] Well, doesn't that sound to you like Kevin reported his back injury to the hospital and requested and received an accommodation?

[RICHARDS] No, I do not agree with that statement. And the reason is because he did not bring that to HR's attention. He did not follow our process.

Again, our process is that he is supposed to notify human resources of his issue. We review that. If medical documentation is warranted, we make that request.

We get the appropriate players together. We review that information. And if we do need to make any reasonable accommodations, we do so, as well as notify the employee of such.

[WHITEHEAD] So are you saying, in effect, that if an employee can't qualify for an Americans with Disabilities Act accommodation, there's nothing short of that, that the person can get?

[RICHARDS] Again, he did not follow our process by bringing it to HR's attention.

[WHITEHEAD] OK. Let me direct your attention to the part of the contract that says employees shall not have to perform unsafe work. Do you agree that, under the contract-- I think you do agree-- that an employee can refuse work if there is a threat to safety or health?

[RICHARDS] Our contract is a little bit vague with regards to that. However, I'm going to ad lib here. From what I remember from the contract, sir, it states that an employee will not be placed in a harmful working environment. That's what it says.

[WHITEHEAD] So if an employee like Kevin could get injured while performing a task, that would be an unsafe condition, correct?

[RICHARDS] [LAUGHS] I mean, let's be serious. Do you know where we work at? We work at a hospital. All of my employees can get hurt just showing up to work, OK? This is just an example of Mr. Hyer trying to get out of work. He has done this routinely in his tasks, as well as - you know, it just puts the patient at risk by not timely moving the patient from the gurney to the bed.

[WHITEHEAD] So are you saying what Kevin did on the day in question was not reasonable?

[RICHARDS] No, it was not. What Kevin should have done was he should have moved the patient and then filed a grievance.

[WHITEHEAD] Well, you talked about training. Are you familiar with the Occupational Safety and Health Administration or OSHA?

[RICHARDS] Generally, yes, of course.

[WHITEHEAD] OK. And are you familiar that OSHA has issued guidelines about lifting, specifically targeted for health care and nursing home workers?

[RICHARDS] Yes, I do. And we cover those in the training modules.

[WHITEHEAD] Are you also familiar that those guidelines discourage nurses lifting heavy patients all by themselves?

[RICHARDS] Actually, what it says is that, if they use the proper technique, which we train them on, it should mitigate them from being injured as well as injuring the patient.

[WHITEHEAD] Well, let me ask you about his role as union steward. Do you agree with Supervisor Martinez that Kevin presents a big waste of time in his role as the grievor on the floor?

[RICHARDS] Those are your words, they're not mine. I will say that he files grievances on a regular basis. And a lot of them are frivolous in nature, yes.

[WHITEHEAD] Is it also correct that the person who's on the front line for management is Ms. Martinez, not you?

[RICHARDS] That is correct.

[WHITEHEAD] OK. One final point. You do agree, don't you, that Kevin was not given a written warning as required by step two of the contract?

[RICHARDS] I will state this: that he was not given a formal, written warning under our standard template. However, he was counseled twice, one being verbal in nature, another one being a documented conversation. As well as the offense of just neglecting to move a patient because of his back, we felt that he should have been suspended for that.

[WHITEHEAD] I see. So he never received, what you'd call a formal, written warning?

[RICHARDS] That is correct.

[WHITEHEAD] Thank you, that's all.

[De Treux] Thank you, ma'am. Any further witnesses for the hospital?

[DAVIS] No, the hospital rests its case subject, of course, to rebuttal.

[De Treux] OK, thank you. Is the union ready to present its case?

[WHITEHEAD] Yes, we are. The union calls the grievant, Kevin Hyer.

[De Treux] All right, will you raise your right hand, please? Do you swear and affirm that the testimony you are about to give is the truth--

[HYER] Kevin, K- E- V- I- N, Hyer, H- Y- E- R.

[De Treux] Thank you.

[WHITEHEAD] Kevin, would you please tell the arbitrator where you work, your position, and your job duties?

[HYER] I can do that. I am employed by Nittany Regional Medical Center. I am a registered nurse. I've been there for three years now. My primary responsibilities surround bedside nursing.

[WHITEHEAD] And in your job, are you required to lift patients into and out of beds?

[HYER] Oh, yes, regularly.

[WHITEHEAD] Has that presented any problems for you in the past?

[HYER] Sometimes it does, due to a specific health issue that I have. Mr. Arbitrator, specifically, I have a back condition. And when my back is acting up or the patient is of a certain size, it can become very challenging for me to perform that job duty.

[WHITEHEAD] Do you receive any medical treatment for your back condition?

[HYER] I do. Specifically, I have a back condition, Mr. Arbitrator, that requires me to see a chiropractor every three, four weeks. I have a heating pad at home. And I regularly take non-prescription, over-the-counter painkillers. It's very manageable. But on occasion, if my back is acting up and I have a particularly large-- for lack of any other nicer way to say it-- patient, it can be a challenge.

[WHITEHEAD] Mr. Arbitrator, the union has prepared, as Union Exhibit 1, the medical records of Mr. Hyer's chiropractor. And I will be asking him to identify these in a moment to put them into evidence.

[DAVIS] Objection.

[De Treux] On what grounds?

[DAVIS] The chiropractor is not here to be cross-examined. And his records can't come in without us having an opportunity to cross-examine him further. The records are really not relevant to this case because you already heard the testimony that the grievant never presented these records to the hospital.

[De Treux] Any response to that?

[WHITEHEAD] Yes, the chiropractor is not available today. Even if he were, there was going to be a very high fee. We had to pay a lot of money for these records alone. We think these will be very helpful to your decision making. I think the company is trying to keep them out because they show he has a legitimate safety concern.

[De Treux] I'm going to sustain the objection. I'm not going to allow the medical records without testimony from the doctor.

[WHITEHEAD] Well, Kevin, is the hospital aware of your back problem?

[HYER] Very much so. I told Olivia, my supervisor. My co-workers know. There's no way they couldn't know because, when this becomes an issue, I ask for assistance.

And generally, it's only the matter of a moment, you know? If someone else has a second, they'll help me lift the patient from the gurney to the bed. And then we get on with what we're charged to do, which is care for our patients.

[WHITEHEAD] So even with an occasional back problem, you know you're required to lift patients. And you typically do.

[HYER] Yeah. It's really not an issue, except when Olivia chooses to make it an issue. In fact, at my prior employer, Steelton Medical Center, this was never an issue because I had very supportive management. And there was always someone willing to assist me when the issue arose. In my new capacity, under the supervision of Olivia, this is more frequently an issue.

[WHITEHEAD] Prior to the day in question, February 15, didn't Supervisor Martinez allow you to get help from your co-worker nurses?

[HYER] Yeah. She often did, when the issue arose. That's why I was so surprised that this got magnified to the level it did.

[WHITEHEAD] Again, prior to February 15, were you ever disciplined in your employment with the hospital?

[HYER] Never. I had never been disciplined at Nittany Regional.

[WHITEHEAD] Can you comment on Supervisor Martinez's testimony under oath, that she disciplined you on two prior occasions?

[HYER] Olivia has a very unique definition of what it means to discipline someone. We have had discussions, conversations, about best practices in patient care. She has these with all of her staff.

They weren't disciplinary in nature. That wasn't the spirit of them. She certainly never handed me anything in writing and asked me to sign it.

She said, "Hey, this is how I would do something." And I'd say, "Yeah, that makes sense," you know? It was more developmental in nature.

[WHITEHEAD] Mm-hm. So to be clear, before February 15, how would you have described your disciplinary record?

[HYER] I had none.

[WHITEHEAD] OK. Now, Supervisor Martinez did testify that she disciplined you twice-- you just referred to that-- once for long breaks and once for not completing work. Can you comment on that please?

[HYER] Yeah, I can comment on that all right. And my comment is that this is old-fashioned union animus, OK? I'm a union steward in the facility, which means that I bring the grievances of other bargaining unit members to her attention.

And that creates work for her. And she doesn't like it. So I'm not her most favorite individual.

[WHITEHEAD] Are you familiar, generally, with the collective bargaining agreement?

[HYER] Absolutely.

[WHITEHEAD] Do you know whether the contract contains a system of progressive discipline? And if so, can you explain it?

[HYER] Yeah. Progressive discipline is spoken to under the Discipline and Discharge Article in the contract. What it exactly amounts to is that discipline is supposed to be rehabilitative in nature.

The first time there is a misstep, you get a verbal warning. The second time there was an issue, you'd get a written warning. If there was yet a third infraction, you would be suspended. And if all those efforts to bring you back in line had failed, the fourth step would be discharge.

[WHITEHEAD] OK. And a moment ago when you said you hadn't received prior discipline, that includes any reference to a verbal or written warning, correct?

[HYER] Absolutely.

[WHITEHEAD] And I think you testified before, but let's be clear, did you ever receive a verbal warning or written warning?

[HYER] No.

[WHITEHEAD] Kevin, let's talk about the key day here, February 15. You obviously were at work that day?

[HYER] I was.

[WHITEHEAD] And were you asked to lift a patient?

[HYER] I was.

[WHITEHEAD] Can you, in your own words, tell the arbitrator exactly what happened between you and Nurse Martinez?

[HYER] All right. I was performing my job duties, as I ordinarily would, when a very large patient-- no other way to candy coat it-- was removed from the OR. And Olivia directed me to lift him from the gurney into the bed. And my back was in pain that day. And visually, I just knew I couldn't do it. It was going to jeopardize my own physical safety and well-being.

And the contract clearly provides for the fact that staff do not need to participate in any activities that are unsafe. We're a health care institution. Is there any other organization that wouldn't be any more concerned in health and safety? So I said, very politely, no, I don't think that this is prudent. And it went downhill from there.

[WHITEHEAD] OK. Did you make clear to her that you had a safety-based concern?

[HYER] Yes. I very, very much articulated to her that this was an unsafe situation. I was jeopardizing my own physical safety as well as the patient's safety, if I were to somehow mishandle him in the process of transferring him from the gurney to the bed.

[WHITEHEAD] Well, did you also mention something about your role as union steward in that conversation?

[HYER] Well, I just stated the fact that she does seem to always have an issue with me when I brought her new, pending grievances. And this altercation, as it were, was on the heels of some new grievances.

[WHITEHEAD] So when she did draw the line, what happened next?

[HYER] Well, she became irate, rabid, said that I was lazy, that I basically was just using my union activities as a cover to avoid doing work. It was really very unprofessional. And she gave me an ultimatum: that either I could do what she said, or I could clock out and go home and she would give me a suspension.

[WHITEHEAD] And what did you decide to do?

[HYER] I decided to protect my health and well-being and, frankly, that of the patient also because I could have, potentially, dropped him in the course of moving him from the gurney to the bed. And I went home.

[WHITEHEAD] Just one last question. Do you know who ultimately moved that patient?

[HYER] My colleague, Aleesha, did.

[WHITEHEAD] That's all we have, Mr. Arbitrator.

[De Treux] Cross-examine?

[DAVIS] Yes. How long have you been a registered nurse?

[HYER] I've been a registered nurse for seven years.

[DAVIS] And how many years have you worked at Nittany Regional?

[HYER] Three years.

[DAVIS] And prior to that time, did you hold a position as a registered nurse at another health care facility?

[HYER] I did.

[DAVIS] And at which facility were you employed as a registered nurse before coming to Nittany Regional?

[HYER] Steelton Medical Center.

[DAVIS] OK. And at Steelton Medical Center, what type of a floor did you work on?

[HYER] It was a bedside nursing, acute care.

[DAVIS] Very similar to what you're doing at Nittany Regional?

[HYER] Yes.

[DAVIS] OK. And when you worked at Steelton on that floor, you were required regularly to move patients from gurneys to beds. Isn't that correct?

[HYER] I was.

[DAVIS] OK. And in fact, you're required in your duties today, at Nittany Regional, to regularly move patients from gurneys to beds. Isn't that true?

[HYER] Yes.

[DAVIS] How long have you had this alleged back problem?

[HYER] I have had this back problem for about nine years.

[DAVIS] And how did that come about?

[HYER] I was involved in a skiing accident.

[DAVIS] OK, so it was not a work-related injury?

[HYER] No, it was not.

[DAVIS] OK. And so I'm certain that, when you applied for the job as registered nurse at Nittany Regional, you disclosed the existence of this back problem on your application, didn't you?

[HYER] I honestly can't recall what I wrote on that application three years ago. I don't know.

[DAVIS] OK. Well, I have something here that will refresh your recollection in that regard: a document that I've marked as Employer Exhibit 2. Can you identify that, please?

[HYER] That's my job application for employment.

[DAVIS] And that's your signature at the bottom, correct?

[HYER] It is.

[DAVIS] Yes. And I'm directing your attention to Question 18. Can you read that question aloud for the arbitrator?

[HYER] Are you physically able to perform the essential functions of your position?

[DAVIS] And how did you answer that question?

[HYER] Yes.

[DAVIS] So you did not mention your back condition on the application to Nittany Regional.

[HYER] Generally, I can perform all of the essential functions of my position. My back only acts up periodically. And it's combined by the problem of dealing with the very rotund patient.

Most of my co-workers are happy to help me. It was never an issue at Steelton. I had very sympathetic support of supervisors there. I didn't lie on my application.

[DAVIS] Well, we'll let the arbitrator determine whether or not you did. Now you did receive training on how to safely lift patients without using your back, by using your legs. Isn't that correct?

[HYER] I may have. I don't recall.

[DAVIS] You don't recall?

[HYER] No.

[DAVIS] You don't recall that you received that training twice, first, when you were initially hired, and then just a couple of months before the incident in question?

[HYER] I don't recall, no.

[DAVIS] Now, I believe you indicated that you were given a choice either to move the patient or to punch out and go home. Is that correct?

[HYER] That is correct.

[DAVIS] And you made a decision to punch out and go home rather than follow the direction of your supervisor, correct?

[HYER] I did. And the contract allows me to. The collective bargaining agreement, it's explicit. Staff are not required to perform activities that are dangerous or unsafe.

[DAVIS] And it's your contention that moving that patient on that day was unsafe to you?

[HYER] Absolutely.

[DAVIS] And you don't deny that you knew the consequences if you did not move that patient.

[HYER] Well, she made that threat. And that's because she doesn't see the forest for the trees and recognize that I'd have hurt myself and the patient, had I done that.

[DAVIS] OK, so you knew that when you refused the order?

[HYER] Yeah.

[DAVIS] OK. Now haven't you been disciplined prior to February 15?

[HYER] No, I haven't.

[DAVIS] Isn't it true that your supervisor had two separate discussions with you, disciplinary discussions, the first about taking long breaks and the second about refusing to perform your work tasks?

[HYER] That's mischaracterizing what the conversation was. Olivia considers herself very enlightened on best practices in health care and likes to share her insights with her staff. And because she's the supervisor, we have to listen, OK?

We had some conversation. She gave me her opinions on what I'm going to label "best practices." I shared my thoughts. She has conversations like that all the time with other co-workers of mine. I think she has them with her own supervisors, actually.

They weren't disciplinary in nature. She didn't give me any piece of paper saying, "You've been disciplined." She didn't require me to sign anything. It was her holding court on what she saw as the best way to operate a hospital.

[DAVIS] So you never had a conversation with your supervisor, Ms. Martinez, where she told you that you were taking breaks that were too long?

[HYER] That's not true. I don't take too many breaks. And my breaks comport with their required lengths of time we're permitted. She was probably-- she was always relatively frustrated with me. It was just degrees of anger because of the fact I bring her grievances filed by other bargaining unit members that hold her accountable to contract violations.

[DAVIS] But she did, in fact, talk to you about the length of your breaks. Isn't that correct?

[HYER] She may have. Again, I saw these conversations as about best practices in health care. It may have come up briefly.

[DAVIS] And isn't it true that she also had a conversation with you about an incident surprisingly similar, actually, to the incident that brought us here today, which occurred about three weeks before where you refused to move a patient from a gurney to a bed? Do you recall that?

[HYER] She may have. And again, if I believe my safety and that of our patients-- which would ostensibly be the concern of a hospital, patient safety-- is in jeopardy, then I will refuse an order because it's not reasonable.

[DAVIS] So it's your feeling that her direct order to you to move this patient on February 15 was not a reasonable order?

[HYER] Absolutely not. It was a dangerous order.

[DAVIS] Now, you said that you're the shop steward on your floor at Nittany Regional?

[HYER] Proudly.

[DAVIS] And therefore, you are very familiar with the collective bargaining agreement, correct?

[HYER] I am, yes.

[DAVIS] And I believe you have in front of you Joint Exhibit 1, which is the collective bargaining agreement. Isn't it true that the first step in the progressive disciplinary procedure that's set forth in that contract involves a verbal warning?

[HYER] But the past practice at the facility, ma'am, is to advise the worker that they're being verbally counseled. At no time did Olivia ever say to me, this is serious enough that I'm going to frame this as the first step of the progressive discipline schedule.

[DAVIS] So your testimony is, at no time did she tell you when she had either of these discussions that she testified to that they were, in fact, discipline?

[HYER] That is my testimony.

[DAVIS] Also, in that same section of the collective bargaining agreement, isn't it true that there is an exception to the progressive disciplinary policy for serious incidents?

[HYER] Oh, yes.

I mean, there's always discretion. And I know that there was a period not too long ago where two individuals got into a fistfight. And she escalated the progressive discipline schedule to discharge those involved.

There was no need to escalate any progressive discipline here. I don't think I did anything unreasonable. And at best, she just needed to verbally counsel me and say, I think you should have moved this patient. Let's talk about it.

[DAVIS] So are you saying that it's not a serious violation of the employer's rules for you to refuse a direct order and to leave a patient, in pain, lying on a gurney, rather than transporting that patient to his bed?

[HYER] It was completely justifiable because it was a health and safety issue. It jeopardized my safety as well the patient's.

[DAVIS] And it's also your testimony and your belief that the fact that you did not move a patient who was writhing in pain on a gurney, having just returned from surgery, that that's not a serious offense?

[HYER] It's a more serious offense to jeopardize my health and safety as well as the patient's. The patient would have been writhing in even more pain had I dropped him or her.

[DAVIS] What is your height and weight?

[HYER] 6' 2" is my height. And my weight's 185 pounds.

[DAVIS] And isn't it true that Aleesha Barber, your co-worker who did move the patient, is a very petite, young woman?

[HYER] She is petite, yes.

[DAVIS] Yes. And do you know that she moved that patient on her own without help from anyone else?

[HYER] I heard that. But I'm also very aware she does not have a back condition like I do.

[DAVIS] An alleged back condition.

[HYER] In your words.

[DAVIS] No further questions.

[De Treux] Any redirect?

[WHITEHEAD] No, we'd like to go to our next witness. And that would be Aleesha Barber.

[De Treux] OK. Thank you, sir. Raise your right hand, please. Do you swear and affirm this testimony you're about to give...

[BARBER] Aleesha Barber.

[De Treux] Thank you.

[BARBER] You're welcome.

[WHITEHEAD] Ms. Barber, thank you, for being with us today. Can you tell the arbitrator where you work and what you do?

[BARBER] I'm a nurse at Nittany.

[WHITEHEAD] Just a very few questions. Do you work with the grievant, Kevin Hyer?

[BARBER] Yes, we work on the same floor.

[WHITEHEAD] As part of your duties, are you required to lift patients?

[BARBER] Yes, that's something that we do all the time.

[WHITEHEAD] Have you ever helped Kevin lift one of his patients where the two of you worked together to do that?

[BARBER] Yes. When it's necessary, sometimes we help each other out.

[WHITEHEAD] Have you ever helped Kevin where you lift a patient instead of Kevin?

[BARBER] Yeah. Kevin sometimes complains about his back. And he will ask me to help move the patient for him. So I'll move the patient for him.

[WHITEHEAD] And on the key day in question, February 15, was Kevin sent home for refusing to lift a patient?

[BARBER] Yes, he was sent home. And I had to lift a very, very large patient. And it really wasn't an easy one.

[WHITEHEAD] Why was that not easy?

[BARBER] He was a really big guy. And it took a lot of effort to move him.

[WHITEHEAD] And was it Kevin who asked you to do that?

[BARBER] No, Olivia did, once Kevin was sent home.

[WHITEHEAD] I don't know if you were in the room when Supervisor Martinez said that Kevin was something like, quote, "always trying to get out of work assignments," or words to that effect. Can you comment on that?

[BARBER] Kevin's a good guy. He does what he's supposed to do. I mean, he may not be the hardest worker in the unit, but he does what he's supposed to do. Besides the back thing, he does all his duties and everything that he's supposed to do.

[WHITEHEAD] Thank you, that's all.

[BARBER] You're welcome.

[De Treux] Cross-examine?

[DAVIS] Yes. Isn't it true that, on February 15, you moved that very large patient on your own?

[BARBER] Yes, I did.

[DAVIS] And I believe you testified that it took a lot of extra effort. Did that extra effort involve using your back at all?

[BARBER] No, not at all. I mean, we are taught to use our legs, not our back. When you use your legs, there should be no strain or no problems or aches with your back.

[DAVIS] And approximately how tall are you, and how much do you weigh?

[BARBER] I'm 5' 4" and 130 pounds.

[DAVIS] OK. OK, and you testified earlier that Kevin is not a particularly hard worker. Does he often try to get out of doing his share of the work?

[BARBER] I don't know if I would put it that way. He's not the hardest worker on the unit, but he does his share. Let's just say, when there's more work to do, he's not in front of the line, if you know what I mean.

[DAVIS] Oh, I know what you mean. No further questions.

[BARBER] Thank you.

[De Treux] Any redirect?

[WHITEHEAD] No, the union rests.

[De Treux] Thank you, ma'am.

[BARBER] Thank you.

[De Treux] Any rebuttal on behalf of the hospital?

[DAVIS] No rebuttal.

[De Treux] How do the parties want to close the case? Oral argument? Written briefs?

[DAVIS] I'm prepared to close on the record.

[WHITEHEAD] Yes, oral argument.

[De Treux] OK. The employer will go first with the closing argument?

[DAVIS] Yes. Mr. Arbitrator, you've heard all of the testimony. You've seen all the evidence in the case. And I believe that the hospital has shown that there was just cause for a five-day suspension of the grievant, Kevin Hyer.

Here we have a case that involves two separate offenses by this particular grievant. He was warned. He received prior warnings regarding his behavior and was warned at one of the incidents that was remarkably similar to what happened on February 15 just three weeks before the incident of February 15.

Now, he not only refused the direct order of his supervisor, but he failed to properly take care of a patient. And as you might imagine, as an acute care hospital, taking care of patients is mission one for Nittany Regional. We submit to you that either of these offenses alone would have justified, actually, termination. But certainly, taken together, each on their own was a very

serious offense. But certainly, taken together, they more than amply provide just cause for a five-day suspension.

Now, the union's going to argue, as they have through their witnesses and in their opening statement, that the hospital needs to follow progressive discipline for both the insubordination and for the failure to properly care for a patient. I submit to you, Mr. Arbitrator, that's a ludicrous position. These are serious violations.

You don't get a free bite at insubordination. You don't get a free bite. You don't get one chance to not properly care for a patient before you can be disciplined. That's just not reality.

These are serious offenses. And under the collective bargaining agreement, the hospital was perfectly within its rights to go directly to a five-day suspension. And as I said, I could even argue, and I believe make the case, that they could have gone directly to termination.

The grievant-- and I know you had an opportunity to observe his demeanor. And quite frankly, credibility is an issue in this case. As the grievant has denied that he ever received any prior discipline, he was very glib in his answers. But when you looked and listened carefully, you could see that he was evasive in almost every answer he gave, certainly, on a cross-examination.

I submit to you that you need to consider that when you consider the credibility of the witnesses and contrast that with the credibility of our main witness, Ms. Martinez, who was very sincere in her testimony. She was not evasive. And she didn't, in any way, try to not answer questions fully.

The union has also raised this issue of anti-union animus. Again, it would certainly be the hospital's position that that is a complete red herring. This particular grievant does engage in a lot of antics. He tries to make statements. He clearly is very enamored with his position as a shop steward.

But quite frankly, if the hospital harbored this anti-union animus, we certainly would have just terminated him. Why give him a five-day suspension? If you have such union animus against someone and he's really causing you a lot of trouble and you want him out of your hair, fire him.

So our position is that we have shown that there was just cause for the five-day suspension. And we certainly urge you to deny the grievance in all respects. Thank you, Mr. Arbitrator.

[De Treux] Thank you. The union ready to make its closing statements?

[WHITEHEAD] Yes, thank you. Mr. Arbitrator, we have here a supervisor who believes that this union does not belong in a health care institution. She concedes that the face of the union on her surgical ward is that of the grievant, Kevin Hyer.

She would never let her non-acceptance of unions affect her behavior, she told us. And yet, she has arranged this disciplinary process that she's in charge of with, what I call "stealth notices," phantom notices that, interestingly enough, may remove the union from this floor of health care. Kevin Hyer may not be here very much longer if this stands.

And she does this even though she's allowed him freedom in the past and still allows that to other nurses other than the grievant. So let's take this a piece at a time. Actually, I think the testimony has helped to narrow the issues in this case.

It's undisputed here that the contract does allow an employee, at least in the case of a threat of serious injury, to decline to follow an order that would risk that injury. That, I think, is common ground. So it seems like the issue here is whether, in this incident involving a back problem and an extremely overweight patient, whether Mr. Hyer acted so unreasonably with his concern about his safety and, as he said, that of the patient as to warrant discipline for not following what Supervisor Martinez insisted on.

I believe the burden is on the hospital to show his unreasonableness. And I submit they haven't carried that burden. First, we would admit that Supervisor Martinez is not on trial here. But her order must be considered in light of a contract that does mandate that the hospital will not require its employees to perform unsafe work. We submit that it must be looked at in light of her past practice of allowing Kevin Hyer to get help when he needed it.

The evidence suggests that, if ever Kevin could get this consideration like other nurses get, it would be on a day when his back was acting up and a very large patient needed to be moved. And he explained all that. In the critical incident, he made that clear, even though Ms. Martinez knew this. He did state the point. And yet, she pushed it to a confrontation.

When she intervened, he wasn't neglecting care, he was seeking help. He was trying to care for this patient. And we submit that he had a sufficiently reasonable and legitimate safety concern here so that there is not just cause. In other words, we're saying that a nurse, no nurse, should be put in a position where they're forced to risk injury to themselves and possibly cost the hospital a workers' compensation case, certainly absenteeism, or health care claims. Must they do all that to prove the reasonableness of their in-the-moment judgment?

Progressive discipline: there is the second issue here. And the union submits that the better reading of the testimony you've heard here today is that the hospital did clearly violate progressive discipline without a sufficient excuse. Their witnesses testified that, well, we didn't actually put it in his file. We didn't actually put it in writing. We didn't give him the formality, but it was there in substance, as though this formality is nothing more than technical stuff.

But progressive discipline is really important because, among other reasons, it gives employees a fair warning that they're getting into serious danger as the system escalates. And it's undisputed here that, in his entire personnel file, nothing, nothing in the way of discipline prior to this incident was ever put in his file, ever given to him in writing. No record of the oral warning that the hospital talks about it. No record of the written warning. And they argue, well, these oral discussions were sufficient.

You know, the grievant is a union steward. He advises people on how to file a grievance and when to file a grievance. And he knows when people have a right to file a grievance. He had no idea that those two conversations constituted discipline. Does anyone in this room doubt for a minute that Kevin Hyer would have grieved those, so-called, previous disciplines if it had been made clear to him that they were disciplines?

The reason he didn't grieve them, he's a steward, and he didn't grieve them because they weren't disciplines. So the hospital resorts to one final argument to save itself. It tells us that, well, we have the right to skip steps in the procedure in a serious case. And to bolster that, their only real illustration is a case from five years ago involving a fistfight between two people on the patient floor. Imagine, a fistfight on the patient floor.

We believe that the hospital is arguing for a huge loophole in the progressive discipline system. This is a hospital where patient care will be involved in many discipline cases, case after case. And if all the hospital has to show is that the discipline involves that, the exception will swallow the rule.

In summary, Mr. Arbitrator, we ask you to sustain the grievance for lack of just cause. But even if you find cause, for violations of the progressive discipline system. Thank you.

[De Treux] Thank you. I appreciate the presentations of both parties, your professionalism here today. I'll issue a decision roughly 30 days from today's date. And with that, we'll close the hearing. Thank you, very much.

Thank you, so much.

[INTERPOSING VOICES]

--We'll have a decision soon. You guys did a great job.

Thank you.

[INTERPOSING VOICES]

Thank you. Good luck to you.

[NARRATOR] The decision on Kevin Hyer's grievance now rests with the arbitrator. He will weigh the evidence and the arguments presented by the parties. The arbitrator will decide

whether this is just cause or a reasonable cause for discipline. He will consider, among other things, whether Kevin Hyer engaged in the acts alleged by the employer, whether those acts violated the rules in the workplace, and whether the discipline is appropriate for the offense committed.

The parties will receive a written award from the arbitrator which includes his decision and a detailed explanation of his reasoning. The arbitrator is expected to arrive at an appropriate remedy. For example, in this case, he may sustain or uphold the grievance and order the hospital to reverse Hyer's suspension and pay him for wages lost due to his suspension.

The arbitrator may deny the grievance and find the hospital's discipline appropriate. Or he may arrive at a decision somewhere in between the parties' positions, such as finding that Hyer violated certain work rules, but ordering that the suspension be reduced to a written warning. However this particular case turned out, the union and the hospital resolved their dispute without litigation, without a work stoppage, and with minimal disruption in the workplace. This peaceful, prompt, and just resolution of workplace disputes through grievance and arbitration is a hallmark of collective bargaining and good faith labor-management relations.

[MUSIC PLAYING]