Altoona Hospital *and* American Federation of State, County and Municipal Employees, Council 83 AFL-CIO. Case 6-CA-15820

13 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 14 December 1983 Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The Hospital Council of Western Pennsylvania filed an amicus brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The essential facts in this case are not in dispute. Marlene F. Focht, a secretary/receptionist in the Respondent's emergency department, received a warning for rude and discourteous behavior based on three separate incidents. Focht grieved the discipline as permitted under the collective-bargaining agreement. Prior to a third-step grievance meeting, Focht hired a private investigator and released to him the name of an individual, Mrs. Shirley Beam, to whom a supervisor had attributed one of the complaints about Focht's conduct. Beam was the mother of a patient treated in the emergency department and was listed as the next of kin on a hospital admission form. The Respondent discharged Focht 23 September 1983 for giving Beam's name to the private investigator. The Respondent maintained that by doing so Focht had disclosed confidential information in contravention of the Respondent's work rules.

Focht grieved the discharge. The grievance went to arbitration and was denied. The arbitrator found that Focht was aware of the Respondent's rule against the disclosure of confidential information, that Beam's identity was contained in a confidential record, and that the Respondent's discharge of Focht was for just cause. In the arbitrators view, Focht had engaged in conduct that was "inexcusable" and had "violated the cardinal rule of confidentiality of hospital information."

The judge declined to defer to the arbitration award for two reasons. He found that the arbitrator had not addressed the unfair labor practice issue as required by the Board in *Suburban Motor Freight*, 247 NLRB 146 (1980). He also found the award to be "repugnant to the Act," thus failing to satisfy one of three standards for deferral set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). On the merits of the case, the judge found that the Respondent violated Section 8(a)(3) and (1) of the Act because the discharge of Focht interfered with her statutory right to pursue a grievance. The judge reasoned that the Respondent's rule on confidentiality was outweighed by Focht's right to defend effectively against the complaint which had resulted in discipline.

In our recent decision in *Olin Corp.*, 268 NLRB 573 (1984), we overruled the *Suburban Motor Freight* requirement that the party urging Board deferral to an arbitration award must prove that the unfair labor practice issue was presented to and considered by an arbitrator. Instead we adopted the rule that an arbitrator has adequately considered an unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The burden is now on the party opposing deferral to demonstrate the defects in the arbitral process or award.[2]

The arbitration award in this case satisfies the *Olin* standard. The contractual issue whether the Respondent discharged Focht for just cause is factually parallel to the statutory issue whether the Respondent could lawfully discipline Focht for disclosure of confidential information during her protected pursuit of a grievance. The arbitrator addressed the same facts that would be considered by the Board in a consideration of the unfair labor practice, namely, the complaint against Focht, the progression of her grievance, Focht's disclosure to the investigator, and the Respondent's rule on confidential information.

In *Olin*, we also reiterated the appropriate method of inquiry for determining when an arbitration award is "clearly repugnant" to the Act such that deferral under *Spielberg* is unwarranted. We stated that "with regard to the inquiry into the 'clearly repugnant' standard, we would not require an arbitrator's award to be totally consistent with Board precedent."[3] We require only that the award be susceptible to an interpretation consistent with the Act. When that requirement is met we

[1] We deny the General Counsel's motion to strike the amicus brief filed by the Hospital Council of Western Pennsylvania.

[2] *Olin Corp.*, supra.

[3] Id. at 574.

find the award not "palpably wrong," and we will defer.[4] We do not find the arbitration award in this case to be "palpably wrong."

It is undisputed that employers have a legitimate interest in keeping certain information confidential;[5] that is unquestionably true with regard to a health care employer whose patient records are especially sensitive. An employee's violation of an employer's rule against the disclosure of confidential information may also be the subject of lawful discipline even when the disclosure is made for reasons arguably protected by the Act. The test of such discipline is whether the employee's interests in disclosing the information outweigh the employer's legitimate interests in confidentiality.[6] If they do not, then discipline is lawful.

In finding that the Respondent had just cause to discharge Focht, the arbitrator here implicitly found that confidentiality concerns outweighed grievance needs. We will not decide whether we might strike a different balance. The arbitrator's award is susceptible to an interpretation consistent with the Act and is therefore not clearly repugnant. We find then that the arbitral proceeding has met the *Spielberg* standards for deferral and that the General Counsel has failed to show that the arbitrator did not adequately consider the unfair labor practice issue. Accordingly, we shall defer to the arbitration award and dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

[4] *International Harvester Co.*, 138 NLRB 923, 929 (1962), affd. sub nom. *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003 (1964), *G & H Products*, 261 NLRB 298 (1982).

[5] *Detroit-Edison Co. v. NLRB*, 440 U.S. 301 (1979).

[6] *International Business Machines*, 265 NLRB 638 (1982).

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in Altoona, Pennsylvania, on October 14, 1983, based on a charge filed by the American Federation of State, County and Municipal Employees, Council 83, AFL-CIO (the Union) on September 29, 1982, and a complaint issued by the Acting Regional Director for Region 6 of the National Labor Relations Board (the Board) on June 8, 1983. The complaint alleges that the Altoona Hospital (Respondent) violated Section 8(a)(1) and (3) of the Act by discharging Marlene F. Focht because of her union and protected concerted activities. Respondent's timely filed answer denies the substantive allegations of the complaint.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a nonprofit Pennsylvania corporation, engaged in the operation of a hospital providing in-patient and out-patient medical and professional care services. Jurisdiction is not in dispute. The complaint alleges, Respondent admits, and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Relevant Contractual Provisions and Rules*

Respondent's employees have been represented by the Union since 1981. The collective-bargaining agreement, effective from April 1981 until June 1984, provides that employees "shall not be discharged, suspended or disciplined without 'just cause.'" It further provides a three-step grievance procedure terminating in final and binding arbitration.

The contract includes, within Respondent's reserved management rights, the right "to establish and require employees to observe reasonable rules and regulations." To the extent relevant here, Respondent's rules provide the following:

CONFIDENTIAL INFORMATION

Information concerning the condition and diagnosis of patients is strictly confidential. Such information is never discussed with anyone not involved in the care of the patient.

Offense	*DISCIPLINE*		
	First Offense	*Second Offense*	*Third Offense*
Rude, discourteous or uncivil behavior.	Written warning	(5) Days off	Discharge

[1] The General Counsel and Respondent's motions to correct the transcript are granted.

Offense	*DISCIPLINE*		
	First Offense	*Second Offense*	*Third Offense*
Rude, discourteous or uncivil behavior towards patients and visitors.	Discharge		
Divulging confidential information	Discharge[2]		

STANDARD OF PRACTICE[3]

Subject: *Patient Confidentiality*

Professionally, ethically, and legally, it is the responsibility of the Nursing Service Department employees to maintain confidentiality regarding the patient, his/her condition, or any personal information learned about him/her during the course of his/her hospitalization.

INTER-OFFICE COMMUNICATION

TO: All Secretaries
SUBJECT: Information on Patient Treatment
FROM: Frank E. Sangiorgio, M.D., Director, Department of Emergency Medicine

As of this date, December 11, 1980, any person calling for information, such as family, friends, industrial nurses . . . you are not under any circumstances to release any information to these people as to condition of patient, what treatment is being done, etc.

Any secretary not abiding by this will be looking for a new job.

Respondent's counsel acknowledge that Respondent's rules on confidential information went beyond disclosure to outside parties. An employee who properly possessed information concerning a patient or his family would be deemed in violation of the rules even if he or she were to contact that patient or family member of his or her own without permission of the hospital.

The names, addresses, and dates of admission of Respondent's in-patients are routinely published in the local press unless the patient, on admission, responds negatively when asked whether they want this information published. A similar practice was followed in the emergency department until about a year prior to the events in this case and was then abandoned. There is no routine publication of emergency admissions.

B. *The Operative Facts*

Marlene Focht had been employed by Respondent for nearly 4 years, and for 3 years was a secretary-receptionist in the emergency department. It was her job to receive incoming patients and type out the nonmedical portions of the patient chart, including the patient's name, age, race, religion, marital status, insurance information, and the name and phone number of the next of kin or a friend. Focht was in the Union's collective-bargaining unit and was a member of the Union.

On July 8, 1982,[4] Focht was called to the office of her supervisor, Lisa Steward.[5] There, with her union steward Margaret Vasal present, Focht was confronted with two complaints of rude behavior. The complaints, which originated with hospital staff, involved incidents allegedly occurring on June 18 and July 6. These were the first such complaints made against Focht during her employment. While they were discussing the July 6 incident, Steward received a call which reported that there was a third incident which had allegedly occurred on July 7. A copy of the charge nurse's shift report, prepared by the nursing shift supervisor Ruth Westerley was immediately delivered to Steward's office. According to that report, a call had been received from the mother of an individual brought into the emergency department for treatment "concerning the rude behavior and indifferent attitude of the secretary." The shift report further related that the complainant had "stated that everyone in the [Emergency Department] waiting area was complaining about the Secretary's attitude."

Steward either described the allegation to Focht, read the report aloud, or showed it to her. In the course of the discussion, Steward told Focht that Shirley Beam, the patient's mother, had made a complaint about the secretary's attitude. Focht told Steward that the department had been very busy on that shift, that the waiting room was backed up with people, and that she had no recollection of Beam or of any incident.[6] As Focht remembers the July 8 meeting, when she indicated that she had no recollection of any incident, Steward told her that the complaint was "just something about your attitude" and said, "I don't think we're going to do much with it anyhow at this point . . ."

On July 12, Focht was called to the office of Respondent's director of human resources, David Duncan. Duncan said that there were a number of complaints about her. Focht protested her innocence and pointed out that in the period of 4 years this had never happened before; suddenly three complaints were lodged in a 3-1/2-week period. She asked Duncan whether she could present witnesses, not hospital employes, who would testify in her behalf. Duncan replied, "it appears to me that there is a problem here . . . I'm going to have to get into this . . . I'm not going to give you any type of notice or anything . . . I'll get back with you." Focht repeated her request for an opportunity to present a defense and was told, "Well, we'll see."[7]

On the following day, July 13, Duncan told Focht, "I feel the least I can do for you at this point is give you a written warning . . . I've already taken a considerable amount of time . . . there appears to be a problem and I

[2] All of the foregoing is contained in the employee handbook.

[3] Published March 17, 1980, reviewed October 26, 1981. Standards of practice take precedence over the employee handbook to the extent that they are in conflict.

[4] All dates hereinafter are 1982 unless otherwise specified.

[5] Respondent admitted that Steward was a statutory supervisor.

[6] While the recollections of Focht, as corroborated by Vasal, and Steward differ as to whether or not Focht was shown the shift report and the patient's chart, it is undisputed that Steward informed Focht of the name of the person who had made the complaint, Shirley Beam.

[7] Focht's testimony with respect to this meeting is uncontradicted.

just don't have the time to get into it at this point. I've already put much time into it . . . I'm telling you the least that I can do for you is give you this written warning." Focht repeated her plea for the opportunity to bring in witnesses to make a defense and mentioned that she had spoken with an attorney. She asked whether she would be reprimanded if she filed a grievance and asserted her intention to defend herself. Duncan told her, "Marlene, you can do anything you want . . . you can take this matter to the Supreme Court if you want to." She was given a written warning which stated:

> WARNING NOTICE: You are hereby warned that continuance or repetition of the behavior or incidents outlined below [rude & discourteous behavior] will subject you to: 5 Days Off Without Pay.[8]

Focht filed a grievance contending that the written warning was unjustified and requesting that it be withdrawn. In Respondent's step-one reply, signed by Lisa Steward, denying that grievance, Respondent stated:

> The grievant, Marlene Focht, was disciplined and counseled in accordance to documented incidents of June 18, 1982; July 6, 1982; and July 7, 1982, of being rude and discourteous to a fellow employee, an Altoona City Police Officer and also to a patient's parent.

The grievance was taken to step two. In a reply dated August 9, Respondent's administrative director for the department of emergency medicine, Kim Eicher, stated that he had "reviewed the documented incidents" and agreed with the previously taken disciplinary action.

In about mid-August, Focht told Vasal that she was thinking of hiring a private investigator to check into the complaint concerning the alleged July 7 incident in order to find out what it was she was supposed to have done and whether or not the complaint was against her. She stated her belief that no one from the hospital would investigate it. Vasal said that she did not see anything in the union contract which would preclude such an action but, because she felt unqualified to advise Focht in the matter, indicated that she would talk with Herb Williams, the Union's president and an employee in Respondent's maintenance department. Vasal called Williams and told him of Focht's inquiry concerning the retention of a private investigator. She asked whether there was anything in the collective-bargaining agreement to prohibit Focht from doing so. Williams called Harold Teague, the Union's Council representative, and was told that no union policy would be violated by such an action.[9] Williams related back to Vasal that there was nothing to prohibit Focht from hiring a private investigator if she so desired. Vasal passed the information back to Focht.[10]

In late August, Focht contacted Gene Ellis, owner of the IPS Detective Agency. She contacted IPS, she testified, because she had heard that this was a reputable and confidential firm. She told Ellis of the complaint that had been made against her by Shirley Beam and asked whether he would call Beam to determine the name or description of the person against whom Beam had lodged her complaint and the nature of the conduct about which she was complaining. Ellis secured Beam's telephone number from the local phone book and called her home. A man answering the phone told Ellis that Beam was not home and, in response to Ellis' question about whether she had been treated at the Altoona Hospital, replied that she had not but that the man's daughter had gone in for treatment of a foot injury. Ellis further introduced himself and was told that, if he wanted to talk to Beam, she could be reached at her job at the Tyrone Hospital. Ellis, whose staff services the Tyrone Hospital, called Beam, reaching her directly. He introduced himself and asked whether she had made a complaint against an individual at the Altoona Hospital. Beam replied that her complaint, dealing with the way they were treated in a visit to the emergency room, was not against any individual but was against the system itself. The entire conversation between Ellis and Beam lasted not more than 4 minutes.

On September 3, as Focht was on her way to the third-step meeting on her grievance over the disciplinary warning, Ellis reached her with what he referred to as good news. He told her that the complaint was not against her but was against the system at the Altoona Hospital. Both he and Beam would be willing to come to the third-step meeting to back her up if asked, he stated.

Focht went to the step-three meeting and, when Duncan asked her whether she had anything to say concerning the allegations of rude and discourteous behavior, denied each of them. She produced letters corroborating her denials with respect to the June 18 and July 6 allegations and, with respect to the July 7 complaint, told Duncan that she had contacted a private investigator who had talked to Beam. She related to Duncan what Ellis had told her concerning Beam's complaint.

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[8] Focht's testimony was corroborated by Vasal and was uncontradicted by Respondent's witnesses.

[9] In fact, Teague testified that employees were told that the Union gave them the right to engage in self-help and encouraged them to use their own means and methods to help the stewards and local officers present their grievances.

[10] In a hearing before the Commonwealth of Pennsylvania Department of Labor and Industry, Unemployment Compensation Board of Review, Williams was asked a lengthy and complex question by the referee, concerning whether the Union would condone the release of various kinds of patient information or the hiring of private investigators. He replied that the Union did not believe "that action should have been taken until after the grievance procedures had been completed and [the arbitrator has] made a decision." Recourse to an investigator would have been appropriate, according to Williams' testimony, at that stage. Williams also testified in the compensation proceeding that he had not learned about Focht having asked about the Union's position on the hiring of a private investigator before she did so. His recollection was subsequently refreshed by Vasal and he testified at the hearing before the arbitrator that Vasal had asked him about the hiring of an investigator before Focht did hire the investigator. Both Focth and Vasal testified in the compensation hearing that Williams had been consulted prior to Focht's call to the private investigator. On the basis of this record, I find no reason to discredit Focht and Vasal or to conclude that Focht did not ask the Union about the propriety of contacting a private investigator before she took such action.

The meeting broke up at this point with Duncan stating that they would get back to her with an answer.[11]

On September 8, following this meeting, Respondent had the coordinator of its patient advocacy program, Barbara Titelman, contact Beam.[12] According to Tietlman's "Anecdotal Record," Beam " was quite willing to discuss the matter." Beam told Titelman that she had been called by Ellis and asked whether Focht had been rude to her. Beam related that she had told Ellis, "No, I heard other people in the waiting room complaining about her. I wouldn't even know her if I saw her again." She also told Titelman that she had given Ellis permission for Focht to call her. According to Titelman's report, Beam also "thought that Ellis had been employed by Respondent to investigate the matter and she resented his calling her at her place of employment."

Respondent denied Focht's third-step grievance on September 16. Duncan's letter indicated that he believed the truth of the claims against Focht, notwithstanding that the situation was confusing. However, according to Duncan, because of the confusing situation and "mitigating circumstances," Focht was given a written warning rather than the discharge penalty normally required by such conduct.

Following issuance of the third-step answer, Lisa Steward again called Focht and told her that they would have to have a meeting "about . . . who gave the name to the detective." Focht reminded Steward that Steward had given Focht's Beam's name.

On September 21, Focht met with Eicher and Debbie Simpson, head nurse in the emergency department. Also present was Herb Williams. At this time, Eicher asked Focht how she obtained Beam's name and who gave it to the private investigator. Focht told him that she had been given the name by Steward and that she gave the name to the investigator, but not until after she had received the written warning. Eicher replied that he was very dismayed that an employee would give out confidential information, that he would consider her actions and would let her know what corrective action he would be taking. Focht told Eicher that Duncan had told her that she could take her case to the Supreme Court if necessary; Eicher said that she had misunderstood Duncan's point.

On September 23, Eicher again called Focht to a meeting. He told her that she was being discharged because of her conduct in hiring a private investigator. She asked whether Respondent was claiming that she had breached patient confidentiality and was told that that was the reason for dismissal. Focht argued that no patient had been involved in the disclosure; Beam was a patient's mother, not the patient herself, and there never had been a completed admission to the hospital. She further argued that the information disclosed to the investigator was not of a confidential nature since it did not deal with a patient's treatment or condition. Once again she asserted that Duncan had told her that she could do what she wanted to do in her own defense, even to taking the case to the Supreme Court. Once again, Eicher told her that she had misunderstood. Focht subsequently received a discharge notice stating that she had been discharged for "breaching patient confidentiality."

Respondent contended at hearing that Focht should have came to management and sought permission to contact Beam. However, Focht was never advised that the hospital would attempt to arrange a meeting with Beam if Focht wanted to question her. It was undisputed that Focht never asked Respondent's permission to contact Beam or to release Beam's name.

A grievance was filed over Focht's discharge and, in meetings over that grievance, Respondent continued to maintain that Focht had breached patient confidentiality and had been discharged for doing so. The discharge grievance went to arbitration on January 28, 1983. On March 2, 1983, the arbitrator denied the grievance. In his decision he found that Focht was aware of the contents of the employee handbook and its prohibition against divulging confidential information. Concerning the complaint, the arbitrator found that Mrs. Beam (referred to in his decision as Mrs. B) had complained about Focht's discourteous behavior toward herself, her daughter, and others and had declined an offer by the hospital to have someone call her back as a followup to the complaint. According to the arbitrator's decision, Beam "made it clear she desired to keep the entire matter private, and to avoid becoming involved [in] any sort of investigation." He further found that Focht "had divulged to an outside person, information contained in the hospital confidential records," that the detective contacted Beam at her place of employment, "and led her to believe he was employed by the hospital," had "ignominiously invaded" her privacy, causing Beam to regret complaining and to withdraw her complaint." According to the arbitrator's decision, the investigator's contact of Beam made her "understandably angry."

The arbitrator concluded that "a relatively simple warning notice given to the grievant on July 13, 1982 has mushroomed into a catastrophic 'tempest in a teapot.'" He found that "what could have been resolved harmoniously in the grievance procedure has now reached a proportion that flagrantly breaches one of the hospital's most significant rules, i.e., the breach of confidentiality of the hospital's record of patients." Focht's "self-help" decision, he held, "violated the cardinal rule of confidentiality of hospital information . . . [and] seriously impugned the integrity of the Union-Management relations that was established by the parties . . ." He concluded that she should have gone to the hospital or

[11] Focht, Williams, and Teague all testified that Respondent gave no indication, at this time, that it was disturbed by Focht's disclosure of Beam's name to the private investigator. Eicher testified that Duncan expressed shock and asked her why she did it. To this, Focht allegedly replied that Duncan had led her to believe she could use whatever mechanism necessary to defend herself. In turn, Duncan replied that this was a very serious matter which would require looking into. As there is no dispute but that Respondent terminated Focht for what it deemed to be a breach of its confidentiality policy, and no contention that this was a pretext to cover some other reason, it is not necessary to resolve this apparent credibility dispute.

[12] The hospital's investigation of this complaint prior to Titelman's call had consisted of a review of the shift report and of an expanded report from the nursing supervisor who had received the complaint's call, together with an examination of the patient's chart and Steward's questioning of Focht. Respondent had no other contact with Beam prior to September 8.

to the Union for help, that she had embarassed her Union by her self-help and that her conduct was "inexcusable." According to the arbitrator, Focht "willfully, and wrongfully violated the trust she acknowledged . . . and therefore, has frittered away her usefulness to the hospital."[13] There was no discussion of, or reference to, the statutory implications of Focht's actions in the arbitrator's decision.

DISCUSSION

The Merits

A long line of Board and court decisions establishes that the filing of a grievance pursuant to the terms of a collective-bargaining agreement is both concerted activity protected under Section 8(a)(1) and union activity protected under Section 8(a)(3). Thus, in *Boston Mutual Life Insurance Co.*, 259 NLRB 1270, 1279 (1982), the Board, adopting the administrative law judge's decision, stated:

> It is well established that grievance filing is within the umbrella of the Act's protection. The underlying rationale of this principle is designed to promote the viability of collective-bargaining. It assures employees of maximum benefits of their collective-bargaining agreement. E.g., *Crown Wrecking Co., Inc.*, 222 NLRB 958, 962-963 (1976). Indeed, the right to file grievances, and have them adjusted, is explicitly granted in Section 9(a) of the Act.

See also *Postal Service*, 261 NLRB 1131 (1982); *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976); *Thor Power Tool Co.*, 148 NLRB 1379 (1964); *NLRB v. Ford Motor Co.*, 683 F.2d 156 (6th Cir. 1982); and *Crown Central Petroleum Corp.*, 430 F.2d 724, 729 (5th Cir. 1970).

In some cases, such as *Bunney Bros. Construction Co.*, 139 NLRB 1516 (1962), and *Hawaiian Hauling Service*, 219 NLRB 765 (1975), the Board, on finding that the employee was engaged in activity protected under Section 8(a)(1), expressly found it unnecessary to determine whether the employer's conduct also violated Section 8(a)(3). In other cases, however, the Board has found the filing and processing of a grievance to be activity sheltered by Section 8(a)(3) as well as by Section 8(a)(1). Thus, in *Dreis & Krump Mfg. Inc.*, 221 NLRB 309 (1975), enfd. 544 F.2d 320 (7th Cir. 1976), the Board, with court approval, found the discharge of an employee for distributing an intemperately phrased leaflet which sought the aid of his fellow employees as witnesses in support of a grievance to be violative of Section 8(a)(3). In *Crown Wrecking Co.*, 222 NLRB 958 (1976), the discharges of employees for invoking their rights under a collective-bargaining agreement were held violative of both Section 8(a)(1) and (3). Similarly, in *Royal Development Co.*, 257 NLRB 1168 (1981), enfd. in pertinent part 703 F.2d 363 (9th Cir. 1983), the Board found that the employer's refusal to rehire an employee because that employee had filed grievances concerning the manner in which employees were scheduled for work violated both Section 8(a)(1) and (3). The Ninth Circuit, on review, while rejecting the Board's conclusion that activities intended to enforce a collective-bargaining agreement are concerted activities protected under Section 8(a)(1),[14] specifically enforced that aspect of the Board's decision which found that the refusal to rehire the employee because she had filed grievances with the union pursuant to a contractual grievance procedure to be violative of Section 8(a)(3).

Focht had filed and was pursuing a grievance with her union pursuant to the terms of the collective-bargaining agreement. Her effort to secure information concerning a complaint allegedly made against her, which complaint had been cited by her employer as a reason for disciplining her, was part and parcel of the grievance procedure and she was discharged for making that effort. Her grievance could not have been effectively pursued without some evidence to support her denials; that was clear from Duncan's assignment of discipline upon what he described as the appearance of a problem, his unwillingness to spend more time to determine if there was really any merit to the complaints against her, and Respondent's failure to further investigate the alleged complaint after Focht's denial that she had done wrong. Focht had checked with the Union concerning her intention to have the complaint investigated by a private investigator and the Union had found no reason to discourage her from the course of action she planned to take. Indeed, employee assistance in the processing of grievances was encouraged by the Union. Focht was thus engaged in protected concerted and union activity (see *Dreis & Krump*, supra) and Respondent's contention that she was airing a "personal gripe" or otherwise engaged in a personal mission must be rejected.[15]

Similarly requiring rejection is Respondent's contention that Focht's conduct amounted to "unauthorized self-help inconsistent with the fundamental policy of the Act to foster established dispute resolution procedures agreed to by the parties in collective bargaining . . . [that she acted] . . . in derogation of the Union's statutory role as the exclusive representative of all employees . . ." She did not bypass the Union; rather she was working alongside it to help sustain her grievance. Her goal, the successful prosecution of that grievance, was not inconsistent with the Union's objectives or contrary to any position the Union had taken. And, as previously noted, the Union encouraged self-help and employee assistance in grievance processing and had specifically found nothing objectionable in the use of private investi-

[13] As there was no transcript made of the hearing before the arbitrator, and no listing of witnesses who appeared before him, it is impossible to determine on what evidence the arbitrator relied in reaching these findings, many of which are contradicted by the undisputed facts adduced before me.

[14] (I.e., the *Interboro* doctrine, *NLRB v. Interboro Contractors*, 388 F.2d 495 (2d Cir. 1967)). Further discussion of the merits of the *Interboro* doctrine is not required at this time inasmuch as the activity involved herein is clearly of a type protected by Sec. 8(a)(3). But see *NLRB v. City Disposal System*, 256 NLRB 451 (1981), enf. denied 683 F.2d 1005 (6th Cir. 1982), pending before the United States Supreme Court on a writ of certiorari granted March 28, 1983.

[15] The cases cited by Respondent in support of this contention are inapposite. None deal with the situation of an employee engaged in filing and processing a grievance pursuant to a collective-bargaining agreement.

gator to look into the complaint allegedly made against her when she had posed the question to her steward. *Emporium Capwell Co. v. WACA*, 420 U.S. 50 (1975), cited by Respondent, which involved employee efforts to bypass the contractual grievance procedure and force direct bargaining between the employer and themselves, has no applicability to the facts of the instant case. See also *Dreis & Krump*, supra, and *United Parcel Service*, 205 NLRB 991 (1973).

The finding that Focht was engaged in activity generally protected by the Act, which activity was inhibited by Respondent's application of its confidentiality rules, however, does not necessarily render those rules unlawful and unenforceable. It cannot be seriously disputed that an employer, particularly one engaged in the health care industry, has substantial and legitimate business justifications for the establishment and maintenance of rules governing the distribution of confidential information. The issue, therefore, is whether the employees' interests in processing grievances and in defending themselves against what they deemed to be contractually prohibited unjust discipline "outweigh the Respondent's legitimate business interests in support of its policy so that, under the circumstances," some breach of those rules, such as Focht's release of the name of a patient's next of kin to a private investigator, falls within the Act's protective ambit. *International Business Machines Corp.*, 265 NLRB 638 (1982); *Jeanette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976).

Here, unlike the situation presented in *IBM*, supra, I find that, in the circumstances presented, the required balance tips strongly toward the statutory interests and precludes application of Respondent's rules to Focht's conduct. Thus, I note that Focht was engaged in processing a grievance under a contractually established grievance procedure seeking to enforce her rights under the "just cause" provision in her collective-bargaining agreement. Effective and meaningful recourse to grievance-arbitration machinery contractually agreed to is a key element in the national labor policy. *International Harvester Co.*, 138 NLRB 923 (1962); *NLRB v. Pincus Bros. Inc.*, 260 F.2d 367 (3d Cir. 1980). That recourse becomes meaningless when, as here, application of an employer's rules precludes the employee and the Union from determining the facts and preparing a case for presentation in the grievance procedure.

While the reasonableness of, or the necessity for, an employee's conduct is irrelevant to a determination of the protected character of that conduct (see *Dreis & Krump*, supra at 314, and cases cited therein), it is arguable that these factors may be deemed relevant to the balancing required between a legitimate rule and statutory rights. Here, the Respondent assigned discipline to Focht, based on a report of a telephone conversation without any further investigation, notwithstanding that Focht had told Respondent that she had no recollection of Beam or of any incident. Moreover, Duncan had told Focht that he was not inclined to spend any more time on the complaints against her, i.e., that Respondent was not going to investigate further. Focht thus reasonably believed that there had been, and would be, no investigation into the complaint which Respondent believed had been made against Focht. In fact, no one had talked to Beam since she initially voiced her complaint. It was therefore essential to any meaningful grievance presentation that Focht find out whether the complaint was against her and what it was that she had allegedly done. Respondent argues that the investigation initiated by Focht was unnecessary because it, rather than she, bore the "ultimate burden" of establishing the basis for the discipline. Such an argument presupposes that the employee is trained as a lawyer in the nuances of whatever rules of evidence might be applied by some arbitrator, subsequently to be selected; it further presupposes that such an arbitrator would rigidly apply evidentiary rules and hold the shift supervisor's report of her conversation with Beam inadmissible or of insufficient weight to sustain the discipline. Neither supposition is necessarily warranted. Even assuming that Focht and the Union were aware of or could have relied on the application of such a burden of proof, Respondent's rules would have prevented the acquisition of evidence necessary for cross-examination of the complaint or of the shift supervisor who took Beam's call, if either were to testify. Such a grievance and arbitration proceeding, where only one side is permitted access to the evidence, is not what the Board and the courts envision. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), and *Transport of New Jersey*, 233 NLRB 694 (1977). Moreover, Respondent's burden of proof argument would, in effect, preclude any possibility that the grievance might be resolved short of arbitration; it would force the employee and the Union into arbitration in the hope that they could, with no evidence save the employee's denial, convince an arbitrator that the employer's evidence of misconduct was insufficient.

Respondent contends that Focht could, and should, have gone either to the Union or to her employer for help in establishing her innocence. In fact, she went to the Union and was given the green light to contact a private investigator. Under Respondent's application of its rule, the Union could have done no more. Inasmuch as Respondent would have deemed a direct contact by Focht with Beam to be a violation of its rules, it must be assumed that it would have treated her disclosure of Beam's name to Williams or Teague and the questioning of Beam by one of them without the hospital's permission similarly to violate those rules. And an employer cannot require employees or their representatives to secure permission before invoking the grievance procedure. See *Pittsburgh Press Co.*, 234 NLRB 404, 412 fn. 8 (1978). Neither can it require an employee or the representative to rely on its investigation of the facts underlying discipline it has already assigned. One-sided fact finding hinders, rather than enhances, the grievance-arbitration procedure. In this respect, the instant case is distinguishable from *IBM*, supra. There, the Board did not find violative the discharge of an employee who had distributed pages from Respondent's confidential salary guidelines. In so finding, however, the Board expressly noted that "Respondent's policy does not itself bar employees from compiling or determining wage information on their own." The employee in *IBM* could have discussed wages with the other employees or otherwise at-

tempted to determine what they were paid without contravening the employer's rule. Here, application of Respondent's rule to grievance situations prevents employees from acquiring the facts necessary to defend themselves from employer-imposed discipline. Focht, unlike the employee in *IBM*, had no reasonable alternative. Thus, the instant case is more like *Jeanette Corp.*, 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1976), where an employer's rule holding wage information to be confidential and prohibiting employees from discussing their wages among themselves was held to be an unlawful infringement on their statutory rights. In that case, the discharge of an employee for violating the confidentiality rule was held violative of the Act.

Additional circumstances further tip the balance towards toleration of some incursions on the employer's right to establish the rules involved here. Focht was charged with rude and discourteous behavior, a serious infraction of the hospital's code of conduct. Repetition, she was warned, would lead to suspension. Ultimately repetition would lead to discharge. It was therefore vitally important that she establish her innocence.[16] She did not seek help in investigating the complaint until well into the grievance procedure, when it had become clear that she would not change Respondent's collective mind without supporting evidence. She asked Duncan whether she could present a defense to the accusation against her and received, at best, a noncomittal answer. Subsequently, Duncan responded to her insistence that she would defend herself by stating that she could do anything she wanted to do, even to going to the Supreme Court. Perhaps Duncan was speaking facetiously, but Focht, not unreasonably, understood this to be authorization for what she was subsequently to do.[17] Moreover, Focht had been given Beam's name by her supervisor, Lisa Steward, and, in releasing that information, which was lawfully in her possession, to a person outside the hospital, exercised considerable restraint and discretion. She went to a licensed, professional investigator with a reputation for maintaining confidentiality.[18] Short of conducting the investigation herself, which still would have violated Respondent's rules according to its own interpretation of them, there was no way for her to secure the information she needed with less risk of more extensive dissemination. Further, it was Beam who, by complaining, had initiated the course of action which followed. Having made a complaint which could affect an employee's job, Beam's right, if any, to have her name, as next of kin, kept confidential from everyone cannot be deemed absolute. Like the innocent observer of a crime or accident who may subsequently be questioned or subpoenaed notwithstanding personal inconvenience or embarrassment, a person who complains, however justifiably, in such a way as to possibly jeopardize another person's employment must expect the possibility of further involvement, and that whatever confidentiality which previously was attached might have to be waived.[19]

Additionally, it must be noted that the information which Focht gave to the private investigator was the least intrusive information she could have given and still have had the complaint investigated. She did not give Ellis a copy of the patient's chart or disclose either the name of the patient or the reason for the hospital visit. She gave out less information than Respondent routinely gives to the local press concerning in-patient admissions. In no way can it be said that Focht was indiscreet or careless with respect to any confidential information entrusted to her.

On balance then, I must find that Focht's right to effectively process her grievance, in all of the circumstances here, outweighs Respondent's right to enforce its rules on confidentiality. Respondent's discharge of Focht interfered with, coerced, and restrained her with respect to her rights under Section 7, and violated Section 8(a)(1) and (3) of the Act.

2. Deferral to arbitration

In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board set forth its criteria for deferral to arbitration: the arbitration proceedings must appear to have been fair and regular, all parties must have agreed to be bound, and the decision of the arbitrator must not be clearly repugnant to the purposes and policies of the Act. A fourth requirement was subsequently added—the unfair labor practice issue before the Board must have been presented to and considered by the arbitrator. *Professional Window Cleaning Co.*, 263 NLRB 136 (1982); *Suburban Motor Freight*, 247 NLRB 146 (1980); *Raytheon Co.*, 140 NLRB 883 (1963).[20] Here, inasmuch as the arbitrator's

[16] In light of the penalty assigned to "rude, discourteous or uncivil behavior" by Respondent's rules—suspension or discharge, the penalty with which Focht was threatened—5-day suspension, and Respondent's refusal to modify its position through three steps of the grievance procedure, it is difficult to understand how the arbitrator could have concluded that this was a "relatively simple warning notice" which "could have been resolved harmoniously in the grievance procedure." (Arbitrator's decision, G.C. Exhs. 2, 10).

[17] This further distinguishes the instant case from *IBM*, where the Board noted that the employee had not obtained the confidential information under circumstances which would have led him to reasonably believe that he was authorized to possess and disseminate that information.

[18] Contrary to the arbitrator, I find no basis for concluding that Ellis, the private investigator, "embarrassed" or "castigated" Mrs. Beam, led her to believe he had been retained by the hospital, or "ignominiously invaded" her privacy. The nature of his profession does not warrant any assumption that he went about this investigation in the manner of a fictionalized television or pulp novel "private eye."

[19] Respondent's contention that a disclosure, such as occurred here, "has a chilling effect on the willingness of patients or their families to voice complaints to a hospital" is irrelevant. Every employer has the right to hear customer complaints about its employees and every employee (at least those covered by a "just cause" for discipline provision) has the right to defend against such complaints. There is no reason why a complaining patient or next of kin in a hospital situation should stand any differently than a complaining customer in any other enterprise and there is no reason why a hospital employee should have less right to defend herself than any other employee. Moreover, in order to show the alleged "chilling effect," Respondent, in brief, citing Titelman's "Anecdotal Record," implied that, as a result of having been called by the investigator, Beam regretted having made that complaint. That record supports no such argument. It quotes Beam as stating that she regretted making the complaint the instant after she had made it; Ellis' inquiry, it appears, had nothing to do with her "regret" and did not cause her to withdraw her complaint.

[20] See also *Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981), enf. 252 NLRB 1236 (1980), and *NLRB v. General Warehouse Corp.*, 643 F.2d 965 (3d Cir. 1981), enfg. 247 NLRB 1073 (1980). In both

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award fails to satisfy the latter two requirements, deferral is unwarranted.

An arbitrator's award is clearly repugnant under *Spielberg* if it is "palpably wrong as a matter of law." *G & H Products*, 261 NLRB 298 (1982). In the instant case, without ever considering that the employee possessed certain statutory rights to effectively process a grievance, the arbitrator found that Focht had violated a known company rule and had thus "frittered away" her job. The arbitrator thus ignored "a long line of Board and Court precedent construing the Act" (*Clara Barton Terrace*, supra; *Ryder Technical Institute*, 199 NLRB 570; *Dreis & Krump*, supra) which require a balancing of statutory rights against the employer's legitimate business interests. See, for example, *IBM*, supra, and *Jeanette Corp.*, supra. By doing so, a decision, palpably wrong and clearly repugnant to the purposes and policies of the Act resulted. The arbitrator reached a conclusion which, by prohibiting employees from investigating the employer's basis for discipline or by requiring employees to seek their employer's permission to conduct such an investigation, impedes the effective and expeditious process of contractually filed grievances. As the Board stated in *Hawaiian Hauling Service*, supra at 766:

> The grievance and arbitration mechanism is a vital cog in the machinery for the resolution of industrial disputes. An arbitrator's award which tends to destroy the effectiveness of that mechanism, as the arbitrator's award here does, is clearly repugnant to the policies of the Act.

See also *Union Fork & Hoe Co.*, 241 NLRB 907 (1979).

The arbitrator further found, contrary to both the facts and clear precedent, that Focht had ignored her collective-bargaining representative, had "greatly embarrassed" it, and had "seriously impugned the integrity of the Union-Management relations that was established by the parties to resolve incidents of the nature the grievant alleged was unwarranted." A finding based on such a conclusion is in direct conflict with the import of *Emporium Capwell*, supra, *Dreis & Krump*, supra, and *United Parcel Service*, supra, and furnishes a further basis to conclude that the award is repugnant to the Act's purposes and policies.

Interrelated with the repugnancy question is the question of whether the unfair labor practice issue before the Board was presented to and considered by the arbitrator. Here, a copy of the Union's charge among the documents presented to the arbitrator was the only reference in the arbitral proceeding to the unfair labor practice issues involved in Focht's discharge. As noted, the arbitrator did not mention or discuss that charge or give any consideration to Focht's rights under the Act. He determined only that a rule existed, that rule was important, Focht knew of the rule and had violated it. On that basis he found just cause for her discharge. In no way can his determination be deemed either an explict or implicit resolution of the unfair labor practice issues. Cf. *Bay Shipbuilding Corp.*, 251 NLRB 809 (1980), where resolution of the factual question of whether the employer had violated the contract necessarily resolved the issue of whether or not there had been a unilateral change. Also cf. *Atlantic Steel Co.*, 245 NLRB 814 (1979), where the arbitrator's findings were complete and comprehensive and were factually parallel to the alleged unfair labor practice. In that case, the Board deferred to the determination of an arbitrator upholding the discharge of an employee who, *after* asking his supervisor a question concerning overtime *and* receiving an answer, made an obscene remark to another employee about that supervisor. The Board noted that the arbitrator had found that the employer had been free to grieve his complaint about overtime, that the remark had been unjustified, that the employee had been discharged on the basis of his entire disciplinary record, and had not been discharged as part of a pattern of harassment for having engaged in concerted activities. The instant case is thus distinguishable from such cases as *Atlantic Steel* and *Bay Shipbuilding* and is strikingly similar to *Clara Barton Terrace*, supra. In that case, a Board majority, Members Penello and Walter dissenting, refused to defer where the arbitrator evaluated the employee's conduct (writing an intemperate grievance letter to management) "in a strict contractual context, without once examining or discussing the statutory protections accorded by our Act." See also *Professional & Window Cleaning Co.*, supra, Chairman Van de Water and Member Hunter dissenting, where the Board refused to defer to an arbitrator's award which resolved the contractual issue (just cause) but ignored the statutory issue (whether the employee's conduct was protected concerted activity or unjustified disparagement). There the Board majority noted that, "[a]lthough a single set of facts is involved," there was a substantial difference in legal issues.

Accordingly, as I find that the arbitrator did not have before him or consider the unfair labor practice issues and, as I further find that the arbitrator reached a decision which was clearly repugnant to the purposes and policies of the Act, I must conclude that deferral to that arbitrator's decision is not warranted.

III. THE REMEDY

It having been found that Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent interfered with, restrained, and coerced Marlene F. Focht in the exercise of her Section 7 rights, and discriminated against her because of her union activities by discharging her on September 23, 1982, I shall recommend that Respondent be required to offer said Marlene F. Focht immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and to make her whole for any loss of earnings she may have suffered as a result of her unlawful discharge, with backpay to be computed in the

of those cases, deferral was deemed unwarranted notwithstanding that the statutory issues were presented to the arbitrators inasmuch as the arbitrators in both cases declined to consider them.

manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).[21]

I shall also recommend that Respondent be required to expunge from its records any reference to the unlawful discharge of Marlene F. Focht. Respondent, additionally, shall be required to provide her with written notice of such expunction and to inform her that Respondent's unlawful conduct will not be used as a basis of future personnel actions concerning her. See *Sterling Sugars*, 261 NLRB 472 (1982).

[21] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ADDITIONAL CONCLUSIONS OF LAW

1. By discharging Marlene F. Focht because of her union and protected concerted activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

2. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. Deferral to the award of the arbitrator is not warranted in the circumstances of this case.

[Recommended Order omitted from publication.]