

In Re the Arbitration of:

WASHINGTON FEDERATION OF)
STATE EMPLOYEES, AFSCME,)
COUNCIL 28, AFL-CIO,)
Union,)

and)

STATE OF WASHINGTON,)
DEPARTMENT OF SOCIAL AND)
HEALTH SERVICES,)
Employer.)

AAA No. 75 20 1300 0425

R. Wright, et al.

Safe Work Environment

OPINION AND AWARD

Date of Award: September 19, 2014

Arbitrator
Carol J. Teather
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OPINION OF THE ARBITRATOR

Introduction

By written grievance filed March 27, 2013, the Washington Federation of State Employees, AFSCME Council 28, AFL-CIO (“Union”), on behalf of employees R.C. Wright, Kate Bowers, and Mark Adams (“Grievants”), alleged the Washington State Department of Social and Health Services (“Employer or DSHS”) “violated, misapplied, and/or misinterpreted” Articles 8.1, 20.1, 20.2, 20.6, 21.2 and 38.1 of the 2011-2013 Collective Bargaining Agreement between The State of Washington and Washington Federation of State Employees (“CBA”).¹ Jt. Ex. 2. The Union alleged that management of Eastern State Hospital (“ESH”) violated and continues to violate these CBA Articles by unilaterally suspending the Emergency Protective Equipment Response Team (“EPERT”) leaving Union members defenseless in extreme situations. The Union further alleged that management’s actions violated prior demands-to-bargain and completely overlooked and interfered with the processing of a safety grievance at “PARM/arbitration” and prior legislative directives. *Id.*

The parties were unable to resolve their dispute during the initial steps of the grievance procedure and the matter was brought to arbitration pursuant to Article 29.3B, Step 5 of the CBA. The arbitrator was selected under the rules and procedures of the American Arbitration Association. There are no issues of either substantive or procedural arbitrability.²

A hearing was held on June 3, 2014, at the Office of the Attorney General, 1116 West Riverside Avenue, Spokane, Washington. The Union was represented by Christopher J. Coker of the law firm, Younglove & Coker, PLLC, and the Employer was represented by Senior Counsel Donna J. Stambaugh. At the hearing, the testimony of witnesses was taken under oath and the parties submitted documentary evidence. An official transcript of the hearing was made by a court

¹ In the grievance the Union had also alleged a violation of Article 37.1 of the CBA. This allegation was withdrawn at Step 3 of the grievance procedure. U. Ex. 4.

² Hearing Transcript (“Tr.”) p. 164.

reporter. The parties submitted post-hearing briefs which were received by the arbitrator on July 31, 2014.

Exhibit List³

- Jt. Ex.1 -Collective Bargaining Agreement between The State of Washington and Washington Federation of State Employees, July 1, 2011 through June 30, 2013
- U. Ex. 2 -Official Grievance Form filed March 27, 2013
- U. Ex. 3 Step 2 Grievance Response dated April 20, 2013
- U. Ex. 4 -Step 3 Grievance Response dated June 25, 2013
- U Ex. 5 -Eastern State Hospital Manual; Policy No. 1.120; Title: Emergency Protective Equipment; effective Oct. 2009
- U Ex. 6 -Memo of April 2013 discussion by Jim Mayo, MD and Margaret Whittington, RN, MSN regarding EPERT
- U Ex. 7 -March 22, 2013, notice of decision to suspend the EPERT program
- U Ex. 8 -Washington State Department of Social & Health Services Report to the Legislature, "Workplace Safety in State Hospitals", Sept. 2009
- U. Ex. 9 -Report to the Legislature, "Workplace Safety in State Hospitals", Sept. 2012
- U. Ex. 10 -Washington State Department of Labor and Industries Report "Prevent Workplace Violence in Psychiatric Settings"
- U. Ex. 11 -Psychiatric Security Attendant Class Specification
- U. Ex. 12 -CMS Conditions of Participation-Interpretive Guidelines /2012 TJC Standards-Elements of Performance
- Emp. Ex. 21 -Memo from consultant nurses Margaret Ray and Margaret Whittington to CEO Connie Wilmot and Lori Johnson, Nurse Executive dated April 26, 2012
- Emp. Ex. 22 -Summary of Eastern State Hospital Emergency Protective Equipment Response Team (EPERT) prepared by Shirley Maike, Chief Operating Officer
- Emp. Ex. 23 -Eastern State Hospital Continuing Education Records of R.C. Wright, Jr., Bridget K. Bowers, Mark Richard Adams
- Emp. Ex. 24 -List of All Hospital New Employee Orientation (AHNEO) and Staff Orientation and Development offered January 1, 2013-June 30, 2013

List of Witnesses

For the Union: R.C. Wright, Psychiatric Security Attendant; Robert Vercoe, Psychiatric Security Attendant; Kimberly Cogswell, Mental Health Technician.

³ All of the exhibits were accepted into evidence. The exhibits are identified as follows: ("Jt.") for a Joint exhibit; ("U") for a Union exhibit and ("Emp.") for an employer exhibit.

For the Employer: Shirley Maike, retired Chief Operating Officer; Lori Johnson, Clinical Nurse Specialist; and Dorothy Sawyer, Chief Executive Officer.

Issues

The agreed issue is: Did the Employer violate Articles 8.1, 20.1, 20.2, 20.6, 21.2, and/or 38.1 of the CBA when it suspended the Emergency Protective Equipment Response Team (“EPERT”) program? If so, what is the appropriate remedy?

Statement of Facts

Grievants are Psychiatric Security Attendants (“PSA’s”) at Eastern State Hospital (“ESH”), a division of the Washington State Department of Social and Health Services. ESH is a 287 bed mental health hospital located in Medical Lake, Washington with a staff in excess of 700.⁴ It receives patients who are involuntarily committed under civil commitment because they were found to be a danger to themselves or others or unable to care for themselves in the community. It also receives patients committed under the criminal justice system after being found not guilty by reason of insanity, before they have been adjudicated for a determination of whether they are competent to stand trial, or for treatment to regain competency so they can stand trial.⁵ The hospital is divided into three “units,” a geriatric unit (“GPU”), an adult psychiatric unit (“APU”), and a forensic unit (“FSU”).⁶ The FSU houses persons found not guilty by reason of insanity and persons charged with felonies who come in for observation and evaluation as to their competency to stand trial.⁷ The FSU is a lockdown unit.⁸ PSAs, such as the Grievants, are the first line of defense when a patient becomes violent in the FSU.⁹

ESH is accredited and certified by the federal Centers for Medicare and Medicaid Services (“CMS”) to provide psychiatric care, and approximately

⁴ Tr. p. 102.

⁵ Tr. p. 108.

⁶ Tr. p. 23.

⁷ Tr. p. 23.

⁸ Tr. p. 24.

⁹ Tr. p. 157.

seventy percent (70%) of its funding comes from CMS.¹⁰ ESH is also accredited by a private accrediting agency “the Joint Commission” to show that it is providing the appropriate level of patient care. The Joint Commission has a contract with CMS to do unannounced surveys on behalf of CMS, so Joint Commission surveys of ESH are to see if it meets both the standards of the Joint Commission and the standards of the Centers for Medicare and Medicaid Services.¹¹

Psychiatric hospitals can be dangerous and violent places,¹² and incidents of assault are not uncommon at ESH.¹³ Grievant Wright was assaulted at work a number of times, including a time when a patient almost took his eye out and another time when a patient spit at him. He stated that one of the most grievous assaults happened during a containment that went bad and his ankle got broken. He underwent three surgeries before he could return to work.¹⁴ PSA Robert Vercoe and Kimberly Cogswell, a Mental Health Technician, also suffered a number of assaults while working at ESH.¹⁵ Even employer witness Lori Johnson, a Clinical Nurse Specialist at ESH, has been assaulted at work.¹⁶

The Washington State Legislature recognized the problem of assaults at state hospitals, and required each state hospital to develop a plan to reasonably prevent and protect employees from violence, and to provide an annual report to the Legislature. RCW 72.23.400(1)-(4); RCW 72.23.451. In 2009 the Legislature directed that certain operating funds appropriated for ESH, and its counterpart Western State Hospital (“WSH”), be used for the purchase of specialized protective equipment for staff utilization.¹⁷ The Legislature did not specify the

¹⁰ Tr. p. 113.

¹¹ Tr. p. 114.

¹² Tr. p. 160.

¹³ U. Exs. 8, 9, and 10; Tr. p. 127.

¹⁴ Tr. pp. 26-27.

¹⁵ Tr. pp. 65-66, 91-92.

¹⁶ Tr. pp. 156-157. The former Chief Operating Officer and acting Chief Executive Officer at ESH, Shirley Maike, did not agree that ESH is a dangerous facility. Yet, she admitted that some significant assaults to employees do occur. Tr. p. 127.

¹⁷ Tr. p. 103; Emp. Ex. 22.

type or kind of equipment; it just said protective equipment.¹⁸ The protective gear had to be purchased out of the hospital's regular allotment as no extra money was provided.¹⁹

ESH purchased specialized protective gear ("EPE") for its employees, and established standards of practice for its use with Policy No. 1.120, Emergency Protective Equipment, effective October 2009.²⁰ The policy provides that the EPE is to be used to manage "extreme assaultive and/or dangerous behavior, or when an individual has a weapon and is hurting himself/herself or others (or threatening to do so) and interventions based on the Recovery Model of Care²¹ and Therapeutic Options²² have failed to de-escalate the situation."²³ The policy established an Emergency Protective Equipment Response Team ("EPERT") made up of staff volunteers trained to use the EPE, and procedures for the deployment and operations of EPERT. It provides for patient debriefing and examination following each use of the EPE, a review of each event to be conducted by a Risk Management Staff, and documentation.²⁴ Under Policy No. 1.120, the use of EPERT in an emergency situation required the approval of four management officials and a minimum of three EPERT members wearing EPE had to be utilized.²⁵

In 2012, ESH management requested and received consultation from two nurse consultants with nationally recognized expertise in providing care to patients in a psychiatric setting. The consultants made a total of three visits to the hospital.²⁶ The consultation was largely related to treatment planning but the

¹⁸ Tr. p. 104.

¹⁹ Tr. p. 134.

²⁰ U. Ex. 5; Tr. pp. 103, 104-105.

²¹ The Recovery Model of Care is a process for how EHS treats patients and EHS's expectations for their success to allow them to be discharged from the hospital and how they can live their life under the Recovery Model. Tr. p. 107.

²² Therapeutic Options is a training program that EHS pays for to train its staff on how to interact with patients who may be escalating in their mental illness. Tr. p. 107.

²³ U. Ex. 5.

²⁴ *Id.*

²⁵ U. Ex. 5.

²⁶ Tr. pp. 115, 129-130, 140-143, 145; Emp. Ex. 22.

consultants also looked at the EPERT program to see if it complied with the Joint Commission standards and the CMS regulations. They found the EPE and some aspects of the EPERT program did not conform with the meaning or intent of the Joint Commission standards and the CMS regulations.²⁷ The EPE worn by members of EPERT included padded guards for the torso, shoulders, forearms, knees and shins made of dense foam and/or rubber, a high-impact molded shell helmet, and an acrylic shield. The consultants felt that staff wearing such equipment in a psychiatric facility might be seen by patients as threatening and intimidating, since they could be viewed as being a law enforcement SWAT team. According to the consultants, such an appearance on the part of staff conflicts with the caring and supportive treatment of patients in a non-intimidating therapeutic environment.

The consultants were concerned with the design and use of the acrylic shield. They felt it was intended to be used as an offensive tool rather than a defensive one which is more appropriate to a psychiatric setting.²⁸ They also appeared to be concerned with the helmet, not only because of its appearance but the fact it is made of a hard material. They felt that staff, as well as patients, could be injured during physical interventions to control a patient in a crisis situation while the staff members were wearing the EPE made of hard material. They did not feel that way about the pads and found them to be “okay”.²⁹

After discussing the matter with the ESH executive committee, on March 19, 2013, acting Chief Executive Officer Shirley Maike,³⁰ made the decision to suspend the EPERT program until appropriate steps were completed to ensure that the emergency response to a situation is safe for patients and staff.³¹ Subsequently, sometime between March 19, 2013, and April 15, 2013, Ms. Maike

²⁷ Emp. Exs. 21 and 22; Tr. pp. 115, 117, 120, 133-134, 143-146; U. Ex. 6.

²⁸ Emp. Ex. 21.

²⁹ Emp. Exs. 21 and 22; U. Ex. 6.

³⁰ Ms. Maike was the acting CEO from January through March 2013 during the absence of CEO Connie Wilmot. Tr. p. 123.

³¹ Emp. Ex. 22; Tr. pp. 17-18, 112.

outlined the reasons behind the decision in a statement of facts.³² The stated reasons are as follows. (1) The EPE purchased for the EPERT is made for and utilized by law enforcement or prison staff; it is not specific to a psychiatric setting. There is no other psychiatric facility that uses such equipment.³³ (2) On the night shift, there are insufficient staff trained in the use of EPE to deploy EPERT in a safe manner. (3) New volunteers for EPERT did not have the necessary EPE because it had to be fitted to them individually and they had not received this equipment. (4) The hospital was in the process of switching helmets because of a complaint that the previous ones hindered vision. (5) EPERT members had not received all of the quarterly training and/or drills mandated by Policy 1.120 to maintain competency. (6) Since 2009, EPERT had been utilized only twice to de-escalate a situation; the last time in 2011. (7) The negative opinion of the nurse consultants regarding the EPE and the EPERT program. The decision to suspend the EPERT program was made without input from any of the staff or patients on how they felt about EPERT.³⁴

The Union was notified of the decision to suspend the EPERT program by means of an email dated March 22, 2013, from John Myers, Labor Relations Specialist to Electra Jubon.³⁵ Subsequently, on March 27, 2013, the Union filed the instant grievance.

Positions of the Parties

The Union points out that employee safety is a recurring theme throughout the CBA. It contends that the Employer breached its duty under CBA Article 8.1 by failing to provide opportunities for EPERT training in a manner consistent with Policy 1.120. It also contends the Employer breached its duties under Article 20 by failing to provide the training necessary and required by Policy 1.120 for its employees to utilize the EPE which was selected by the Employer for use in

³² Emp. Ex. 22.

³³ The EPE selected was based on a recommendation from the Department of Corrections (“DOC”) and DOC provided the training on its use. ESH patients are not inmates of the DOC. Tr. p. 106.

³⁴ Emp. Ex. 22; Tr. p. 124.

³⁵ U. Ex. 7.

managing extreme assaultive and/or dangerous behavior, or when an individual has and is using a weapon (or threatening to do so). It further contends the Employer breached its duty under CBA Article 20.3 by making the decision to suspend the EPERT program before discussing the matter with any employee or member of the Union and before it even developed a statement of facts regarding its decision. According to the Union, the goal of the cited provisions of the CBA, as with the Washington Industrial Safety and Health Act (WISHA), is to provide a safe working environment for employees, and the actions of the Employer in this case violated the clear provisions and intent of the CBA.³⁶

The Employer, on the other hand, claims it did not violate any of the CBA Articles stated in the grievance. It contends there is no evidence supporting a violation of Articles 8.1, 20.1, 20.2, 20.6, and 21.2, and the Union has not proven a violation of Article 38.1. The Employer points out that Article 35 – Management Rights, among other things, specifically reserves to management the right to develop, enforce, modify or terminate any policy, procedure, manual or work method associated with its operations and to determine training needs, methods of training, and employees to be trained. The Employer argues that in accordance with Article 35, it initially developed the EPERT policy and later suspended that policy. According to the Employer, the Union waived the right to bargain changes to the Employer’s policies associated with its operations; therefore, there was no duty to bargain the decision to suspend the EPERT policy. The Employer further contends the Union’s and the Grievants’ requested remedy to re-implement the EPERT team and re-establish the EPERT policy does not comport with the CBA and is in direct conflict with the Management Rights provision allowing the Employer to make the determinations on program issues and appropriate policies.³⁷

Discussion

³⁶ Grievant’s Post-Hearing Brief.

³⁷ Respondent’s Closing Statement.

The management rights clause of the CBA, Article 35, provides, in pertinent part, that:

Except as modified by this Agreement, the Employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provision or statute, will include but not be limited to:

...

F. Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;

...

N. Determine the training needs, methods of training and employees to be trained;

....

Jt. Ex. 1, pp 93-94.

In 2009, the Employer purchased specialized Emergency Protective Equipment (EPE) to protect its employees in situations where they have to deal with extreme assaultive and/or dangerous behavior, or when a patient is using a weapon to hurt himself or herself or others or is threatening to do so. The Employer then enacted Policy No. 1.120 governing use of this equipment, training, review and documentation. It is undisputed the Employer had the right to take these actions. What is disputed is the Employer's right to unilaterally suspend them.

Under Article 35, the Employer has the right to modify or terminate any policy unless it has waived the right in another provision of the CBA.

Article 8.1

Article 8.1 provides:

The Employer and the Union recognize the value and benefit of education and training designed to enhance employees' abilities to perform their job duties. Training and employee development opportunities will be provided to employees in accordance with agency policies and available resources.

Jt. Ex. 1. Employer Policy No. 1.120 provides for initial training in use of the EPE and mandatory quarterly updates and practice drills to maintain competency. U. Ex. 5 §§ II B(2) and IV E. The EPERT program was in effect from October 2009 until March 19, 2013. It is undisputed that, during this time, the Employer did not provide all of the quarterly updates in training or drills in use of the EPE.³⁸ Grievant Wright underwent EPERT drills in June 2012³⁹ and November 2011, and EPERT training in September 2011. Grievant Bowers was drilled in EPERT in November 2011 and Grievant Adams received an EPERT drill in June 2012.⁴⁰ Thus, although they did not receive regular quarterly EPERT drills and/or training, Grievants were trained in use of the EPE.

Ms. Maiké testified that the Employer was not able to do all of the training required by its Policy 1.120 because there were other pressing issues for staff training to make certain ESH met the requirements of the CMS and the Joint Commission. Tr. 113. Her testimony in this regard is supported by evidence showing Grievants received a considerable amount of training in job-related skills and subjects other than EPERT, including therapeutic options, safe patient handling, seclusion and restraint, and infection control. Emp. Ex. 23. It is also supported by the list of staff training courses offered by the Employer during the period January 1, 2013-June 30, 2013, which for the most part concentrated on therapeutic options. Emp. Ex. 24. The Joint Commission Standards and the CMS regulations for psychiatric hospitals require a safe, therapeutic environment which protects the rights of patients. Emp. Ex. 21; Tr. 145-146. The nurse consultants and the Nurse Executive at the time, Lori Johnson, felt the EPERT program was contrary to CMS regulations. *Id.* Tr. 145-146; Emp. Ex. 21.

³⁸ No dayshift staff received the mandatory quarterly updates since 2011. Evening shift received the last training in June 2012, and night shift received the last training in the first quarter of 2012. Ex. 22, p. 1; Tr. p. 111. *See also* Ex. 23.

³⁹ Grievant Wright's ESH Continuing Education Record also indicates that he underwent an EPERT drill in what looks like April 2012, but due to a hole punched in the document the evidence is unclear.

⁴⁰ Emp. Ex. 23.

There is no evidence the Employer had sufficient resources to provide the quarterly training and drilling required for EPERT members under Policy No. 1.120 as well as the staff training necessary for EHS to meet the requirements of the CMS and the Joint Commission. EPERT members are all volunteers and such an assignment is not an essential function of any job classification. Emp. Ex. 22. Since a failure to meet CMS requirements would jeopardize the hospital's accreditation and certification, and consequently its ability to treat patients, the decision to prioritize the training necessary to meet CMS requirements is reasonable. The Union has not established a violation of Article 8.1.

Articles 20.1, 20.2 and 20.6

The provisions of CBA Article 20, Safety and Health, cited in the grievance are as follows:

- 20.1 The Employer, employee and Union have a significant responsibility for workplace safety and health.
 - A. The Employer will provide a work environment in accordance with safety standards established by the Washington Industrial Safety and Health Act (WISHA).
 - B. Employees will comply with all safety and health practices and standards established by the Employer. Employees will contribute to a healthy workplace, including not knowingly exposing co-workers and the public to conditions that would jeopardize their health or the health of others. The Employer may direct employees to use leave in accordance with Article 12, Sick Leave, when employees self-report a contagious health condition.
 - C. The Union will work cooperatively with the Employer on safety and health-related matters and encourage employees to work in a safe manner.
- 20.2 The Employer will determine and provide the required safety devices, personal protective equipment and apparel, including those used in the transporting of offenders, patients and/or clients, which employees will wear and/or use. If necessary, training will be provided to employees on the safe operation of the equipment prior to use.

...

20.6 When an employee(s) worksite is impacted by a critical incident the Employer will provide the employee(s) with an opportunity to receive a critical incident debriefing from the Employee Assistance Program or other sources available to the agency.

Jt. Ex. 1.

Article 20.1

The Union pointed out that Article 20.1A states the Employer will provide a work environment in accordance with the safety standards established by the Washington Industrial Safety and Health Act (WISHA). The Union then referenced RCW 49.17.060, a WISHA general safety standard requiring an employer to provide its employees with a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to an employee. Assaultive, dangerous and weapon wielding patients at ESH are a recognized hazard that cause or are likely to cause serious injury or death to an employee.⁴¹ The actions of the Employer in purchasing the EPE and developing the EPERT program were done to manage this hazard and to provide an emotionally and physically safe environment for all.⁴²

Article 20.1 clearly states that the Employer, the employee and the Union have a significant responsibility for workplace safety and health, and that the Union will work cooperatively with the Employer on these matters. Article 21.1C. This language places a limitation on the Employer's exercise of discretion under the management rights clause by indicating the Union has a right if not a duty to provide input in connection with safety-related matters, such as an emergency protective equipment program. This is not to say the Union may make the final decision only that it must be consulted before the Employer makes the decision

⁴¹ Employees have been injured and there has been one death at EHS. Tr. pp. 26-27, 65-66, 91-92, 156-157, 126.

⁴² Policy No. 1.120, paragraphs I, III, part A, IV, part A1; U. Ex. 5.

and then the Union must cooperate and assist the Employer in implementing its decision.

In the instant case, the Employer did not consult with the Union or any employee before it decided to suspend use of the EPE and EPERT. The decision was made by the acting CEO after a discussion with the executive committee of EHS. By its action in this regard, the Employer ignored the Union's shared responsibility for workplace safety and its right and duty to work cooperatively with EHS management on safety-related matters. Accordingly, I find the Employer violated Article 20.1C by failing to obtain the Union's input before making a final decision to suspend use of the EPE and the EPERT program. Nevertheless, the Employer's decision was neither arbitrary or capricious nor unreasonable.

The Employer had legitimate operational reasons for its decision to suspend the EPERT; the most significant being the fact that EPERT might not comply with the standards of the Joint Commission and the CMS regulations and thereby jeopardize the hospital's certification, accreditation and funding source. Lori Johnson was Director of Nursing/Nurse Executive for three years beginning in 2010 and a member of the executive committee.⁴³ She was present when the nurse consultants visited the hospital, discussed EPERT with them, and received their memorandum regarding the potential negative outcomes with use of the EPE.⁴⁴ Ms. Johnson is familiar with CMS regulations and in her professional opinion use of the EPERT is contrary to CMS regulations because it is not recovery-based and does not provide for a therapeutic environment. She found the protective gear intimidating and felt it could be interpreted as abusive. She pointed out that the staff is not supposed to be physically or mentally abusive to patients and that use of the EPE by staff potentially could be considered to be both.⁴⁵ Ms. Johnson was

⁴³ Tr. pp. 137-139.

⁴⁴ Tr. pp. 140, 142-145; Emp. Ex. 21.

⁴⁵ Tr. pp. 145-146.

on the executive committee when the decision was made to suspend EPERT and concurred with the decision.⁴⁶

The Union argued that the suspension of EPERT left employees defenseless in critical situations with no safety equipment other than a blue foam shield and rubber gloves when faced with a weapon wielding and/or dangerously assaultive patient. Yet, both prior to EPERT and after its suspension, employees were not entirely defenseless. There are blue foam shields on the wards that employees can use to protect themselves by holding the shield between their body and a violent patient. There are also rubber gloves that are not padded. There are no helmets available and no arm, hand, leg or foot protection. However, employees got very creative in these situations and have used a mattress pad or a chair when necessary to protect themselves.⁴⁷ Although they do not have much protective equipment, employees do have radios and alarms which can be used to summon support in dealing with a violent patient.⁴⁸

Ms. Cogswell's method of dealing with a violent or threatening patient, who may have a weapon, is to yell very loudly for staff assistance, and to use the radio in her pocket to notify the appropriate authority that she is in need of assistance and to give her location. She stated that when she is on the ward and yells "staff" all available staff respond. She also described a security alarm that can be pressed to alert all the wards that an employee is in need of staff assistance on a particular ward. When the alarm is sounded, available staff in all units of the hospital will respond, including the PSAs, and the violent patient is subdued by the sheer volume of support.⁴⁹ This procedure is called containment and the least amount of force or staff needed to contain the patient and prevent him/her from hurting himself/herself or others is supposed to be used.⁵⁰ These safety measures, however, do not completely protect employees from the recognized hazard of

⁴⁶ Tr. p. 148.

⁴⁷ Tr. pp. 45-47, 72-73, 91.

⁴⁸ Tr. p. 62.

⁴⁹ Tr. pp. 87-88, 35-36, 95-96.

⁵⁰ Tr. pp. 102-103.

violent and assaultive patients. Both Ms. Cogswell and Grievant Wright suffered assaults that put them out of work for a period of time and other assaults which resulted in injuries that did not warrant work time loss.⁵¹ Mr. Vercoe has been assaulted on the job at least ten times.⁵²

In addition to the foregoing, there is also an option of calling the police, but this would only be as a last resort in the case of an armed patient. Furthermore, summoning the police is discouraged because of the length of time it takes them to get to the hospital and the paperwork involved.⁵³

On occasion, PSAs must go into a seclusion room and engage in the involuntary administration of medicine to a potentially violent patient.⁵⁴ In carrying out such a task, the PSA has personal protective equipment, such as gloves, goggles and eye shields, which protect from bodily fluids and the like but do not provide any measure of safety in dealing with assaultive behaviors.⁵⁵

All of the employee witnesses stated they felt safer with the EPERT program in place even though it required four approvals, was only used in the most dangerous situations, and required at least more than fifteen minutes for the requisite three members to respond to a call. The EPE clearly provided more bodily protection than the regular foam pad shields, rubber gloves, mattress pads, gloves, goggles and eye shields available to employees who are not members of EPERT or trained in use of the EPE. Employees wearing EPE can act more quickly and forcibly to quell a hazardous situation without injury to themselves than employees with only foam shields, rubber gloves and whatever else might be in the room that could serve as personal protection from an assaultive and/or weapon wielding patient. Under these circumstances, the ability to utilize EPERT should have provided a much greater level of safety to all employees from the

⁵¹ Tr. pp. 25-27, 91-92.

⁵² Tr. pp. 65-66.

⁵³ Tr. pp. 47-49, 73-76. *Cf.* Union Ex. 6 (EPERT would be ineffective in a hostage situation with a weapon wielding patient and calling police would be the only option.)

⁵⁴ Tr. p. 87.

⁵⁵ Tr. p. 62.

recognized hazard than they otherwise had. Nevertheless, the evidence does not support such a finding. During the approximately three and one-half years it was in place, there were only two occasions when EPERT was actually used to manage and control a situation involving an assaultive and dangerous patient or one using a weapon on himself/herself or others or threatening to do so.⁵⁶ This was a very minor use of EPERT considering the number of reported assaults on staff per 10,000 patient hours during a large portion of that period was in excess of 31.7.⁵⁷ The evidence does not establish that EPERT was responsible for substantially reducing the number of assaults on or injuries to EHS staff.

Based on the evidence showing the EPERT program as presently constituted has the potential for adversely affecting EHS's certification, accreditation and funding source, the lack of evidence showing that during the period EPERT was in effect it contributed to a safer environment by substantially reducing the number of assaults and injuries, and the evidence showing EHS lacked sufficient resources to meet all of the quarterly training requirements of Policy 1.120, it appears highly unlikely the Employer's suspension decision would have been different had it obtained the Union's input.

The Employer's future actions, however, require Union input in accordance with the language and intent of Article 20.1. The Employer did not terminate EPERT. Rather, it suspended the EPERT program "until the appropriate steps have been completed to ensure that emergency response to a situation is safe for patients and staff."⁵⁸ This would seem to indicate the Employer is looking to modify the EPERT program or replace it with another emergency protective equipment program. This is a reasonable approach as not all the EPE it purchased was found to be objectionable. The helmet and acrylic shield were the problems; the pads were acceptable. Absent these items, the protective equipment would not

⁵⁶ Tr. pp. 51, 80-81; Emp. Ex. 22.

⁵⁷ See U. Exs. 8 and 9 (the number of staff reported assaults per 10,000 patient days in 2010 was 12.4, in 2011 it was 10.4, and in 2012 January to April it was 8.9). The last time EPERT was used to de-escalate a situation was in August 2011. Emp. Ex. 22.

⁵⁸ Emp. Ex. 22.

appear so much like that worn by a law enforcement SWAT team and would likely be much less intimidating. It would be similar to the blue shield in that the pads would simply be a barrier between the employee and a violent patient. Furthermore, simpler equipment might be less expensive, safer for patients and staff, and require less training for effective use thereby reducing the drain on the Employer's limited resources. Alternatives might also be considered.⁵⁹

Article 20.2

Although the Union recognized the Employer's right to determine and provide the safety devices, personal protective gear and apparel necessary to protect its employees from hazards, it argued the Employer violated Article 20.2 by failing to provide training necessary for safe operation of the equipment and as required by its Policy No. 1.120.

Article 20.2 requires training on the safe operation of personal protective equipment and apparel prior to its use. All of the members of EPERT were trained in use of EPE, including all of the Grievants.⁶⁰ There is no evidence that any employee did not receive training in the safe operation of personal protective equipment and apparel prior to its initial use.

The Union has not established a violation of Article 20.2.

Article 20.6

Article 20.6 states the following:

When an employee(s) worksite is impacted by a critical incident the Employer will provide the employee(s) with an opportunity to receive a critical incident debriefing from the Employee Assistance Program or other sources available to the agency.

Jt. Ex. 1, p. 62.

The record is devoid of any evidence showing that an employee impacted by a critical incident was not given an opportunity to receive a critical incident

⁵⁹ See U. Ex. 6.

⁶⁰ Emp. Exs. 22 and 23; U. Ex. 4, p. 3; Tr. pp. 36, 42, 68.

debriefing or that a request for such a debriefing was denied. The Union has not established a violation of Article 20.6.

Article 21.2

Article 21.2 Tools and Equipment, provides:

The Employer may determine and provide necessary tools, tool allowance, equipment and foul weather gear. The Employer will repair or replace employer-provided tools and equipment if damaged or worn out beyond usefulness in the normal course of business. Employees who misuse, vandalize, lose or damage state property may be subject to disciplinary action. Employees will be required to return all Employer provided tools, equipment (i.e., electronic equipment, badges, etc.) and foul weather gear upon separation from employment. In those cases where an employee fails to return the provided tools, equipment and/or foul weather gear, the Employer may deduct the value of the items from the employee's final pay.

Jt. Ex. 1, p. 62.

There is no evidence of a violation of this provision of the CBA and the Union did not point to any. The Union has not established a violation of Article 21.2.

Article 38.1

Article 38.1 states:

The Employer will satisfy its collective bargaining obligation before making a change with respect to a matter that is a mandatory subject. The Employer will notify the Executive Director of the Union of these changes in writing, citing this Article, and the Union may request negotiations on the impact of these changes on employee's working conditions. In the event the Union does not request negotiations within twenty-one (21) calendar days of receipt of the notice, the Employer may implement the changes without further negotiations. The timeframe for filing a demand to bargain will begin after the Employer has provided written notice to the Executive Director of the Union. There may be emergency or mandated conditions that are outside of the Employer's control requiring immediate implementation, in which case the Employer will notify the Union as soon as possible.

Jt. Ex. 1, p. 99.

The Union did not provide any specifics as to how or why it believes the Employer violated, misapplied, and/or misinterpreted Article 38.1 by its action in unilaterally suspending the EPERT other than to indicate during the grievance process that it was a change in working conditions and the Union had made a demand to bargain.⁶¹ Furthermore, the Union presented no evidence, authority or argument on the issue of whether EPERT is a mandatory subject. I find the Union has not established a violation of Article 38.1.

Conclusion

ESH had the management right to suspend modify or terminate Policy 1.120, EPERT, but that right was limited by Article 20.1 of the CBA giving the Employer, the employee, and the Union significant responsibility for workplace safety and health and requiring the Union to work cooperatively with the Employer on these matters. Thus, when the Employer unilaterally suspended EPERT without any input from the Union it violated Article 20.1.

The Employer did not violate Article 8.1 when it failed to provide the quarterly training and drills mandated by Policy 1.120, due to insufficient resources.

The Employer did not violate Article 20.2 as all EPERT members were trained in the safe operation of the EPE before having to use this equipment.

There was no evidence establishing a violation of Articles 20.6, 21.2 and 38.1 by the Employer.

AWARD

The grievance is GRANTED based on the finding of a violation of Article 20.1 of the CBA. The remedy requested by the Union is the following.

To re-implement the EPERT team immediately and re-instate the EPERT policy back to the P&P manual; provide the appropriate equipment and any necessary external or internal training required to stay in compliance in order to keep our members safe; Management needs to comply with all agreements made in previous DTB's and

⁶¹ U. Ex. 4, p.3.

not interfere with the safety grievance that is at PARM/arbitration; Management needs to support the EPERT team in its duty to keep the employees, patients, and hospitals safe; and to make the Grievants whole.

U. Ex. 2.

The Employer had the authority and legitimate operational reasons when it decided to suspend use of the EPE, the EPERT and Policy 1.120. Therefore, I do not feel immediate re-implementation of the EPERT team and reinstatement of the EPERT policy is appropriate at this time. What seems to be appropriate is a review and examination of the EPE and Policy 1.120 in light of the expressed concerns of the experts, the information obtained by the limited use of the EPERT program prior to its suspension, and the needs of the hospital, its staff and its patients. Accordingly, the Employer is ORDERED to conduct such a review and examination and either revamp the current EPERT program and equipment so it meets the requirements of the CMS and the Joint Commission as well as the safety concerns and needs of ESH management and staff in dealing with assaultive, dangerous and/or weapon wielding patients, or come up with an acceptable alternative. The Employer is FURTHER ORDERED to include the Union in all steps of this process with the understanding that EHS management has the right to make the final decision.

Date: September 19, 2014

/s/

Carol J. Teather
Arbitrator