

**National Medical Care, Inc. and Qualicare of New England, Inc. d/b/a Human Resource Institute and Health Care Division, Local 285, Service Employees International Union, AFL-CIO, Case 1-CA-19685**

9 February 1984

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS

On 14 March 1983 Administrative Law Judge Thomas A. Ricci issued the attached decision. The General Counsel filed exceptions and a supporting brief, and both the Respondents filed answering briefs.

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,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommendation.

## ORDER

The recommendation of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III, par. 14, of his decision, the judge used the term "girl" to refer to a woman. We find the term "girl" inappropriate and hereby correct the judge's reference.

<sup>2</sup> We do not rely on the judge's statement that "[s]ix months is too long a time to look back for a hidden motive in the absence of any other substantive proof of illegal intent."

## DECISION

### STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held at Boston, Massachusetts, on November 17, 18, and 19, 1982, upon complaint of the General Counsel against National Medical Care, Inc. and Qualicare of New England, Inc., herein called the Respondents or the Companies. The complaint issued on September 14, 1982, upon a charge filed on March 16, 1982, by Health Care Division, Local 285, Service Employees International Union, AFL-CIO, herein called the Union or the Charging Party. The principal issue of the case is whether an employee of these two Respondents was discharged in violation of Section 8(a)(3) of the Act. Briefs were filed after the close of the hearing by all parties.

Upon the entire record and from my observation of the witnesses I make the following

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENTS

Respondent National, with its principal office and place of business in Boston, Massachusetts, operated an out-patient psychiatric clinic at Lowell, Massachusetts, until January 1, 1982. In the course of its business it caused large quantities of oil, gas, and office supplies and other goods used by it in its operations to be purchased and transported in interstate commerce from other States of the United States. Its gross annual revenue is in excess of \$250,000. It annually receives goods and materials valued in excess of \$5,000 directly from out-of-state sources.

Respondent Qualicare, which took over the Lowell, Massachusetts, clinic on January 1, 1982, also is engaged in the operation of out-patient psychiatric clinics. In the course of its business it also causes large quantities of oil, gas, and office supplies and other goods used by it to be purchased and transported in interstate commerce and through various States of the United States to its place of business. Its annual gross revenue is in excess of \$250,000, and annually it receives goods and materials valued in excess of \$5,000 directly from out-of-state sources.

I find that both Respondents are engaged in commerce within the meaning of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

I find that Health Care Division, Local 285, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICE

This proceeding presents essentially a single issue in the discharge of a man. Was he released because he engaged in union activity, or did he lose his job for perfectly proper and legal cause? Put more precisely, in terms of Board law, has the General Counsel carried the affirmative burden, always resting on him, of proving the complaint allegation so as to at least place a burden on the Respondents which dismissed the man to come forth with convincing evidence in support of its contrary assertion that it released him for legitimate reasons? *Wright Line*, 251 NLRB 1083 (1980). The question is a very simple one here, both as to credibility and as to the inference suggested.

Russell Harris, the man involved, is a mental therapist. His art is to talk privately with disturbed people and to try to straighten them out so they, like everybody else, can tolerate the vicissitudes of life. As one of about 30 such therapists, Russell worked for National Medical Care in a clinic at Lowell, Massachusetts. There were supervisors in the place, and like all supervisors they checked on what the underlings did and how they did it. This reality is an important element of the case, because while the General Counsel contends Harris was a plain employee, the Respondent argues he was an independent

contractor. But an independent businessman, or even a professional one, is not hampered by supervision. Somewhat inconsistently the Respondent nevertheless says Harris refused to heed the critical voice of his supervisors, in fact that this is why he was fired. In any event, with the General Counsel insisting the man was supervised by people with authority over him, it follows that when they found fault with his performance they had a perfectly legitimate right to do so.

In the spring of 1981 Harris conceived the notion of establishing the Union as bargaining agent at the Lowell clinic. He was already represented by the Union at a clinic located in Brookline, also in Massachusetts, and also owned and operated by National which ran the Lowell clinic. The two supervisors stationed at Lowell at the time were Marilyn Russell, director, and Ruth McCarthy, assistant director. Director Russell learned of the union activity by Harris, and reported it to Joseph Nolan, the higher official whose office was at Brookline. Russell left the Respondent on October 31, and opened her own clinic, exactly like that of the Respondent, two or three blocks away, operating in some form of competition for the same business. McCarthy went with her, as co-owner of the new business. Russell testified that, when she told Nolan what Harris was doing, Nolan became very angry and in no uncertain terms voiced his determination to get rid of him. As a witness for the Respondent, Nolan denied any such threats. Be that as it may, work continued right on and the union movement soon died off. In fact, by the end of October, before leaving the place for good, Russell told Nolan there was no union activity going on at Lowell at all.

On December 31, the Company called National Medical Care which had been operating a group of six clinics in the general area including Brookline and Lowell, left the business completely, and a company named Qualicare took over all those locations. At Lowell, with Russell and McCarthy having left, a new director was hired on November 1, Nancy Langman Dorwart. In the higher echelon of supervision Nolan and Paul Gorman, stationed at Brookline, were retained in the same positions of authority.<sup>1</sup> On December 15, Dorwart, together with her superior, placed Harris on probation for 30 days, the contemporaneous documents stating the reason as rules' violations, both clinical and administrative. On January 22, Harris was discharged. By this time National was no longer in the picture at all and Qualicare was in complete control of all things.

The basic sequence of events tells a revealing story. Two men, Harris and Noonan, both therapists, obtained union authorization cards sometime in June 1981 and started soliciting signatures. Harris told Director Russell, then the top management official at the Lowell clinic, of his such activities. Russell then reported the activity to Nolan, her superior, whose office was at Brookline. She

testified Nolan became "enraged," "furious," saying "I'm going to get rid of him." Nolan even told her then, as Russell continued to testify, to do a "utilization review" on Harris. Nolan, still with the Respondent, denied having voiced any such threats. The union activity died an unexplained death. When Harris talked to Director Russell about it, she advised him to file an election petition and "get it over with," but no action was taken. And the Union's executive director, Nancy Mills, testified she was not in favor of organizing only the Lowell clinic as a separate bargaining unit. Russell even told Nolan, when she left the Company at the end of October, that the union activities were all over.

Six months later, in December, the Respondent put Harris on probation, listing, in writing, a number of faults of his in the course of his employment. By that time there was the new director at the Lowell clinic, Dorwart. There is nothing significant indicating she knew, or was informed of Harris' union activities of any kind. Harris ignored the written probation letter, not even bothering to read it, as will appear. A few weeks later another incident came to the director's attention, also involving his work performance, in which he was reported as having again violated a working rule. With this, the Company discharged him on January 22.

As I view this sequence of events, I cannot see a prima facie case in support of the allegation of unlawful discharge for union activity. When told he was being put on probation, Harris told Dorwart he wanted a union representative present. This was the first time Dorwart heard of his prouinion penchant. But by then the decision to put him on probation had already been made. And even were I to believe, which I do not, that Nolan said, back in July, he intended to fire the man to put a stop to his union activity, why did he not do it then and there, or at least within a reasonable time thereafter? He did nothing for 6 months. By this time the union activity had died, and he had no reason to carry out the threat. Six months is too long a time to look back for a hidden motive in the absence of any other substantive proof of illegal intent.

Besides this, many things happened in the interval between the threat said to have been expressed by Nolan and the discharge date that bear a direct relationship to the final action taken. Even were I to believe Nolan made the alleged antiunion statements, I would still find the Respondent has come forth with convincing evidence it had good cause to dismiss the man, and in fact would have discharged him entirely apart from any consideration of his union activity.

The unduly extended transcript of testimony is ridden with repetitive statements about how Harris went about the business of dealing with patients of the clinic and about the correct way he should have done it instead. Much of the talking appears in professional jargon incomprehensible to the layman, including myself. Was it right of him to insist that a family with seven children should be considered separately, or was the director correct in arguing otherwise? Are vitamins good for a disturbed person, or should a therapist refrain from recommending any medications? I cannot answer these ques-

<sup>1</sup> A third organization, I think!, Human Resource Institute, is also named in the pleadings, in connection with both National and Qualicare. Exactly what that phrase denotes was not made clear on the record. Is it a holding company, a parent organization? Does it only mean each of these successive companies which owned and operated the clinic at Lowell used the words HRT to indicate the kind of business they do? I do not know, but that question is of little moment, given the answers dictated by the clear evidence to the basic questions to be decided.

tions, but what I do know, because the record clearly shows it, is that Harris again and again disagreed with his supervisors, both as to how or when the meetings with patients should be held, and as to how the record should be kept. It is this fact of disagreement between subordinate and superiors that has meaning in this case.

There is another aspect of this record that is understandable to me, as to anyone having experience in the field of Board proceedings. A man discharged assertedly for misbehaving on the job can be expected to deny all guilt, to explain away each and every so-called incident of misconduct as no more than the imaginings of a hateful employer. Harris tried hard to do this. To hear him say it, there was nothing wrong with anything he ever did on the job. But the shoe fits the other foot as well. Called upon to defend its action in a Board proceeding long after a discharge, it is not surprising that the company witnesses would emphasize and belabor every jot and tittle of the employees' errors to build up a picture of absolute horror. Neither story can be taken at face value.

But decision here does not rest on any generalization about how litigants behave at a trial. While it is true that Director Dorwart, over more than 100 pages of testimony, strained to make Harris look bad, it is also true that, despite his efforts to clear himself, Harris did admit he was told a number of times that he had done things wrong, that he quarreled in disagreement with the way his superiors kept telling him he should discharge his duties. Moreover, his denials of the many criticisms voiced to him throughout the year 1981—by both Russell, the first director, and by Dorwart, the November replacement—also suffer from the fact that, in total, he was not a very convincing or credible witness. Repeatedly he answered direct questions evasively, tried to doubletalk his way out of clear replies, and admitted past errors but only obliquely, in the continuing effort to avoid plain statements. But what more than anything else clouds his total testimony is his story about the probation letter he knew on December 17 had been mailed to him.

On December 15 Dorwart told him, formally, he was to come to the office on the morning of December 17 for a meeting with Gorman, who was coming from Brookline for that purpose. Harris chose not to come that day, sending a letter saying he was too busy. With the employee thus ignoring the request to come to the office, the Company wrote him a letter telling him he was on probation for 30 days and listing the areas where his performance had been remiss. Harris came to the office on the afternoon of December 17, after Gorman had left. Dorwart said she was too busy to talk to him then, that a letter putting him on probation had been mailed to him. In his direct testimony Harris tried to make it appear that, in refusing to discuss with him what the problems of the moment were, the director was concealing an improper objective. But the truth is it was his own too great a sense of independence that had made the critical meeting impossible. If there was any disrespect or arrogance displayed by anyone that day, it was on his part, not that of the director.

The probation letter was mailed with a return receipt requested. By December 31 Harris had not received it. First he said the holiday season made it difficult to get to

his mailbox. Then he said he did go to the box, but found only the notice telling him to call for the letter at the post office where he would sign the requested receipt. He did not do that either; he just ignored the entire business. Is this the way an employee who honestly believes, as Harris insisted was the case, that he was unjustly being put on probation behaves? Or does it indicate, as I am convinced it does, that he well knew he deserved to be put on probation, and matters were not going to be helped by his reading the letter. Probation means the employee is given a chance to change his ways, to improve his performance. Harris' indifference, therefore, also indicates he had no intention of doing anything on this job differently from what he had always done. This attitude was in keeping with his constant disagreement—over the past several months—with the directors telling him to do this or do that differently from the way he was doing it.

Not getting back the return receipt, Dorwart sent a girl to the post office and learned the letter had not been accepted by Harris. With that, she called him in and gave him another copy of the letter. That same day Harris gave notice he was going on vacation for 2 weeks, and left on January 1. The letter, received in evidence, lists a number of the work rules Harris had violated and told him he would have to do something about them. At the hearing, Harris argued that, if he did not change any of his work methods during the 30-day probation period imposed on him, he could not be faulted because, after all, during the first 2 weeks of the period—December 17 to 31—he had not seen the letter, and during the next 2 weeks he was on vacation! In the light of his obvious indifference to criticism of any kind, that argument will not do in this case. Certainly, it can hardly resurrect the old statement of 6 months earlier that Nolan was going to fire him because of his union activity.

No useful purpose would be served by detailing all the testimony about what the Company blames were errors in work and recordkeeping by Harris for many months before he was put on probation. It will be enough to speak about those things Harris admitted he was criticized for. Whether he was right or wrong, as I said, I do not intend to sit in judgment. Management had a right to run the business the way it, and not the employee, chose.

The first item in the probation letter says all correspondence relating to the therapist's work must be approved by the appropriate clinical director. Harris admitted "Nancy [Dorwart]" and he had a "disagreement" about that matter. The second item calls attention to the rule against seeing patients after 8 p.m. weekdays or after 2 p.m. on Saturdays. As to this Harris also said Dorwart had called him down for violating that rule, and that he thought it had been necessary, but that he was told not to do it again. The third item said there must be no unauthorized meeting with patients outside the clinic. Harris said he had done this "six, seven, eight, ten times," including after Dorwart had come on the scene, but "not on a regular basis."

On December 11 Harris found a notice in his box telling him he had incorrectly diagnosed, and reported, the

psychic condition of a patient, and telling him to correct his report. Harris admitted this criticism too. This was the second time Dorwart had told Harris to make the correction. All that matters in this case—an NLRB proceeding—is that the superior had to tell the claimant to change his ways. (This item is a perfect example of what I mean when I say I cannot judge—between Dorwart and Harris—which of them is correct in the use of words like “the intra psychic dynamics” of a client.)

A physician psychiatrist named Allan Cohen testified for the Respondent. He said that in April 1981 he learned that a patient of his had been advised by a therapist at the Lowell clinic to stop taking vitamins and to take a medication called antibuse instead. Since this was contrary to his instructions to the patient, the doctor reported it to the clinic. On checking it developed Harris had given that advice. Harris admitted this, and added the matter was discussed and that he disagreed with the director about it. That a therapist is not authorized to prescribe medications—contrary to the advice of the physician on a case—was admitted by all parties.

Another on-the-job dereliction by Harris was referred to as “billing irregularities,” i.e., billing for a full hour therapy treatment when in fact less time was devoted to it, or billing the wrong person, as, for example, billing the parents who are covered by insurance instead of the child who is not. Harris admitted Russell and McCarthy, the former supervisors, had talked to him in criticism about that “in the fall” of 1981.

With all the foregoing admitted by Harris, there can be no question the Respondent had ample cause for its decision to put him on probation in December 1982. As already stated, he ignored the letter calling to his attention his past failures. In January, while he was on vacation, still another disregard of the rules on his part came to the Company's attention. A doctor named William Kornfeld called the clinic to inform it that a patient of his had been told by a therapist there to stop taking a drug called Holdol, which the doctor had prescribed. The patient told the doctor that he had for that reason not taken the drug for some time. Again it developed, on checking, that Harris had been the therapist on that case. At the hearing the Respondent called this the straw that broke the camel's back and decided to discharge Harris.

I do not know for a fact whether Harris told the patient what the patient told the doctor. In his cross-examination of the doctor the General Counsel kept stressing the fact that a disturbed patient, an unbalanced person, can make things up, can imagine things out of the blue. He may be right; how do I know? But it is a fact that the complaint came in, and that it involved Harris. If the General Counsel is correct, the director should have ignored it. But can a clinic ignore things of that kind, or does it have a duty to play it safe?

Harris' entire testimony reflects a clear sense of superiority, arguing he was always right when contradicted by his colleagues or supervisors on the way he thought he should practice his calling. His derogatory language about all officials who disagreed with his methods makes very convincing Dorwart's testimony that repeatedly he quarreled with her, disputed her ideas of how the work should be done, and spoke offensively to her. This con-

tinuing disagreement between him and Dorwart, as well as with the earlier supervisors, had been going on for some months. How long did the employer have to stand for it.

I cannot credit Russell as to her conversations with Nolan about Harris. For one thing, she was not clear as to exactly when she reported one thing or another to him. She said that in the summer of 1981 she told Nolan about Harris' union activity. She also said, again referring to some time during the summer, that she learned from an office manager that Harris had been billing the customers wrongly, i.e., submitting bills for more time than he was really spending with the client. She reported this to Nolan, too, who then asked her to “monitor” him, “we had to do something about it.” At one point she also said, directly, that in response to her information about Harris' union activity, Nolan told her to do a “utilization review” on him. This suggests retaliation. But in the next breath Russell said she “was supposed to do one [utilization review] on everyone all the time.” When asked had she been told to fire the man, it proved impossible to draw a coherent response from her. Finally, her open animosity against her former employer was obvious, to say nothing of the fact that by the time of the hearing she was competing for the Respondent's business. She quoted the supervisors as using words that were “shocking and glaring.” In the light of her total demeanor on the stand, I must credit Nolan's contrary testimony that he did not threaten to discharge Harris, because of his union activity.

Harris' attitude toward others in higher authority is directly proved also by the testimony of Russell, the earlier director. When testifying about the Cohen incident, where Harris favored giving the patient antibuse contrary to the doctor's orders, she said that Harris “is very assertive and he went on and said I think and you think and I think and they discussed it and Allan [Dr. Cohen] got very annoyed about it. The doctor's orders was followed, but it was a hassle.” Elsewhere in her testimony Russell described Harris as a “pest” and a “nudge.” This was from the General Counsel's own witness, and supports the testimony of the later director, Dorwart, that Harris is very difficult to get along with and spoke offensively to her.

At one of the conversations with Dorwart, Harris said he was being harassed because of his union activity. But, as the Respondent correctly quotes from Board precedent: “An employee cannot insulate himself or herself from a discharge for cause simply because he or she happens to engage in activity protected by the Act.” *Ben Franklin Division*, 251 NLRB 1512 (1980). See also *Klate Holt Co.*, 161 NLRB 1606 (1966).

The union activity had long gone and been forgotten by the time Harris was discharged. To close the gap, the General Counsel quotes the Sun King, Louie XIV. If he can do that, I can quote a more respected philosopher. “The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend when the wind blows across it.” The Confucian Analects, Book XII, 19.

RECOMMENDATION<sup>2</sup>

I hereby recommend that the complaint be, and it hereby is, dismissed.

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.