

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 NORTH RIDGE CARE CENTER :
 :
 and : Case 12
 : No. 42046
 : A-4425
 SERVICE AND HOSPITAL EMPLOYEES :
 INTERNATIONAL UNION LOCAL 150, :
 AFL-CIO :
 :

Appearances:

1148 Mr. Michael Manning, Labor Relations Division, Hillhaven Corporation,
 Broadway, Tacoma, Washington 98401, appearing on behalf of the
 Employer.
 Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr.
William S. Kowalski, 788 North Jefferson Street, Milwaukee, Wisconsin
 53202, appearing on behalf of the Union.

ARBITRATION AWARD

North Ridge Care Center, hereinafter referred to as the Employer, and Service and Hospital Employees International Union Local 150, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement, effective January 1, 1988 through December 31, 1990, which provides for final and binding arbitration of grievances over alleged violations of the agreement by the Employer. Pursuant to a request for arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the three (3) day disciplinary suspension of an employe. Hearing was held in the Employer's offices in Manitowoc, Wisconsin on November 14, 1989. A stenographic transcript of the proceedings was prepared and received by the undersigned on December 5, 1989. Post-hearing arguments were received by the undersigned by January 11, 1990. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE:

Did the Employer violate the collective bargaining agreement when it issued a three (3) day suspension to the grievant on March 18, 1989?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

. . .

ARTICLE 15 -- GENERAL PROVISIONS

. . .

15.3 Employees will individually and collectively render loyal, efficient, courteous, and safe service to the facility. They will cooperate with the facility and each other in advancing the welfare of the facility and proper service to patients at all times.

ARTICLE 18 -- DISCHARGE

18.1 The Employer may discharge or suspend an employee for just cause, but in respect to discharge, shall give a warning of the complaint against such employee, except that no warning notice need be given to an employee if the cause of such discharge is dishonesty; drinking; or recklessness resulting in an accident to a patient; abuse of a patient, verbal or physical; sleeping on the job; or leaving patients unattended. A Union steward will be called in when requested by an employee for all disciplinary actions up to and including discharge.

18.2 When an employee has worked twelve (12) consecutive months without receiving a warning notice or an admonishment, and upon the request of the employee, a copy of such notices will be removed from his/her file and will not be used against him/her in any further disciplinary action.

BACKGROUND:

The Employer operates a nursing home in Manitowoc, Wisconsin. Employees assigned to specific areas and tasks are also assigned specific work partners and a specific schedule for break and lunch. However, due to the nature of the jobs performed by employees in providing services to residents of the nursing home, schedules are changed to ensure the needs of the residents are met.

On March 1, 1989, Anne Maki, hereinafter referred to as the grievant, was assigned to work in the Home's 100 Wing on the 5:00 a.m. to 1:00 p.m. shift. The grievant was scheduled to take a twenty (20) minute work break immediately following the residents' breakfast. After food trays had been picked up, Maki and the three (3) other employees assigned to the 100 Wing met and discussed the break period. The grievant and another employee switched their break times. Two (2) employees went on break and when these two (2) employees returned Pauline Mitchell and the grievant went on break. Upon returning to the 100 Wing after the work break the grievant and Mitchell were stopped by Shelly Messman, their immediate supervisor in front of room 103. Messman asked the grievant why she had switched breaks. The grievant responded that she had wanted to talk to someone, Pauline, and that the employees had discussed it and agreed to it. Messman did not immediately respond to the grievant's work. The grievant then proceeded on down the hallway and Mitchell walked to room 106.

At the hearing Messman testified the grievant proceeded to keep walking away from her and failed to acknowledge her. Messman then testified she stated to the grievant, "I am talking to you." 1/ the grievant then went into a linen closet, got a towel, threw it on a bed and stated, "so she'd have someone to talk to." 2/ The grievant then turned and went back down the hall. Messman then testified she stated to the grievant she would take the matter up with Donna Quimby.

Messman then met with Quimby, the Director of Nursing. After informing Quimby of the matter, Quimby directed Messman to write up a disciplinary action. Quimby then reviewed the grievant's personnel file, noting there was a written verbal warning on June 17, 1988 and a written warning on October 4, 1988.

Quimby testified that after she reviewed the grievant's personnel file she met with the grievant, Messman, and the grievant's Union Steward, Cindy Filiez. Quimby testified that the grievant denied being disrespectful to her supervisor and denied she had walked away from her twice. Quimby further testified that the Grievant's tone of voice was loud, disrespectful and inappropriate for the setting. Filiez acknowledged at the hearing that the grievant's voice was above normal conversational tone, and Messman testified the grievant yelled at Quimby and her. The grievant also refused to sign the Notice of Disciplinary Action. The grievant was suspended by Quimby for three (3) days. Thereafter, on March 13, 1989, the grievant filed the instant grievance.

On March 19, 1989, Quimby and Acting Administrator Rod Karman interviewed Mitchell concerning the grievant's actions. During this interview Mitchell acknowledged that the grievant had walked away from Messman twice. However, Mitchell pointed out that she also walked away from Messman because she thought the conversation had been concluded. Based upon Mitchell's statements, Karman and Quimby concluded that the grievant had, at least once, walked away from Messman. However, thereafter, Mitchell supplied the Employer with the following written statement:

This is my statement as to what happened on Wednesday, March 8th, 1989 at 9:30 A.M. between Anne Maki, Michele Messman (our team leader) and myself in the hallway of 100 wing. A copy of this statement has also been given to the Union.

Anne and I were approached in the hallway outside of room 103 by our team leader and questioned as to why we had switched breaks. I stated, "Anne had talked to the other two girls earlier and we all decided."

Then Anne began her explanation as to why we switched breaks, stating, "had been discussed between all N.A.'s on the wing and we decided amongst ourselves to switch", also saying, "Pauline and I wanted to talk."

I thought the conversation had ended there and started walking away. Anne also walked away towards the linen closet, got out a towel and walked back towards room 103. I had stopped in front of room 106 and picked

1/ Transcript, p. 30.

2/ Ibid.

something up off the floor. At the same time the team leader stated, "Anne, don't walk away, I'm talking to you."

A conversation continued between Anne and our team leader in the doorway of room 103. During the entire time I was standing outside of room 106. At the end of their conversation our team leader stated, "Well I'll just have to go to Donna about this."

Anne then went into room 103 and the team leader left the wing. Anne did not walk away from the team leader or answer her questions sarcastically.

Mitchell acknowledged at the hearing that she did state the grievant had walked away from Messman at least twice. Mitchell asserted, however, that she felt she had been badgered into saying so. 3/ On March 23, 1989, Quimby sent the following letter to the grievant:

To:S.E.I.U. Local 150 North Ridge Care Center

From:Dona (sic) Quimby, Director of Nursing Services

Date:March 23rd, 1989

Re:Anne Maki

The disciplinary action taken by North Ridge Care Center in response (sic) to the March 8th, 1989 incident involving Anne Maki was appropriate. I must emphasize that disciplinary action was not based on the fact that Ms. Maki organized the rescheduling of break time for the 100 wing Nursing Assistant's (sic), the morning of March 8th, 1989, but, that she walked away from the Team Leader, Michele Messman LPN, while the issue was being discussed.

An investigation of the incident indicates that Anne Maki did indeed walk away from her Team Leader during the discussion in a manner which showed an insubordinate attitude.

Ms. Maki has two previous incidents which showed an insubordinate attitude ; (sic) a written verbal notice on 6/17/88 and a written verbal notice on 6/17/88 and a written warning 10/4/88.

Thus the disciplinary action of 3/8/89 resulting in suspension becomes the third step in the progressive disciplinary process and will stand as appropriate.

Thereafter, the matter was processed to arbitration.

EMPLOYER'S POSITION:

The Employer contends the grievant was suspended for just cause. The Employer points out the grievant was given a written verbal notice concerning her attitude on June 18, 1988. The grievant also received a written notice concerning her attitude on October 4, 1989. The Employer stresses neither disciplinary action was grieved. The Employer argues the grievant was forewarned of the probable disciplinary consequences if she did not correct her conduct.

The Employer also argues Article 15.3 requires courteous service to the facility and to cooperate with each other. The Employer points out Messman had every right to question the grievant about her break schedule.

The Employer also asserts it made an effort to determine whether the grievant had in fact violated a rule or order of management. The Employer points out that Quimby met with Messman, the grievant, and Union Steward Filiez. The Employer argues it's investigation of the matter was conducted fairly and objectively. The Employer also stresses there was no known animus between Messman and the grievant and, therefore, Messman's testimony is more credible than the grievant's. Thus, the Employer concludes, the grievant's suspension was justified.

The Employer also points out that neither the Union nor the grievant requested that Mitchell be at the first step of the grievance procedure. The Employer points out that Mitchell acknowledged verbally in a meeting with management that the grievant walked away from Messman twice. Thereafter, when

3/ Transcript, p. 85.

Mitchell submitted a written description of the matter which did not acknowledge that the grievant had walked away twice, District Director Korman again questioned Mitchell and Mitchell acknowledged verbally the grievant had in fact walked away twice from her supervisor.

The Employer asserts the evidence is substantial enough to convince a reasonable person that the grievant did in fact walk away from her supervision twice. The Employer argues insubordination may be manifested by simple refusal to obey an order, open defiance or an air of insubordination in the grievant's conduct. The Employer asserts the grievant in this matter was guilty of both an air of insubordination and a refusal to stop what she was doing (walking away) and talk to a supervisor.

The Employer also contends the penalty in this matter is appropriate as the grievant had already received two (2) previous disciplinary actions.

The Employer would have the undersigned deny the grievance.

UNION'S POSITION:

The Union contends the grievant was not insubordinate on March 8, 1989. The Union argues insubordination consists of the following:

A worker's refusal or failure to obey a management directive or to comply with an established work procedure. Under certain circumstances, use of objectionable language or abusive behavior towards supervisors may be deemed to be insubordination because it reveals disrespect of management's authority.

The Union asserts that under the standards of what constitutes insubordination the Employer's actions in disciplining the grievant was without just cause.

The Union contends the grievant's conduct on March 8, 1989 was entirely corroborated by the testimony of Mitchell. The Union also contends that even Messman's testimony hardly presents a picture of an insubordinate employe. The Union asserts that even if the grievant was sarcastic in her response to Messman, mere sarcasm falls far short of constituting the defiant and confrontational attitude which is insubordination. The Union asserts the grievant's actions in no way challenged management's authority.

The Union also contends Messman is not a credible witness. The Union points out Messman initially had no recollection of the grievant asking her why she never got answers to her questions. On cross-examination Messman then recalled the statement, but later could not recall whether the statement was made on the Wing in the Wing or later in Quimby's office. The Union concludes Messman's recollection of the entire incident is hazy and should not be given much weight. In contrast, the Union points out, both Maki and Mitchell testified clearly and consistently about the incident.

The Union argues that under the accounts of even all three (3) witnesses, the grievant obeyed Messman's first directive to return to her. The Union asserts Messman's testimony regarding the grievant's second walking away simply does not establish insubordinate behavior.

The Union would have the grievance sustained, that reference to the incident be removed from the grievant's personnel file, and that the grievant be awarded three (3) days backpay.

DISCUSSION:

The record demonstrates that on March 18, 1989 the grievant was suspended for three (3) days for an act of insubordination. This act of insubordination involved walking away from the grievant's supervisor while the supervisor was talking to the grievant. Management's investigation was limited to a face-to-face discussion with the supervisor, the grievant, and the grievant's union steward. After the discipline was levied, management became aware another employe, Mitchell, witnessed the events in question. Mitchell's version of the event did not support the supervisor's claim that the grievant had in fact walked away from the supervisor twice while the supervisor was talking to her, but at most once.

The grievant's defense herein is that in both instances of walking away the grievant thought her conversation with the supervisor had concluded. The undersigned notes here that the Employer has presented no evidence which refuted this defense. The undersigned also finds the supervisor's version of the event so lacking in detail, specificity and consistency that the undersigned can not conclude the supervisor is a credible witness.

Mitchell testified that the grievant and her returned from break and the grievant was asked by the supervisor why she switched breaks. Both employes responded. Then they continued on down the hallway. The supervisor's testimony did not refute Mitchell's or the grievant's testimony that each responded to the supervisor's question.

The supervisor also changed her testimony three (3) times concerning the grievant's response. "How come when I ask questions you don't answer?"; at that point I told her I'll take this up with Donna 4/; I can't think where it came in 5/; and, I don't know if it came up in this discussion or if it was brought up in Donna's office. 6/ The undersigned also notes here that the supervisor initially testified that it was the grievant's statement of "So I'd have someone to talk to.", that she informed the grievant she would take the matter up with the Director of Nursing. 7/ Messman also did not refute Mitchell or the grievant's testimony that this latter statement was part of the grievant's response when she was originally asked why she had changed breaks.

However, even if the undersigned found the supervisor's testimony to be credible, the undersigned still could not conclude the grievant was insubordinate. There is no evidence the grievant refused to comply with any directive given to her. There is no evidence she either used objectionable language or abusive behavior. At most, the supervisor's testimony demonstrates she asked the grievant a question and the grievant gave her, if not immediately, a response. That the grievant continued moving and performing duties, and thus may have walked away twice from her supervisor, does not lead to a conclusion that the grievant displayed either a discourteous or insubordinate attitude.

Therefore, based upon the above and foregoing, the undersigned finds the Employer did not have just cause to discipline the grievant. The Employer is directed to cleanse the grievant's work record and to make her whole for all lost wages and benefits. The grievance is sustained.

AWARD

The Employer violated the collective bargaining agreement when it issued a three (3) day suspension to the grievant on March 18, 1989. The Employer is directed to remove all reference of this matter from the grievant's personnel file and to make the grievant whole for lost wages and benefits.

Dated at Madison, Wisconsin this 7th day of March, 1990.

By _____
Edmond J. Bielarczyk, Arbitrator

4/ Transcript p. 90.

5/ Transcript p. 92.

6/ Transcript p. 93.

7/ Transcript p. 30