

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
 :
THE LABOR ASSOCIATION OF :
WISCONSIN, INC., LOCAL 902 :
 :
and : Case 101
 : No. 42879
 : MA-5833
LINCOLN COUNTY :
(PINECREST NURSING HOME) :
 :

Appearances:

Mr. Dennis A. Pedersen, Business Agent, Labor Association of Wisconsin, Inc., appearing on behalf of the Association.
Mr. Charles A. Rude, Personnel Coordinator, Lincoln County, appearing on behalf of the County.

ARBITRATION AWARD

The Labor Association of Wisconsin, Inc., Local 902, hereinafter referred to as the Association, and Lincoln County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance involving a discharge. The undersigned was so designated. Hearing was held in Merrill, Wisconsin on December 11, 1989. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on February 6, 1990.

BACKGROUND

The grievant was employed as a nursing assistant at the County's Pinecrest Nursing Home until her discharge on July 21, 1989. The grievant had been employed as a nursing assistant previously by the County and her latest employment had been continuous for over two years during which period there were no prior complaints about the grievant abusing any patient.

On July 19, 1989, a visitor, hereinafter referred to as Mrs. A, had taken her father, a resident of the Home, by wheelchair to the elevator on the second floor in order to go down to the dining room. At that point Mrs. A observed the grievant, whom she did not know, slam down a food tray and tell a resident, hereinafter referred to as R, "you're going to eat this". Mrs. A then observed the grievant shake R by the shoulders so that R's head bobbed around uncontrollably and saw the grievant slap R on the side of the head. Mrs. A looked away and thought to herself that this was not right. She again looked at the grievant and observed her shaking R by the shoulders a second time such that R's head bobbed uncontrollably. Mrs. A subsequently observed the grievant shaking R a third time. Mrs. A was about thirty feet from the grievant during her observations. The next day Mrs. A reported her observations to the Home's administration.

R is an elderly and frail woman who is totally dependent on the staff for all her needs. She is physically and mentally handicapped. She cannot speak, her mind is that of a five or six year old and she has little, if any, muscle control. Whenever she is lifted up in her chair, her head bobs about, unless it is restrained, due to her lack of muscle control. It is very difficult to feed R as her head must be held when she is given food, and because her muscle control is lacking, her tongue hangs out requiring her mouth to be held closed so she will consume her food. R can easily choke in this situation, so nursing assistants must be careful and also must continuously tell her to eat. During feeding R slides down in her chair and must be lifted back up into a sitting position by lifting her under her arms. Some nursing assistants were concerned

about feeding R outside a private room because of the appearance it created, but R's relatives asked that she be fed with the other residents and the County respected their wishes.

During Mrs. A's observations, a second nursing assistant was feeding another resident in the same area within five feet of the grievant. This nursing assistant had her back to the grievant and neither saw nor heard any shaking or slapping but thought that the grievant's tone was impatient. This nursing assistant testified that had there been any shaking or slapping of R, she would have been aware of it. Also, R was being fed in the presence of another resident, hereinafter identified as S, who is very protective of R, such that if a pillow slips from R's chair or if R needs some assistance, S will begin to yell for a nurse. S made no sounds on July 19, 1989 during the feeding of R so as to alert anyone to a problem with R. S did not testify.

The Home's administration, upon receiving the report from Mrs. A, called in the grievant who was identified by Mrs. A. The grievant admitted that she had fed R on the day in question but denied that she had in any way abused R. The grievant could offer no explanation as to why Mrs. A made the statement she did. The County also spoke with the second nursing assistant who was present during the feeding of R. The grievant denied that she shook or slapped R. The County's rules and regulations strictly prohibit resident abuse and provide for immediate discharge for any violation of these rules and regulations. After this investigation, the County credited Mrs. A's version and discredited the grievant's and terminated the grievant on July 21, 1989 for resident abuse.

ISSUE

The parties stipulated to the following:

Was the grievant discharged for just cause on July 21, 1989?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

Article II-Management Rights

The management of Lincoln County and the direction of the work force is vested exclusively in the Employer, to be exercised through the department head, including, but not limited, to the right to hire, promote, demote, suspend, discipline and discharge for just cause;

. . . .

COUNTY'S POSITION

The County contends that the abuse of any nursing home resident is behavior that cannot be tolerated. It submits that even though several months had passed since the incident occurred, Mrs. A's testimony at the hearing was straightforward and sincere, leaving no doubt that what she reported was accurate. It points out that Mrs. A readily identified the grievant and is an unbiased observer. It asserts that Mrs. A's testimony was not contradicted and the only contention offered by the grievant was that R was difficult to feed. It contends that while this may be true, the residents must be treated with dignity and respect while taking care of their needs and shaking a resident and striking her on the side of the head is not acceptable behavior. It notes the absence of any claim of a "life threatening" condition as a reason for drastic countermeasures on this occasion. It concludes that the discharge for resident abuse should be sustained.

ASSOCIATION'S POSITION

The Association contends that the County has the burden of proving its case and that burden should be "proof beyond a reasonable doubt" because the County has alleged the grievant was terminated for the kind of conduct that violates certain criminal statutes. The Association maintains that even if a lesser burden is applicable, the County has failed to meet the standard of "just cause" under the traditional burden. The Association argues that the testimony of a number of witnesses for the County was not relevant to the instant case as these witnesses neither had firsthand knowledge of any of the facts nor conducted any inquiry to determine the guilt or innocence of the grievant.

The Association asserts that the County failed to properly investigate all of the facts before it decided to terminate the grievant. It insists that the type of superficial investigation conducted by the County does not meet the standard of a comprehensive investigation necessary for just cause. The Association claims that the grievant was terminated based solely on Mrs. A's observations without any corroborating evidence and that the grievant's version was discounted even though her work record does not suggest that her veracity should be questioned. The Association states that it bears Mrs. A no particular ill will but points out that there are some inconsistencies in her testimony. It notes that she was about thirty feet away from the grievant and R during her observations and did not see the other nursing assistant who was

within five feet of the grievant. The Association refers to the uncontested testimony of a number of witnesses that R was totally and completely dependent upon the staff for her care and that she was verbally unresponsive and had to be instructed with each bite that "she must eat". Also, the Association points out that R had to be "handled" or "maneuvered" with nearly every bite of food.

It notes that R had to be adjusted in her chair very often during feeding and when this was done, her head moved back and forth. It suggests that the nursing assistant who was much nearer to the grievant than Mrs. A heard nothing out of the ordinary and S, who was very protective of R, made no reaction that day. It submits that the grievant has categorically denied slapping R and has denied shaking R in a violent manner.

The Association contends that Mrs. A drew an erroneous conclusion from her observations because of the manner in which R was fed. It submits that the County was obligated to train its employes to feed residents in a different manner or location to prevent any erroneous observations but so far the County has not done so. The Association concludes that the County has failed to establish that just cause existed to terminate the grievant and it asks that she be made whole.

DISCUSSION

The Association has argued that the appropriate burden of proof in this matter is proof beyond a reasonable doubt. This burden of proof is required in criminal cases but in this case is not appropriate as the grievant has not been charged with any crime nor does this case involve an element of criminal intent. Furthermore, the consequences of a conviction for a crime, which may include the deprivation of one's liberty, are not present. The undersigned finds that in the instant case the County need only demonstrate by a preponderance of the evidence that the grievant committed patient abuse and that this was sufficient to immediately terminate her employment.

The primary issue to be determined is whether the grievant abused R. The testimony of Mrs. A was very credible. She testified directly and sincerely about what she observed. Mrs. A had no prior contact with the grievant and did not know her. The undersigned was impressed with Mrs. A's forthrightness and candor and must conclude that she truthfully testified as to her observations.

On the other hand, the undersigned was also impressed with the candor and the testimony of the grievant. Certainly, the grievant has an interest in the outcome of this case as her job is at stake so that if there was simply a choice between the credibility of Mrs. A and the grievant, the bias of the grievant might tip the scales against her.

In this case, however, due to other facts in evidence, a resolution of the underlying issue strictly on the credibility of the grievant and Mrs. A is not required. The evidence also includes the testimony with respect to the physical and mental condition of R. It is undisputed that R has severe physical and mental handicaps that require the staff to provide her total physical care. In particular, R lacked muscle control so that when she was moved her head would bob around. Additionally, she had to be fed in an unusual manner. The difficulty in feeding her as well as the requisite handling of R was uncontroverted. Mrs. A's observations of R being shaken and her head bobbing around is entirely consistent with R's being lifted by the shoulders or under her arms to reposition her during feeding. In other words, Mrs. A's perception of R's being shaken as her head was moving back and forth is consistent with the normal repositioning of R which would cause her head to bob. Mrs. A could easily have reached this erroneous assumption from her perceptions. Additionally, R's head had to be held when she was fed so that the movement of the grievant's hand to R's head is consistent with her feeding R. Mrs. A could have easily perceived this as a slap to the head. The testimony of the other nursing assistant who was within five feet of the grievant supports the conclusion that nothing out of the ordinary occurred. Thus, the totality of the circumstances points to the conclusion that there was no abuse of R, rather the perceptions by Mrs. A simply led to a wrong conclusion on her part. Mrs. A truthfully testified to what she observed but what she perceived was not what in fact occurred.

The County's interest in making sure that no patient is abused is an obvious and compelling interest. In this case, arguably it should not be faulted for making sure no resident is abused even if that means erring on the side of preventing such abuse. However, the County has a contractual obligation to its employes not to discharge them without just cause. Here, the County did not take into consideration the physical problems of feeding R as well as R's physical and mental limitations. These factors account for appearances which could easily be mistaken for resident abuse. Furthermore, with the grievant's record of no prior abuse of any kind, the County should have conducted a more thorough investigation to determine whether real abuse had occurred. On the facts presented, the undersigned concludes, under all the circumstances, that the evidence fails to prove that the grievant physically abused R, and therefore, the County did not have just cause for her termination.

Based on the above and foregoing, the record as a whole and the arguments

of the parties, the undersigned issues the following

AWARD

The County did not have just cause to discharge the grievant. The County shall immediately reinstate the grievant and shall make her whole by payment of a sum equal to her wages from her discharge on July 21, 1989 to the date of reinstatement less any unemployment compensation and interim earnings received by grievant.

Dated at Honolulu, Hawaii this 15th day of March, 1990.

By _____
Lionel L. Crowley, Arbitrator