BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

PARK VIEW REHABILITATION PAVILION and PLEASANT ACRES EMPLOYEES UNION, LOCAL 1280, AFSCME, AFL-CIO

and

WINNEBAGO COUNTY (PARK VIEW REHABILITATION PAVILION and PLEASANT ACRES)

Case 199
No. 45534
MA-6636
(Carrie Grace)

Appearances:

Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh WI 54901, by Mr. Gregory N. Spring, Staff Representative, appearing on behalf of the Union.

Mr. John Bodnar, Corporation Counsel, Winnebago County, Post Office Box 2808, Oshkosh WI 54903-2808, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to the provisions of Article VII of the collective bargaining agreement between the parties for the years 1990 and 1991, Local 1280, AFSCME, AFL-CIO (hereinafter referred to as the Union) and Winnebago County (hereinafter referred to as the County) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over a written reprimand given to Nursing Assistant Carrie Grace. The undersigned was designated. A hearing was held in Winnebago, Wisconsin on August 20, 1991, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties made oral arguments at the close of the hearing, and the record was closed with the adjournment of the hearing.

Now, having considered the evidence, the arguments of the parties and the record as a whole, the undersigned the following Award.

ISSUE

The parties stipulated that the following issue was to be determined herein:

"Did the Employer have just cause to issue the written reprimand to the grievant, Carrie Grace, on September 7, 1990? If not, what is the appropriate remedy?"

PERTINENT CONTRACT PROVISION

ARTICLE VI
DISCIPLINARY PROCEDURES

The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

Any employee receiving disciplinary action shall receive notice of such discipline and the reasons for same within ten (10) calendar days of the date of the alleged infraction or the Employer's knowledge thereof except where unusual circumstances exist.
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Any employee may be suspended, discharged, or otherwise disciplined for just cause. As a general rule, the sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, and discharge. Any written reprimands sustained in the grievance procedure or not contested within the first six (6) working days after the date of the reprimand shall be considered a valid reprimand. Except for patient care warnings, no valid warning shall be considered effective for longer than a twelve (12) month period.

The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge.
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BACKGROUND FACTS

The County is a municipal employer providing general governmental services to the people in Winnebago County, Wisconsin. Among the services provided is the operation of Park View Health Center, a nursing home for the aged and disabled. In operating the Center, the County employs, among others, Nursing Assistants who are represented by the Union. The grievant, Carrie Grace, has been a nursing assistant at the Center for six and one-half years.

On August 29, 1990, the grievant was working the day shift. At approximately noon, she went in to take the temperature of J. W., an 84 year old man who had suffered a stroke. She was using an electronic thermometer, which measures temperatures via the insertion of a probe approximately 1/2" into the patient's anus. Prior to insertion, a disposable plastic cover is slipped over the probe. When in place, the probe cover should fit tightly. After the temperature is taken and the probe removed, the cover is released by pressing a button at the base of the probe.

The grievant inserted the probe and, when the temperature had been measured, withdrew the probe. The plastic cover did not come out with the probe. She immediately notified her supervisor, who attempted to recover the probe cover with her fingers. She found that it was deep enough inside the patient that she could not reach it. J. W.'s doctor was contacted, and he told the nursing staff to monitor the patient, but wait for him to pass the probe cover. Three days later, J.W. did pass the probe cover. He was not injured by the mishap, and did not voice any complaint of discomfort.

On September 7th, the grievant received a written reprimand as follows:

> On August 29, 1990 you inserted a thermometer probe with a probe cover into a patient's anus. When you removed it, the cover was not on the probe, but remained in the patient.
>
> This kind of carelessness cannot be tolerated. Because it endangers the health, safety and comfort of a patient, it must be considered a violation of that patient's rights.
>
> You must review the way you follow procedures to make sure you are performing them in the correct manner in order to provide safe care for your patients. Future incidents of this kind will bring further discipline.

A grievance was filed, alleging that a written reprimand was inappropriate, and out of sequence with progressive discipline. In processing the grievance, the County conceded that the incident was unintentional, but insisted that the element of harm to a patient and violation of a patient's rights mandated a written warning. The matter was not resolved in the lower steps of the grievance procedure and was referred to arbitration. Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

Arguments of the Employer

The County argues that the grievant was negligent in using the thermometer probe, and

that her negligence endangered a patient's well-being. Thus a written reprimand is amply justified and the grievance should be denied.

That the grievant was negligent is evident from the fact that the accident happened. The probe cover, the County argues, would not have come off unless the grievant either failed to attach it properly, hit the release button as she was removing the probe, or pushed the probe in so far that the patient's body brought pressure to bear on the flange at the end of the probe (some 2-1/2" deeper than is recommended). It is evident that the grievant, at the very least, inserted the probe too deeply in the patient, given the Assistant Director of Nursing's testimony that it was extremely unlikely that the cover would have been sucked up into the body by natural body functions.

As testified by a State Ombudsman, improper treatment violates a patient's rights. The County asserts that the suspension or discharge are the normal responses to patient rights violations, and that the grievant received a written reprimand only because she mitigated the seriousness of her offense through prompt action to summon nursing help, and because of her clean record. The County points to a similar case one year ago, where a Nursing Assistant left a thermometer in a patient, and received a written reprimand. Moreover, the State of Wisconsin, which oversees and regulates nursing homes, requires written documentation of the steps taken to address a patient rights violation, including evidence that the facility has complied with its own personnel policies. The policies of the County warn of discipline for abuse, neglect or mistreatment of patients. Therefore The County had little choice but to document discipline in this case via a written reprimand.

Arguments of the Union

The Union argues that the discipline is unjustified or, in the alternative, excessive. The County's claim that they were required to issue a written reprimand in order to comply with State regulations misstates that law. The County is required to show that corrective action has been taken, not to show evidence of disciplinary action. Even if the State imposes some obligation on the County, it is irrelevant to the rights of the employee under the labor contract which governs this matter. The contractual standard is just cause for discipline, which requires proof of two elements: First, that the employee engaged in misconduct and second, that the employer has employed progressive discipline. Neither element is established in this case.

The Union acknowledges that an accident occurred, but it occurred in spite of the grievant's best efforts, not because of them. The probe cover dislodged for some reason -- the grievant testifies that she had checked it to be sure it was tight and there is no evidence that she did not. She followed the procedures as she knew them. Other employees testified to incidents of probe covers coming off in patients or simply falling off the probe. While the Assistant Director of Nursing testified that she tested the probe the day after this incident and found that the cover could not be removed without using a great deal of pressure, she used only one probe cover, while thousands are used in the facility each year. It is reasonable to speculate that she used a probe

cover that was free of defects, while the grievant was unfortunate enough to use a defective probe cover..

The only thing that made this a more significant matter than past cases of probe covers coming loose is that this probe cover was drawn into the patient and could not be recovered. One of the employer's witnesses testified that the body could draw a probe cover into itself even if it was properly inserted. In this regard, the Union expresses some skepticism about the County's theory that the grievant somehow placed the probe so deeply in the patient that the cover itself was two to three inches up the anus. In any event, the Union notes, the patient expressed no distress or discomfort, and was not harmed by the incident.

The second element of just cause turns on the use of progressive discipline. The contract refers to discipline as a process for "informing" employees of deficiencies and "correcting" behavior, and specifies that the normal progression of discipline will begin with an oral reprimand for a first offense, unless the incident is cause for immediate suspension or discharge. No one can seriously argue that this incident would have justified suspension or discharge. Since the grievant has a clean disciplinary record, she should have received at most an oral reprimand.

The Union acknowledges that the County issued a written reprimand to another employee in the summer of 1990 for forgetting a thermometer inside a patient and that this reprimand was not grieved. In that case, however, the employee was clearly negligent and had no desire to pursue a grievance. This case is distinguishable because the employee's conduct is far less serious. If, the Union argues, the obvious negligence of the former employee justified only a written reprimand, the conduct of the grievant could not possibly justify a written reprimand.

For all of the foregoing reasons, the Union asks that the grievance be sustained and the written reprimand be removed form the grievant's personnel file.

DISCUSSION

This is a discipline case, under a just cause standard. As such, the County bears the burden of proof. In order to establish just cause for discipline, the County must, at the outset, show that the grievant engaged in some form of conduct which violated a specific rule or ran counter to a reasonable expectation that an employer would, under the circumstances, hold for its employees. In this case, the record evidence fails to establish such misconduct, and the grievance is therefore sustained.

The parties stipulated that this incident was unintentional, and that the patient was not harmed by the probe cover, which remained in his body for three days. The discipline must stand or fall on whether the grievant failed to follow proper procedures for utilizing the thermometer probe. The County asserts two violations of proper procedure - first, that the probe cover was not properly affixed to the probe, and second that the probe was inserted too far into the patient's

body. The grievant denies both charges, and there is no direct evidence that improper procedures were employed, other than the fact that the probe cover did come off and did lodge deeply within the patient's body.

The County argues that the probe cover cannot come off if it is properly seated on the probe. As evidence of this, the County presented testimony by two nurses who, while not working with the electronic thermometer on a regular basis, had placed probe covers on the thermometer probe and tried to remove them. They found that the cover would not come off unless heavy pressure was used at the base of the probe. Such pressure could not have been applied to the probe while it was inserted in the patient's anus. In contradiction to this testimony, however, was the testimony of two nursing assistants who use the probe on a daily basis, and who had occasionally experienced probe covers coming off after they had been properly affixed to the probe. Neither of these witnesses was a Union officer, nor does the record show them to be particular friends of the grievant. Further, the grievant repeatedly demonstrated that a probe cover could be removed with relatively slight pressure near its tip, even after it had been pushed tightly over the probe.

There does not appear to be a fixed procedure in place for how employees are to position probe covers, other than that they are to place them firmly on the probe and push to be sure they are tight. The grievant and the two nursing assistants who testified on her behalf all swore that they had followed this procedure, although using varying methods of pushing on the probe cover to insure tightness of fit. Unless the undersigned discredits the testimony of the two nursing assistants, it must be concluded that it is possible to follow correct procedures and still have the probe cover come off prematurely. There is absolutely no basis for discrediting this testimony. As noted, the two nursing assistants were apparently disinterested parties, and they testified clearly and showed no suspicious lapses of memory or vagueness on cross-examination. In crediting the testimony of the two nursing assistants and the grievant, I do not mean to suggest that the nurses testifying on behalf of the employer lied or misrepresented their experiences with the probe. It appears likely that the characteristics of individual probe covers dictate whether the cover will remain tightly affixed to the probe or will come loose. Assuming that the probe covers the nurses used and testified about were not defective, it is quite possible that the testimony about how difficult it is to remove the covers without using the release button is completely true.

As there is persuasive evidence that probe covers can come loose even when proper procedures are followed for affixing them, and inasmuch as the only evidence of failure to follow procedures in this case is the fact that the cover came loose, the undersigned cannot conclude that this incident was caused by the grievant's failure to follow proper procedure for affixing the probe cover. There remains the question of whether the grievant caused the cover to become lodged in the patient's body by inserting the probe too far.

Again, the only evidence that the grievant might have violated established procedures by placing the probe too deeply within the body is the fact that the probe cover was found to have

traveled up into the patient's body far enough to be beyond the reach of a nurse's finger. The grievant, for her part, demonstrated the depth of insertion, and showed it to be between 1/2" and 3/4". The County relies on the testimony of the Assistant Director of Nursing, who stated her opinion that it was unlikely that an object inserted in the anus could be drawn up into the body through natural processes.

The County's own witnesses disagreed on the question of whether an object could be drawn up through the anus. The Union presented testimony that this could, in fact, occur and that it was one of the reasons that a nurse was required to keep a grip on glass rectal thermometers when using them to take a patient's temperature. The undersigned has no particular expertise in such matters, but common sense suggests that there must be some natural means by which a probe cover could be drawn up inside the body. In this case, the probe cover, which is approximately three inches long, was found to be an additional three inches inside the patient's body. If it was located that far inside the body simply by virtue of the grievant's use of the probe, she must have inserted not only the entire length of the probe but some three inches of the handle inside the patient. The probe handle broadens out quite a bit at the bottom of the probe and it seems extremely unlikely that the grievant, an experienced nursing assistant, would have utilized such a peculiar procedure. It seems far more likely that the cover moved up into the body after it came loose from the probe. Unless the grievant or her supervisor pushed the probe cover 3 inches further into the patient's body while trying to remove it -- a conclusion for which there is no basis in the record evidence -- the cover must have been drawn into the body by some natural process.

Whatever the means by which the probe cover traveled up into the patient's body, there is insufficient evidence in the record to prove that it occurred as a result of some form of misconduct by the grievant. The County's case is entirely circumstantial in nature, and there are simply too many other reasonable explanations for what occurred on August 29, 1990 to support the imposition of discipline in this case. The undersigned concludes that the County has failed to prove any violations of proper procedure by the grievant, and thus that the discipline was not supported by just cause. Both parties agreed at the hearing that the proper remedy if the written reprimand was unjustified would be an order expunging it from the grievant's record, and that is the remedy ordered herein.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Employer did not have just cause to issue the written reprimand to the grievant, Carrie Grace, on September 7, 1990. The appropriate remedy is an order expunging the written reprimand from the grievant's file and the other personnel records of the County, and the County is hereby so directed.

Signed and dated this 22nd day of August, 1991 at Racine, Wisconsin.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator