BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
PINE VALLEY MANOR EMPLOYEES UNION LOCAL 3363, WCCME, AFSCME, AFL-CIO	Case 91 No. 46213 MA-6913
and	
RICHLAND COUNTY (PINE VALLEY MANOR)	

Appearances:
Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.
Mr. Benjamin Southwick, Corporation Counsel, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and County respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration. Pursuant to said agreement, the undersigned was appointed by the Wisconsin Employment Relations Commission to hear the instant dispute. Hearing was held in Richland Center, Wisconsin on January 28, 1992. No stenographic transcript was made. The parties completed their briefing schedule on February 13, 1992. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties at hearing stipulated to the following issue:

> Did the County have just cause to discipline the Grievant? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

Article 7 - Discipline

> 7.01 Just cause shall be the standard of review in discipline and discharge cases for nonprobationary employees. Notice of all discipline or discharge shall be in writing and a copy shall be provided the employee at the time the action is taken and a copy will be mailed to the Union within two (2) calendar days, except that written notice of oral discipline shall be given to the employee and the Union as possible after the action is taken. Disciplinary notices shall include the primary reason(s) on which the Employer's action is based.

FACTS

The grievant, Cheryl Smith, has been employed by the County in its Pine Valley Manor Nursing Home for approximately five years with a satisfactory personnel record and work history. She had, prior to this incident, never received any discipline.

As a nursing assistant she is responsible for the personal care of a number of residents including the transfer of non-mobile patients from their beds to wheelchairs and back again as the occasions arise. A piece of

equipment, utilized for the transferring, the "Hoyer Lift," is available to assist the nursing assistants in their transfer of the patients.

The evidence fails to establish that the County made it clear to employes that they were not to transfer patients by themselves when utilizing the Hoyer Lift prior to March 5, 1991. Although a written policy existed which stated two persons were required for operating the Hoyer, the policy manual may not have been readily available on the floor. Moreover, at least three other nursing assistants testified that they were unaware of the existence of said policy. However, notwithstanding Union assertions to the contrary, the testimony of supervisory nurse Janine Crary clearly reflects her instruction to a group of nursing assistants under her supervision that the nursing assistants were always to have help by another assistant when transferring patients with the Hoyer lift. According to Crary, she told a group of assistants, which included Smith, on or about March 5, 1991, that "If I ever catch you transferring with just one (referring to operating the Hoyer), I will write you up."

Significantly, the grievant, who admitted her presence at the meeting, did not recall whether Crary raised the subject of using two assistants on the Hoyer lift. She claimed that she was unaware that there was a policy of requiring two nursing assistants to operate the Hoyer at any time prior to the incident in dispute.

On March 22, 1991, Smith was returning a resident to his room. Another nursing assistant, Pat Ackmann, offered to help Smith transfer the resident from his wheelchair to his bed. Smith declined the offer, noting that Ackmann probably had a great deal of work to do anyway.

Ackmann then informed Crary that Smith was transferring a patient on the Hoyer by herself. Crary went to the resident's room, stood outside of the door listening to Smith operate the Hoyer, then entered and asked the grievant whether she had transferred the patient by herself. When Smith indicated that she had done so, Crary told her that in the future she should have assistance when operating the Hoyer lift.

Approximately one month later, Smith was summoned to the Director of Nursing's office where she was suspended for ten days because of the March 22 incident and sent home. The suspension is the subject of the instant grievance.

POSITION OF THE PARTIES

County

The County asserts that there was a clear written policy regarding operating the Hoyer lift that was known or should have been known by the grievant. It points to unrebutted testimony by Crary which establishes that Smith was clearly told about the policy during a meeting two to three weeks prior to the incident.

Stressing that Smith admits making the transfer without Ackmann's assistance, the County argues that her actions were dangerous and created a safety hazard for the patient involved in the transfer. Smith's action, it argues, also subjected the nursing home to possible liability and fines from regulatory agencies.

The County maintains that the punishment was warranted and appropriate under the circumstances. It requests that the discipline imposed be sustained.

Union

According to the Union, there is no dispute that Smith transferred a patient using a Hoyer lift without assistance from another employe. This, however, is the only undisputed fact in this case. The Union, to dispute the County's contention that Smith violated a long-standing and well-known rule, presented three other nursing assistants with some thirty-five years of service among them, who testified that they had never heard of the policy requiring two employes to use the Hoyer until the grievant was disciplined. Moreover, the Union points out that the policy manual was not available on the floors when employes looked for it.

The Union stresses that the County "assumes" assistants have knowledge in the operation of the Hoyer and has not adequately informed employes of its two-employe operation policy. It points out that the County is not so careless with its restraint policy, making the argument that there really was no such rule in existence at the time. Thus, the grievant cannot be held responsible to adhere to said non-rule.

The Union claims that Supervisory Crary's testimony regarding the March 5 meeting lacks credibility. It also asserts that the credible evidence demonstrates that unassisted Hoyer lift transfers are not inherently dangerous. It notes that there is no evidence that any resident has ever been injured by an unassisted Hoyer transfer and that if unassisted transfers were inherently dangerous, product instructions would so state.

Viewing Crary's actions on March 22, 1991, the Union argues that Crary either regards sole Hoyer transfers to be safe or she was willing to take foolish risks with patient safety to prove a point to an employe. It argues that in reality, sole Hoyer transfers are not dangerous at all; that Crary knows this; and that her actions prove it.

According to the Union, if unassisted Hoyer transfers were truly dangerous, the County would not have waited a month to discipline the grievant. It stresses that the punishment imposed far exceeds the seriousness of the offense, bringing to the Arbitrator's notice, several instances where residents were injured and the nursing assistants responsible received two or three-day suspensions. Because there is no explanation for the disparate treatment, there is no reasonable basis for treating Smith differently than other employes.

Even if it were believed that Smith was properly on notice of the existence of the rule by virtue of a discussion with Crary on March 5, 1991, Crary testified that she told these employes she would "write them up" if she caught them violating the rule. Being given a ten-day suspension on the first offense is a far cry from being "written up." Therefore, the discipline imposed, the Union argues, is well beyond the discipline employes were led to believe they would receive, and is, therefore, unreasonable.

In sum, the Union suggests that the County failed to take any steps typically taken by employers to insure employe awareness of the alleged rule violated, that it has exaggerated the hazards of solo operation to justify the harsh degree of discipline imposed, and that said discipline is out-of-line with the discipline imposed on other employes for more serious offenses, including offenses which resulted in injury to residents.

It requests that the grievance be sustained and the grievant be made whole from any loss of wages and benefits resulting from her suspension and that said suspension be expunged from her personnel record.

DISCUSSION

The stipulated issue posed by the parties can be divided into two sub-issues; namely, (1) Did the County have just cause to discipline the grievant? and (2) Did it have just cause to impose the ten-day suspension?

While the facts in this case are disputed, the Arbitrator has no reason to disbelieve the testimony presented by Director of Nursing Linda Beggs who stated that the County had adopted a uniform policy requiring two nursing assistants to utilize the Hoyer lift in making patient transfers. Beggs credibly testified that she understood this policy to be contained in the policy manual which is maintained on all floors of the nursing home.

While the Union argues that making a solo transfer is not inherently unsafe or dangerous, the management of the County is well within its prerogatives to determine that it is unsafe to make such a transfer and to forbid the nursing assistants from making Hoyer lift transfers without help from another employe. The undersigned declines to substitute her judgment for that of management in this respect.

The fact that the policy manual was not readily located by the Union president on the floor in question and the Union testimony of at least three other assistants that they were unaware of any such management policy prior to the grievant's suspension is, however, problematic. If the undersigned were presented with just this amount of evidence, the discipline which the County seeks to impose could not be sustained because it does not appear that the County succinctly and uniformly communicated its Hoyer transfer policy to its employes so that said policy was common knowledge. However, as the County correctly notes, approximately three weeks earlier, Smith and some of her co-workers were expressly warned by their supervisor not to make Hoyer lift transfers without assistance.

Because Crary's account of this meeting in which she issued the warning is unrebutted, Smith had notice of the County's Hoyer policy. Accordingly, there was just cause for the County to discipline the grievant, who disregarded Crary's instructions and admitted making the solo Hoyer lift transfer having declined assistance from a co-worker. Smith's contention that she could not "recall" any such warning from Crary does not rebut Crary's credible testimony.

A question, nevertheless, remains as to the severity of the discipline imposed. The Union's point that the County has not communicated its Hoyer

policy to employes as effectively as it has communicated its restraint policy to the employes is well-taken. Yet the County has sought to impose a discipline more severe than that awarded to employes who have violated the restraint policy. Crary's action of waiting outside the door until Smith actually accomplished the transfer by herself also convinces the undersigned that the County does not consider this action to be as serious a safety breach as violating the restraint policy.

The County has given no reasons as to why Smith should be punished more severely than those employes violating a well-known policy whose actions resulted in harm to the residents in whose care they were entrusted. Because no such evidence has been presented to explain this disparate treatment, it must be concluded that the ten-day suspension is unduly harsh. Given Smith's satisfactory work history, a two-day suspension, similar to those awarded to employes violating the restraint policy, is appropriate under the circumstances.

Accordingly, it is my decision and

AWARD

1. That the County did have just cause to discipline the grievant.

2. That the County did not have just cause to impose a ten-day suspension.

3. That it did, however, have just cause to impose a two-day suspension.

4. That the County is ordered to change its disciplinary record and make the grievant whole for any wages and benefits lost in excess of two days.

Dated at Madison, Wisconsin this 8th day of April, 1992.

By _____
Mary Jo Schiavoni, Arbitrator