

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 LOCAL 2427, AFSCME, AFL-CIO : Case 217
 : No. 49596
 and : MA-8002
 :
 SHEBOYGAN COUNTY :
 :

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Ms. Louella Conway, Personnel Director, Sheboygan County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1992-94 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union requested, with the County's concurrence, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear a disciplinary grievance. The undersigned was appointed and held a hearing in Sheboygan, Wisconsin, on November 17, 1993. The parties completed filing briefs on February 21, 1994.

ISSUE:

The parties agree that the issue is:

Was the written warning given to Jeff Swoverland on January 19, 1993, for just cause? If not, what is the appropriate remedy?

BACKGROUND:

The Grievant, Jeff Swoverland, is a certified nursing assistant at Rocky Knoll Health Care Facility, one of the nursing homes run by the County. The Grievant has been employed there for four years. He works a second (or PM shift) and has no prior record of discipline.

On January 19, 1993 1/ the Grievant was given the following written warning:

STATEMENT OF INCIDENT Being disrespectful to a client/poor work performance.
 A complaint was received from a family member stating that Jeff had been rough with a resident. After interviews

1/ All dates are for the year 1993 unless otherwise stated.

with resident and family it is felt that this is not an isolated incident. The supervisor who received the complaint noted that the resident had a skin tear on the wrist.

The resident involved in the complaint will not be named here. He apparently complained to his family, and the family complained to the PM nurse, Mary Ann Dudzinske, who reported to Social Services Supervisor Lee Ann Thibodeau and Director of Nursing Nancy Slupski the following in a memo dated January 4, 1993:

This evening (resident's name omitted)'s son told me (resident) told him this AM when (resident) refused to get dressed -- pants on -- a "big" male n.a. grabbed (resident)'s wrist and twisted it.

His left arm above the wrist noted to have dry skin tear approx 2" long. (Resident) has had some episodes of confusion, was resistive to care -- near combative this PM. -- Did refuse to wear pants. No male n.a. worked this PM. There is no report or incident report from day shift. I told (resident)'s son I would pass this info to appropriate persons.

The Grievant was not accused of causing a skin tear to the resident, but of being rough and disrespectful. The Grievant did not work on January 4th.

When Thibodeau received the complaint, she conducted an investigation which did not end until January 19. She felt that the allegation of rough handling did occur, based on the resident's complaint which did not change over time, despite the fact that he had some confusion and memory problems. Moreover, the resident's son reported that his father identified the Grievant by his first name, Jeff, as a large male with a beard. The Grievant wears a beard and is of average height and weight.

Thibodeau testified that the resident and the family could not give a specific date of the rough treatment, just a general time frame. Slupski, Thibodeau, and the Facility's Administrator, William Schoen, felt that the rough treatment could have happened before January 4th. Thibodeau felt that because the resident had a general fear of the Grievant, the complaint regarding rough treatment was not an isolated incident.

The personnel policies for County institutions provide that a first offense of being disrespectful to clients warrants a written reprimand, in the absence of aggravating or mitigating circumstances.

When Thibodeau and Slupski met with the Grievant and Union Steward Sharon Zirtzloff on January 19, the level of discipline had already been determined. The Grievant wrote a statement saying he did not have a problem with any resident. Zirtzloff and the Grievant testified that the written warning had been prepared before they met with the Slupski and Thibodeau. Zirtzloff and the Grievant also both testified that Slupski and Thibodeau stated that the incident occurred on January 4th. The Grievant told them that he did not work on January 4th.

According to the Grievant, Thibodeau and Slupski would not initially tell him who the complainant was, but only that it was a male resident. The Grievant testified that he looked at the charts of male residents to narrow it down. It is unclear when he went to look at these charts.

After the meeting with Thibodeau and Slupski, the Grievant and Thibodeau went to the complaining resident's room. According to the Grievant, Thibodeau

woke him up, and he identified the Grievant as "Mr. Smith." According to Thibodeau, the resident initially did not look at the Grievant, and then said and he did not like being "thrown around like a dog." Thibodeau testified that the Grievant said, "we all get treated like dogs." She also felt that the Grievant did not try to establish any rapport with the resident. The resident was known to be resistive to care or combative at times.

Another employee, Cheryl Koch, recalled a skin tear incident with the resident. She was in his room when the day shift floor nurse, Patricia Geiger, entered, and asked him if he received an injury to his arm by "Pete." The resident said yes, that he was mad and struck out at the aide, Pete Watry. Watry is a tall male. In January, he wore a beard but now has only a mustache. He was not working between January 1st and January 11th. The Grievant testified that residents often mix him up with Watry. Another employee, Mike Erdmann, had a beard. Erdmann was described as a thin male with glasses, not as tall as the Grievant,

The Grievant testified that he found nothing charted regarding the skin tear until January 23rd, when a late entry noted a skin tear that happened on January 4th. The Grievant stated that he was taught to walk away from patients who are resistive to care, and wait for awhile and try again later.

THE PARTIES' POSITIONS:

The County states that under state law, no form of abuse to residents will be tolerated, whether physical, verbal or mental. The Grievant was aware of the County's policy on resident rights and has received inservice training on residents' rights which include how to deal with resistive residents. Even though the particular resident involved was combative or resistant to care, laws and policies require that such residents be treated with respect and dignity.

While the Grievant testified that the incident could have involved another aide who also had a beard, Pete Watry, the County notes that Watry was on sick leave from January 1 through January 11, and the incident was reported on January 4. While the Grievant did not work on the 4th, he worked on January 1, 2, and 3. The County does not claim that the incident happened on January 4th, but that the incident was reported on the 4th.

The County asserts that the fact that the resident related the same information on several different occasions confirms the fact that the incidents occurred, and the resident and family identified "Jeff" as the aide who had given him rough treatment. Thibodeau did a complete investigation, and the resident never changed his story. Thibodeau also took the Grievant to the resident's room to reconcile with the resident, and it was after this that it was determined that discipline was appropriate. Union representative Zirtzlaff stated that the discipline was already written out when he accompanied the Grievant to the meeting, but the Grievant's statement is that the action to be taken was not completed with he met with Thibodeau. The County imposed its normal level of discipline in accordance with its progressive discipline policy.

The Union argues that the Grievant was not even at work the day of the alleged incident, January 4th, which is supported by the schedule and testimony of the Grievant and the PM nurse who received the complaint from the family. The Grievant also worked PM or second shifts, and the incident allegedly occurred in the morning. Dudzinske's report refers to a big male, and there were three males that work on that ward. The original report did not mention a beard or name the Grievant, and the three males -- Watry, Erdmann, and the Grievant -- all have beards. The Union further notes that the skin tear referred to in Dudzinske's report was not formally documented until January 22nd. The resident has episodes of confusion, and on January 19th, the resident called the Grievant "Mr. Smith," and at a later date, told other

employees that it was "Peter" and it was an accident.

The Union states that it does not take any kind of patient abuse lightly, but to be wrongly accused is a matter of pride to an employee and a matter of keeping one's employment record out of the line of progressive discipline. The Union contends that the County has not proven that the Grievant did anything to the patient on January 4th as charged, and asks that the warning be removed from his records.

DISCUSSION:

There is no question but that rough treatment of a resident warrants discipline, and a written warning would be appropriate for such an infraction. The question is whether the County has demonstrated that the Grievant did indeed treat the resident in a rough manner.

One of the major problems with this disciplinary action is that it is almost void for vagueness. There is no notice to the Grievant of when the incident for which he was disciplined happened, or who the complaining resident was. The written warning also refers to a skin tear on the resident's wrist, but now the County states that Swoverland is not being disciplined for the skin tear, but for the rough handling of the resident.

Dudzinske's report is dated January 4th. The first paragraph of her report clearly indicates that the incident happened on the 4th, during the morning, and Swoverland did not work any shifts on the 4th. However, the written warning, issued on January 19th, does not specify any date of the incident. Thibodeau, who was responsible for the investigation, testified that the family could not give a date, just a general time frame, and she concluded that the incident could have happened before the 4th.

When, then? The Grievant is entitled to notice of what he is being charged with and when it occurred. The County's warning amounts to a statement that he was rough with someone sometime. Swoverland and Zirtzlaff testified that during the disciplinary meeting, they were told that the incident occurred on January 4th. Did the Employer change the date once it learned that Swoverland did not work on the 4th?

Swoverland and Zirtzlaff also testified that the written warning was already prepared by the time they met with the Director of Nursing and Thibodeau. The employer should conduct its investigation in a fair and objective manner, and where the employer fails to obtain the employee's side of the story before a decision regarding discipline is made, there is a basic lack of fairness in the process.

Every employee is entitled to know what he or she is being charged with, and with some degree of specificity -- such as in this case, what is the allegation of roughness, to whom, and when did it occur. That's not asking too much from an employer. The disciplinary action needs to be specific enough in its allegations in order to direct the Grievant to change specific behavior. The County's claim that this was not an isolated incident has no evidence to support such a conclusion, except the social worker's feeling that it was not an isolated incident based on her conversations with the resident. I would require more proof to sustain such an allegation.

For the reasons noted above and based on the record as a whole, I find that the County did not have just cause to issue a written warning to Jeff Swoverland on January 19th and the County will be ordered to remove this warning from his personnel records.

AWARD

The grievance is sustained.

The County is ordered to remove the written warning issued on January 19, 1993, from Jeff Swoverland's personnel file.

Dated at Elkhorn, Wisconsin, this _____ day of April, 1994.

By _____

Karen J. Mawhinney, Arbitrator