

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 NORTH CENTRAL HEALTH CARE FACILITIES : Case 13
 : No. 50918
 and : A-5220
 :
 LOCAL 150, SERVICE EMPLOYEES' :
 INTERNATIONAL UNION, AFL-CIO :
 :

Appearances:

Mr. David L. Wadinski, Union Representative, Local 150, Service Employees' International Union, AFL-CIO, appearing for the Union.
 Ruder, Ware & Michler, Attorneys at Law, by Mr. Ronald J. Rutlin, appearing for the Employer.

ARBITRATION AWARD

Local 150, Service Employees' International Union, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. North Central Health Care Facilities, herein the Employer, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Wausau, Wisconsin on June 27, 1994. A copy of a transcript of the hearing was received on July 27, 1994. The parties completed the filing of post-hearing briefs on September 26, 1994.

ISSUES:

The parties stipulated to the following issues:

Did the Employer have just cause to discharge the grievant? If not, what is the appropriate remedy?

BACKGROUND:

The Employer provides extended care and mental health care services. There is a food service department staffed by a Director, an Administrative Dietician, three Line Supervisors/Food Service Managers, and a number of Cooks and Dietary Aides. The Director is Christine Hess. The Line Supervisors are Pete Buckmaster, Cathy Higar and Joyce Macaluso. The grievant, Jeannene Looker, was employed as a Dietary Aide from April 18, 1990 through February 18, 1994.

Food Service Managers work shifts of either 6:00 a.m. to 2:30 p.m. or 11:00 a.m. to 7:30 p.m. Dietary Aides work shifts of either 6:30 a.m. to 3:00 p.m., 10:30 a.m. to 7:00 p.m., or 4:00 to 7:30 p.m. Dietary Aides and Cooks are given job task assignments which detail the tasks for which each person is responsible and the approximate time periods for accomplishing the various tasks.

On Friday, February 11, 1994, 1/ the grievant was working the 10:30 a.m.

1/ Unless otherwise specified, all other dates herein refer to 1994.

to 7:00 p.m. shift in the position of "late salad area." There are numerous conflicts in the testimony of the witnesses with respect to the actions of the grievant on that date.

The following account is a composite of the testimony of the Food Service Managers concerning the events on February 11. At approximately 1:45 to 2:00 p.m., Buckmaster, who was working the 6:00 a.m. to 2:30 p.m. shift, saw the grievant in the work area of the Cooks. He asked the grievant if she had completed her work and she replied that she had not. He told her to return to her work area. Shortly thereafter, Buckmaster again saw the grievant in the Cooks' area, so he went and sent her back to her work area. At about 2:20 p.m., Buckmaster again saw the grievant in the Cooks' area. He went and asked her if she had finished her work. When she replied that she had not finished her work, he sent her back to her work area. Before Buckmaster left work at about 2:30 p.m., he told Higar, who was working the 11:00 a.m. to 7:30 p.m. shift, to keep track of the grievant because she had been leaving her work area without her work being done. Either shortly before, or shortly after, 2:30 p.m., two Cooks told Higar that they needed some help to complete their work. Right after the Cooks requested help, another Dietary Aide told Higar that she was finished with her tasks for the day, so Higar sent that Aide to help the two Cooks. At about 2:45 p.m., Higar saw the grievant in the Cooks' work area.

Higar told the grievant to get back to her work area. Higar then went to the dish room and then to the food service office. When she saw the grievant in the Cooks' area again, Higar told her to get to her area and to finish her work. Higar saw the grievant back in the Cooks' area at approximately 3:00 p.m., so she told the grievant to finish her work. The grievant replied that she was finished with her work. Higar told her that she still had to stock C2.

Higar then went to the food service office and talked to Macaluso about the grievant's behavior. Macaluso told Higar that earlier she had observed the grievant dancing around the table in the Cooks' area after Higar had left the area. Macaluso was working in the food service office on a project on February 11. Macaluso also told Higar that at numerous times she had seen the grievant go into the Cooks' area and talk with them until Higar approached the area at which point the grievant would return to her work area. Shortly after 3:00 p.m., Higar went to the grievant and had her come to the office. Higar then told the grievant that she was being sent home because of her behavior and for not following directions. The grievant responded that she would be good. Higar arranged for another supervisor to give the grievant a ride home. Prior to going home, the grievant telephoned a Union steward to inform the steward that she was being sent home.

The following account is a composite of the testimony of the grievant and one of the Cooks. The grievant testified the only time on February 11 that a supervisor had told her to go back to her work area was when she was told to do so by Higar at a few minutes after 3:00 p.m. According to the grievant, she had been in the Cooks' area at different times during the day either to get pans, utensils, covers or spatulas or to ask the Cooks if they needed pans, but did not go to that area to work, except at 3:00 p.m., or to talk. She was with the two Cooks at about 2:20 p.m. when they asked Higar if the grievant could help them. Higar said the grievant could help the Cooks as soon as she finished her own work. The grievant said that Macaluso may have seen her dancing around in the Cooks' area at one time when she was telling the Cooks that she had made it through a day without smoking.

The grievant was not scheduled to work on Saturday or Sunday. She returned to work on Monday and also worked on Tuesday and Wednesday. Thursday was her scheduled day off. When she reported to work on Friday, she was called into a meeting with Hess and Marilyn Johnson, a Union steward. Hess gave the grievant the following letter:

This letter is notification that your employment with North Central Health Care Facilities will terminate effective February 18, 1994. The reason for your termination is uncooperative behavior.

On December 7, 1993, you were suspended from work for intentionally putting dishes of food on the conveyor belt rather than the patient's tray thus disrupting the work flow for other employees. You were advised that further incidents of this type would result in your termination.

On February 11, 1994 at 1:45 p.m. you were observed by Cathy Higar, Food Service Manager helping in the cook's area with sandwiches although that was not your assigned area nor was your assigned work completed. You were directed by Ms. Higar to return to your assigned work area which you did. However, at 3:00 p.m. you were again observed back at the cook's area helping make sandwiches although your assigned work still was not done nor had any Food Service Manager directed you to work in that area.

Providing efficient food service to residents of the Facility requires a cooperative team effort by all Food Service employees. We cannot attain this goal if employees are allowed to ignore supervisory instructions and do whatever task they like when they want to. It is apparent from your disciplinary record that you are unable to work cooperatively and follow directions. I have therefore decided to terminate your employment.

During the meeting, the grievant's work record was discussed and she was given an opportunity to make any comments which she wanted to make. Hess did not rescind the termination. The grievant filed a grievance contesting the termination, which grievance became the basis for the instant proceeding.

During the time period of February 20, 1993 through July 14, 1993 the grievant had received twelve work performance-communication forms, which are non-disciplinary in nature and are intended to give either positive reinforcement or suggestions for improving performance. Nine of the forms dealt with behavior which the supervisor considered inappropriate. Three of the forms were of a complimentary nature for the grievant's performance.

On July 15, 1993, the grievant was given a written copy of a verbal warning for refusing to follow a supervisor's directive. On October 19, 1993, the grievant was given a written warning for uncooperative and insubordinate behavior. On November 15, 1993, the grievant was given a written warning for eating left over food after being told on two prior occasions that such an action was not permitted. The grievant was suspended for one day without pay on December 7, 1993, for uncooperative behavior while working on the tray line.

The grievant grieved the suspension, but the grievance was denied by the Employer and the grievance was not processed to arbitration.

POSITION OF THE UNION:

None of the warning notices previously received by the grievant are similar in nature to the most recent incident and, therefore, the termination did not meet the test of progressive discipline. Further, the grievant was not

given the opportunity to correct any mistakes she may have made in order to keep from receiving a greater degree of discipline.

The Employer failed to prove that the grievant had a behavior problem. The Employer attempted to consider all of the grievant's warnings as inappropriate behavior in an attempt to show it had followed progressive discipline.

The grievant had not been disciplined previously for being out of her work area. Moreover, it is not uncommon for employes to be in other work areas to help other employes when they have finished their work. Conversations between employes while they are working are not prohibited. Due to the inconsistent testimony of the supervisors, it is questionable whether any of their testimony is credible.

The Employer did not have just cause to discharge the grievant. Even if some discipline was appropriate, discharge was too severe a penalty for a four year employe. Therefore, the grievant should be reinstated with full back pay and other benefits.

POSITION OF THE EMPLOYER:

The Employer asserts that it had just cause to discharge the grievant for her repeated refusals to obey legitimate orders from her supervisors to stay in her work area and to finish her assigned job tasks. Such a persistent refusal to obey a legitimate order constitutes insubordination and justifies summary discharge without the necessity of prior warnings or attempts at corrective discipline.

The grievant had received increasingly severe penalties in the past via a progressive disciplinary process, including non-disciplinary communication forms, a verbal warning, two written warnings and a one day suspension, for her insubordinate and uncooperative behavior. At each stage of the disciplinary process the grievant was advised that further such behavior would not be tolerated and would result in a more severe penalty, including termination.

The grievant's interest in the matter and the amount of testimony to the contrary indicate that her testimony can not be believed. Considering the patience with which the Employer had dealt with the grievant in the past, it would be uncharacteristic for Higar to send the grievant home after only instructing the grievant to return to her work area once. The grievant stated that Buckmaster and Higar lied about instructing her to return to work more than once. In view of the grievant's interest in saving her job, her testimony should not be credited when it conflicts with the testimony of her supervisors.

The only testimony in support of the grievant's version of the events came from her friend, Goldsworth. Goldsworth's testimony was worded in such a way as to do her friend the least amount of harm. The grievant's testimony was generally uncooperative and evasive.

RELEVANT CONTRACTUAL PROVISIONS:

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Article 23 - GENERAL PROVISIONS

- E. Discipline: The Employer shall not discharge nor discipline an employe without just cause.

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DISCUSSION:

The grievant acknowledged only one occasion on February 11 when a supervisor told her to go back to her work area. That occasion was shortly after 3:00 p.m. when Higar told her to go do the C unit. The grievant testified that Buckmaster and Higar had lied when they testified that on five prior instances on February 11 one of them had told the grievant to return to her work area. The undersigned does not find the record supports the Union's assertion that inconsistencies between the testimony of the supervisors requires the grievant's testimony to be credited. Buckmaster testified that the first time he told the grievant to return to her work area on February 11 was about 1:45 p.m. Higar testified that when she came on duty about 11:00 a.m., Buckmaster told her to keep an eye on the grievant. Higar did not say that Buckmaster told her at that time he had talked to the grievant about being out of her work area. Since Buckmaster was not asked whether such a conversation had occurred, his testimony is not in direct conflict with Higar's testimony, as implied by the Union.

Higar testified that when she told the grievant to return to her work area at about 3:00 p.m. on February 11, the grievant had completed her assigned duties for the time period ending at 3:20 p.m., but she had other duties to be completed prior to 3:40 p.m. Thus, such testimony does not conflict with the termination letter which stated in part "However, at 3:00 p.m. you were again observed back at the cook's area helping make sandwiches although your assigned work still was not done..." Consequently, the record does not reveal any significant inconsistencies in the testimony of the various supervisors concerning their accounts of the events on February 11.

One of the Union's contentions is that the Employer considered a number of warnings for unrelated infractions in deciding to terminate the grievant. As a rule, an employe's work record should not be considered in determining whether the employe is guilty of committing the infraction which initiated the termination. However, an employer should consider an employe's work record in determining the level of discipline to be imposed. In fact, the Union urges such a consideration in the instant case, when it argues that the penalty of discharge was too severe in view of the grievant's length of service with the Employer.

Moreover, the termination letter stated that the basis for the grievant's termination was her uncooperative behavior. The letter then continued to explain the Employer's rationale for that basis, including the conclusion that the grievant was unable to work cooperatively and follow directions. Several of the communication forms issued to the grievant in 1993 certainly dealt with those subjects. Both the verbal warning dated July 15 and the written warning dated October 19 resulted from the grievant's failure to comply with directions and from her uncooperative behavior in completing assigned duties. Similarly, the grievant's suspension on December 7 resulted from her behavior on the tray line, which behavior reasonably could be characterized as being of an uncooperative nature. Accordingly, the Employer had a sound basis for judging the grievant's conduct on February 11 to be similar in nature to the incidents which had resulted in earlier communication forms and disciplinary actions. The evidence clearly supports the Employer's contention that it had followed a program of progressive discipline in an attempt to correct the grievant's behavior. The record leaves no doubt that the grievant was given ample opportunities to correct her conduct and that she received adequate warning that further incidents would lead to additional discipline, including termination of her employment.

Whether or not the grievant's actions on February 11 were deserving of discipline is a judgment which rests on the determination of which version of her actions is accepted. Acceptance of the grievant's version would require a conclusion that the three supervisors had a shared motivation for fabricating a basis to justify the termination of the grievant, and therefore, they all lied in their testimony concerning the grievant's conduct on February 11.

Although most of the communication forms were critical of the grievant's conduct and were issued by Higar, three of the forms containing criticisms were from other supervisors. Also, one of the three communication forms which complimented the grievant for her work was from Higar. In order to conclude that there was a conspiracy to achieve the grievant's discharge, it would be necessary to assume that the conspiracy was founded and initiated early in 1993 when the various supervisors began issuing communication forms to the grievant to inform her of conduct which they did not consider appropriate. Further, the assumption also would have to be made that the supervisors included some communication forms which complimented the grievant on her conduct in an attempt to avoid having the grievant think that they were conspiring to arrange her discharge. There is simply no basis in the record to conclude that the three supervisors conspired to get the grievant terminated by fabricating stories of her conduct and their responses to her conduct.

The testimony of Goldsworth never directly refuted the testimony of the supervisors that on several occasions they observed the grievant out of her work area and talking to the cooks. Similarly, the grievant admitted that she might have been in the Cooks' area more than once on February 11, but only to get equipment and not to talk to the Cooks. Such a characterization by the grievant of her activities implies that the supervisors may have misinterpreted her motives for being in the Cooks' area. Further, the grievant testified that, although she did not recall dancing around in the Cooks' area as Macaluso testified, she might have done so because she had gone a full day without smoking. Certainly the grievant had an incentive for denying the conduct to which the supervisors testified she had engaged on February 11. The undersigned is not persuaded that the grievant's rendition of her actions on that date should be accepted. Rather, the undersigned believes that the supervisors gave the accurate account of the grievant's conduct on that date.

The grievant was not discharged just for helping other employes when she had finished her tasks. Rather, she was discharged for behavior which the Employer appropriately considered to be uncooperative and insubordinate in nature.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Employer did have just cause to discharge the grievant on February 11, 1994; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 18th day of November, 1994.

By Douglas V. Knudson /s/
Douglas V. Knudson