

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEBOYGAN COUNTY INSTITUTIONS
EMPLOYEES, LOCAL 2427, AFSCME, AFL-CIO

and

SHEBOYGAN COUNTY

Case 282
No. 52843
MA-9125

Appearances:

Ms. Helen Isferding, District 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

Sheboygan County Institutions Employees, Local 2427, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Sheboygan 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 Union, with the concurrence of the County, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held on October 10, 1995, in Sheboygan, Wisconsin. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on December 19, 1995.

BACKGROUND:

The County operates Rocky Knoll Health Care Facility, a 190-bed skilled resident care facility, where the grievant, Jane Kiefer, was employed as a Certified Nursing Assistant from October 11, 1989 until her discharge on November 30, 1994. On November 27, 1994, the grievant was in a resident's room and was performing morning cares on the resident. Robin Diedrich, a Licensed Practical Nurse, entered the room to drop off a tube feeding bin. The curtains around the resident's bed were almost closed except for a 3 inch opening. Diedrich heard bed and side rail noises and peeked through the curtain. She observed that the resident was on her right side facing the window and the grievant had her left hand on the resident's side. She saw the grievant hit the resident several times in the left upper arm area with her right hand using a closed fist. Diedrich was very upset to see this and quietly left the room. Diedrich knew she had to report this to a supervisor and walked up and down the hall. A supervisor came

by and Diedrich was crying and upset and stated she had to talk to the grievant. After about ten minutes, the grievant came into the hall and Diedrich asked to speak with her. They went into a back room and Diedrich confronted the grievant about what she saw. According to Diedrich, the grievant denied hitting the resident to inflict harm. The supervisor came into the room and was informed as to what had been observed. The supervisor called the Director of Nurses who told her to send the grievant home until contacted by the Director of Nurses. An investigation was conducted and the County discharged the grievant on November 30, 1994 for resident abuse. The discharge was grieved and appealed to the instant arbitration. The parties stipulated that the grievance is timely. The parties also stipulated that there were no marks on the resident in question.

Issue:

The parties were unable to agree on a statement of the issue. The Union stated the issue as follows:

Did the Employer discharge the grievant Jane Kiefer without just cause? If so, what is the appropriate remedy?

The County stated the issue as follows:

Did the employer violate the contract when it terminated Jane Kiefer on November 30, 1994? If so, what is the appropriate remedy?

The undersigned frames the issue as follows:

Did the County have proper cause to discharge the grievant on November 30, 1994? If not, what is the appropriate remedy?

Pertinent Contractual Provisions:

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due to him/her for such period of time involved in the matter.

County's Position:

The County points out that it has a legal obligation to care for the residents in the health care facilities it operates. It notes that it must be licensed to operate such facilities as well as comply with all applicable state and federal laws. In addition, the County recognizes that the law grants residents specific rights including the right to sue to receive adequate and appropriate care.

The County contends that there is not an issue of credibility present in this case because Robin Diedrich observed the grievant hitting the resident on the upper arm with a clenched fist. The nurse in charge observed how upset and visibly shaken Diedrich was. It observes that Diedrich's statement on November 27 and 28, 1995 support her testimony. It urges that the evidence established that the incident occurred as described by Diedrich and there was no animosity between Diedrich and the grievant.

The County submits that the grievant abused the resident within the definition of abuse under Wis. Adm. Code HSS 132.13(1) and HSS 132.43(1) and 2. It insists that hitting a resident with a clenched fist is an intolerable infraction and cannot be allowed to occur ever again.

The County states that it was necessary to report the incident to the State and the State investigated and concluded that the County took appropriate action to resolve the situation. The County argues that it has an obligation to address the situation and its discipline policy calls for termination for resident abuse. The County submits that it has a responsibility to protect the rights of all residents at its facilities and all employees including the grievant are given a copy of the County's policy on ethical behavior of employees to residents and the grievant signed a document that she received, read and understood the policy. The County points out that the grievant received on-going training with regard to residents' rights. It alleges that the grievant was observed striking a resident with a clenched fist, behavior which is inappropriate and cannot be tolerated. It insists that termination is the only appropriate discipline. It points out that residents of long-term care facilities are a highly vulnerable group especially like the resident who cannot communicate to defend herself. The County cannot tolerate abuse and the grievant's conduct was of such grievous magnitude that it was abuse and termination was warranted. The County requests that the grievance be denied.

Union's Position:

The Union believes that this is an unfortunate incident where someone "thought" they saw something that they did not. It submits that Diedrich did not see patient abuse and did not see the grievant hitting the resident. It argues that the County must first prove that the grievant did what she is accused of in order to sustain the discharge. It asserts that the grievant did not hit the resident based on the following reasons:

1. There were no marks or bruising on the resident.
2. If Diedrich saw the grievant striking the resident, why didn't she immediately intervene? Diedrich never even spoke to the grievant much less tell her to stop.
3. Diedrich did not confront the grievant until sometime later and did not report the alleged incident to her supervisor immediately which is indicative that Diedrich had doubts about what she had seen.
4. Diedrich stated that the resident was wearing black sweat pants which could not be true because the resident was being diapered.
5. The investigation was not fair because Diedrich's statement was handed in and corrected like a kid's homework.
6. Diedrich's description of what she saw the grievant doing did not constitute harm to the resident and was not the same action the grievant described. Diedrich's description was refuted by the grievant who testified she was trying to hold the resident on her side and because of a past car injury to her lower arm and wrist, she used a fist rather than the flat of her hand. This was misinterpreted by Diedrich.
7. The State investigation found that the grievant was innocent.

On the bases of these reasons, the Union concludes that the County failed in its burden of proof and it asks that the grievance be sustained and the grievant be made whole.

County's Reply

The County contends that the mere fact that there were no marks or bruises on the resident does not change the fact that the grievant used a clenched fist to hold or move the resident and the grievant's demonstration showed she certainly inflicted discomfort on the resident. With respect to the black sweat pants, the County asserts that these may have been in the leg area or on the bed and Diedrich's observation was short in duration. It observes that what the resident was wearing has no relevance because what Diedrich observed was the grievant striking the resident with a clenched fist.

The County asserts that the Union is attempting to confuse the time frame between the incident and the conversation between the grievant and Diedrich. It claims that the record does not establish any different time frame than the ten minutes testified to by Diedrich. It also notes that Diedrich was the nurse on the floor and Anhalt was the charge nurse for the entire facility so the incident was properly reported. The County denies that Diedrich's statement was corrected until the County liked it, rather Diedrich was simply asked to complete a more detailed statement to completely document the incident and the accusation that the County corrected the statement is untrue. The County maintains that it acted correctly and the grievant was properly discharged. It asks that the grievance be denied.

Union's Reply

The Union notes that several times the County stated it had no option but to terminate the grievant, but according to the Union, once the State cleared her, the County had the option to return her to work and make her whole, yet it chose not to do so but rather to ignore the State and deny the grievance.

The Union takes issue with the County's statement that credibility is not an issue because the County chose to credit Diedrich despite the lack of proof of hitting, the grievant's good work record and the State's findings. The Union submits that the grievant's demonstration of what Diedrich originally said on the morning of the alleged incident was not what the grievant actually did. It notes the second demonstration of what she actually did was not patient abuse. It asks that the grievance be sustained and the grievant made whole.

Discussion:

The main issue in this case is whether the grievant hit the resident in the upper arm with a closed fist. LPN Diedrich testified that on November 27, 1994, she witnessed the grievant hitting the resident in the upper arm area three - four times with a closed fist. This is confirmed by Diedrich's written statements made on November 27 and 28, 1994. 1/ There are no inconsistencies in these statements. Diedrich had no reason to fabricate her observations. There was no animosity between Diedrich and the grievant. Diedrich is an experienced employee so this case is not an observation by a new and inexperienced employee. The Union has argued that Diedrich thought she saw what she did not actually see. Based on Diedrich's demeanor as a witness, it does not appear that she would misinterpret what she saw. Resident abuse is serious business and loss of a job by an innocent person due to a misinterpretation or poor observation is also a grave matter. Diedrich surely understood this and yet her report and testimony regarding her observations were clear and convincing. Diedrich did not misinterpret what she saw and it is concluded that she saw what she reported. The argument with respect to the black sweat pants

1/ Exhibits 16, 17 and 18.

does not alter this conclusion. It was stipulated that there were no marks on the resident but the lack of marks does not establish that the grievant did not hit the resident. A person can be struck and show no marks. Why Diedrich did not immediately intervene is troubling but her statement that seeing this upset her may explain why she didn't do anything immediately. Her confrontation with the grievant a short time later and her being in tears supports her being upset.

The grievant has a stake in the outcome of this case and denial of an accusation of wrongdoing protects that stake. The grievant does have an old injury to her upper arm which she testified causes her to clench her fist for greater strength in her hand. Therefore, the grievant has conceded that Diedrich saw a clenched fist by the grievant. Given the factors here; no animosity, clear, precise and consistent statements from Diedrich, Diedrich's experience, and the fact the grievant makes a fist for strength and has a stake in the outcome of the case, the undersigned credits Diedrich and concludes that the grievant hit the resident as described by Diedrich. Although the State took no action against the grievant, this has no bearing on this case. The State may have a different standard for taking action, may have discredited Diedrich or perhaps decided discharge was all that was required. The basis for the State's decision is unknown and the undersigned must determine under the contract whether proper cause exists for termination. Therefore, the State's determination does not affect the outcome in this case.

Having concluded that the grievant struck the resident in the upper arm area several times, the final issue to be determined is whether discharge is appropriate. Hitting a resident as testified to by Diedrich is resident abuse and is inimical to the duties of a Certified Nursing Assistant and her responsibility to provide proper care and treatment of residents. The grievant may not have intentionally tried to inflict harm on the resident and her actions may have been out of frustration in having to handle the resident all by herself. But whether it was done to deliberately harm the resident or not, the grievant's conduct did result in abuse to the resident. The County's policies provide discharge for the first offense of resident abuse. The undersigned cannot conclude that the County acted unreasonably in this case as the grievant cannot be trusted to vent her frustration in the future on any resident. Thus, discharge was appropriate.

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 had proper cause to discharge the grievant on November 30, 1994, and therefore the grievance is denied.

Dated at Madison, Wisconsin this 11th day of January, 1996.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator