

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

PARK VIEW HEALTH CENTER EMPLOYEES
UNION, LOCAL 1280, AFL-CIO

and

WINNEBAGO COUNTY

Case 265
No. 53420
MA-9351

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, on behalf of the Union.

Mr. John A. Bodnar, Corporation Counsel, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Winnebago, Wisconsin, on June 5, 1996. The hearing was transcribed and both parties thereafter filed briefs and reply briefs which were received by August 28, 1996. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Did the County have just cause to suspend grievant Virginia Borgardt and, if not, what is the appropriate remedy?
2. Was grievant Virginia Borgardt properly terminated from employment and, if not, what is the appropriate remedy?

BACKGROUND

The County operates a nursing facility in Winnebago, Wisconsin, where it cares for the infirm and elderly.

Grievant Borgardt was employed there as a Certified Nursing Assistant, ("CNA"), since May, 1992. She received an oral reprimand on January 25, 1993, for poor work performance and a three-day suspension on February 8, 1993, over several violations of patients' rights. None of

those matters involved patient abuse.

Borgardt and fellow CNA Andrea Casad on June 1, 1995, 1/ worked together on the 10:30 p.m. - 6:00 a.m. third shift taking care of patients.

There is a sharp testimonial conflict between Borgardt and Casad -- who was working part-time -- over the latter's claim that she saw Borgardt that night engage in repeated acts of verbal and physical abuse, charges which Borgardt denies.

Casad, now a Registered Nurse who works elsewhere, testified that Borgardt that night forcibly held down the arms of 80 year-old patient "O.R.", 2/ and said in "a very mean tone" "That's enough, knock it off."

Casad added that Borgardt, about 20-30 minutes later, grabbed patient "A.M." 's hands and said: "I don't like you. Go ahead, scratch me. I would like to bring you out to the railroad tracks and leave you there and I can name some others I would like to as well."

Casad then told Registered Nurse Pam Nemmitz, her immediate supervisor, that Borgardt had told a patient that she did not like her. Nemmitz replied she would "have a word" with Borgardt. Casad stated that after Nemmitz spoke to Borgardt, Borgardt throughout the rest of the night repeatedly referred to Nemmitz as a "bitch" and used "the 'F word'".

Casad stated that Borgardt subsequently told sleeping patient "F.B.": "Frieda Bug, Frieda Bug, wake up." Casad said that no one before then had ever referred to that patient in that way and that there was no need to wake up "F.B.". 3/

She also said that Borgardt later told sleeping patient "L.L.": "Wake up. I know you can hear me" and that the patient "slightly" woke up even though there was no need for her to wake up.

Casad further testified that Borgardt placed a wet washcloth over patient "V.G." 's face even though there was no need to do so and that she, Casad, removed it.

1/ Unless otherwise stated, all dates hereinafter refer to 1995.

2/ Initials, rather than actual names, are used herein to identify patients in order to protect their privacy.

3/ This incident was not referred to in the County's subsequent July 7 termination letter to Borgardt. I therefore reserved ruling at the hearing on whether it could be considered in determining whether the County could use it in support of its discharge decision.

For her part, Borgardt said that she put a dry washcloth over patient "V.G." 's mouth on June 1 in order not to be spit upon; that she just held patient "O.R." 's hands "down lightly"; that she never told any patients that night, "That's enough. Knock it off"; that she never told any patients that night she would like to leave them by the railroad tracks; and that she never awakened patient "L.L." .

Casad's next scheduled day of work was on June 4. She that day told supervisor Betty Sparkman what had happened on June 1. Asked why she did not do so earlier, Casad replied: "I was concerned about Virginia and what would happen to her if I did report it."

On cross-examination, Casad admitted that she was unaware of whether other CNAs had difficulty in dealing with the aforementioned patients and that, furthermore, she on June 1 did not speak to Borgardt about any of those incidents.

Personnel Coordinator Mark Luebke interviewed Borgardt on June 12 regarding Casad's allegations, at which time Borgardt either claimed that some of her statements were said in jest, or that some of the allegations against her did not occur, or that she could not remember others. Luebke again spoke to Borgardt on June 22, at which time she denied all the allegations against her except for putting a dry wash cloth on patient "V.G." 's face. Luebke added that it was impossible to interview the patients involved because of their mental condition.

He further stated that the decision was made on June 29 to suspend Borgardt for five (5) days, rather than to fire her, because of her seniority and discipline-free record over the last two years. Thus, Borgardt was suspended for five (5) days and was scheduled to report for work on July 5. In addition, Borgardt was then told that she was being reassigned to the position of Room Attendant on the first shift and that her higher rate of pay would be red-circled. Luebke explained that Borgardt was reassigned to the Room Attendant's position so that she did not have direct contact with patients.

Borgardt failed to report to work on July 5 as scheduled. Luebke said that he later that day spoke to her and told her that she would be fired if she did not report to work; that Borgardt claimed she could not do so because her husband left for work at 2:00 p.m. and that she therefore did not have childcare to take care of her son when she and her husband were not there; that he replied that he would try to change her hours from 6:00 a.m. - 2:00 p.m. to 5:30 a.m. - 1:30 p.m. to accommodate her child-caring needs; and that she said that that was unacceptable. Borgardt subsequently refused to come to work on July 6 and July 7. Luebke terminated her by letter dated July 7.

Luebke also said that the State of Wisconsin was investigating the June 1 incidents at the time of the instant hearing to determine whether Borgardt had engaged in patient abuse contrary to state regulations.

On cross-examination, he stated that no employees other than Casad have ever complained about Borgardt's work in the last several years and that he presented Borgardt with all the facts he had on June 12 when he first met with her.

Administrator Charlene Lowe testified that she interviewed Borgardt on June 22 and 29; that Borgardt did not deny Casad's allegations on June 22; but said that she had not done anything wrong; that Borgardt then admitted that she could have told patient "O.R." that she wanted her on the railroad tracks; that she admitted putting a dry washcloth over patient "V.G."s face; and that she did not deny waking up patients "L.L." and "F.B."

Lowe added that she suspended Borgardt because "there was intent there"; i.e., to abuse patients and that she decided to transfer Borgardt to a Room Attendant's position because there "wouldn't be direct hands-on care with the residents. . ." She also said that Borgardt "told us that she didn't want to work another position."

On cross-examination, she said that Borgardt may have told her that she was joking when she told patient "A.M." about the railroad tracks; that she did not talk to any other CNA's about the June 1 incident; and that an LPN several years ago was transferred to a non-patient care type position after she experienced patient care problems.

CNA Diane Wilcox testified on behalf of the Union that she had worked with Borgardt and that Borgardt had never abused patients. She said that patient "O.R." is "always very, very restless, very moveable, which is why it is sometimes necessary to hold her hands" and that, "I personally will never do this person alone because she is very difficult to handle for one person." Wilcox also stated that patient "A.M." was a difficult patient who "would hit at you" and who regularly threatened to have CNA's fired. She added that patient "L.L." had to be turned in her bed at night to avoid leaving red marks on her body and that patient "V.G." was very hard to handle and "very hard to change".

On cross-examination, she agreed that patient abuse would occur if someone tells a patient that they would like to put them on the railroad tracks and leave them there.

Paul Behnke, Local 1280's President, testified that he attended meetings with management and Borgardt regarding her employment status; that Borgardt then said she did not do any of the things "to the extent which they were stated"; and that she also said that if there were to be any discipline imposed against her, she would have to work the night shift because of her problems with child care.

Borgardt testified that some of her answers to management differed between the June 12 and June 22 meetings because "I had more time to think about what was said at the first meeting, because they didn't give me much time to think of what night that was." She also said that she turned down the Room Attendant position on the day shift because she enjoyed her work as a

CNA and because she must take care of her son - who has Tourette's Syndrome - in the daytime when her husband is working. She also said that she would like to return to the third shift as either a CNA or Room Attendant and she admitted saying during her subsequent unemployment compensation proceeding that she could work days.

On cross-examination, she admitted that Luebke offered to make special scheduling arrangements for her so that she could care for her son and that she turned him down. She also flatly denied ever making any reference to railroad tracks to any patients. She also was unable to say why Casad would make up the allegations against her.

Borgardt subsequently grieved her suspension and July 7 termination, hence leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union argues that the County lacked just cause to suspend Borgardt because she in fact commit any of the misconduct levied against her; because her testimony should be credited over Casad's given Casad's limited work experience; because Borgardt did not have any intent to injure patients; and because "the accusations of physical abuse also seem to be taken out of context." The Union also asserts that the County constructively discharged Borgardt by assigning her to a different job on a different shift, thereby providing "an option to the Grievant that was so unacceptable that she refused to accept it." As a remedy, the Union asks for a traditional make-whole order which includes Borgardt's reinstatement and a back pay award.

The County, in turn, maintains that Borgardt "is not a credible witness" and that Casad's testimony should be credited over Borgardt's; that it had the right to transfer Borgardt to a different position; and that it had the right to first suspend and then terminate her because of her repeated acts of patient's abuse on June 1 and because of her refusal to report to work on June 5, 6 and 7 after she was told by Luebke that she would be fired if she did not do so.

DISCUSSION

This case turns on whether Casad's testimony regarding Borgardt's alleged acts of patient abuse should be credited over Borgardt's contrary denials.

I find that Casad's testimony should be credited in its entirety because Casad was a much more credible witness than Borgardt at the hearing. The record also shows that Borgardt earlier engaged in wholesale evasions during the course of the County's investigation which lead to her suspension and that her testimony at the hearing here differs materially from what she earlier told Luebke and Lowe during their investigation. Thus, I find that Borgardt originally told Luebke on June 12 that she could not remember certain acts and that she had been joking when she made certain other statements, only to deny their occurrence when she again met with him on June 22. I

also find that Borgardt did not deny to Lowe that she woke up patients and that Borgardt then told her that it was possible that she referred to railroad tracks when she spoke to patient "A.M."

All this is why I discredit Borgardt's testimony and why I credit Casad's.

As a result, and based on Casad's credited testimony, I find that Borgardt on June 1 told patient "A.M.": "I don't like you. Go ahead, scratch me. I would like to bring you out to the railroad tracks and leave you there, and I can name some others I would like to as well."

This was a despicable thing to say. When that gross act of misconduct is combined with the fact that Borgardt needlessly woke up patients "L.L." and "V.G." and that she needlessly put a wet washcloth over patient "V.G."s face, it must be concluded that the County had just cause to suspend her. 4/

Thereafter, Borgardt chose to forfeit her job when she refused to report to work on July 5, 6 and 7 after Luebke warned her on July 5 that she would be fired if she did not immediately report to work. Furthermore, the record reveals that Luebke then offered to adjust her schedule so that she could meet her child caring needs, but that Borgardt then turned him down.

That was all that the County was required to do given the fact that it properly transferred Borgardt to a Room Attendant's position on the first shift after she had demonstrated on June 1 that she no longer could be trusted to administer proper patient care.

For while Borgardt claimed here that she could not work days, the record reveals otherwise, particularly since Borgardt represented at her earlier unemployment compensation proceeding that she could work days. All this is why Borgardt was not constructively discharged; she instead chose to voluntarily abandon her job after the County imposed an appropriate level of discipline.

In light of the above, it is my

AWARD

1. That the County had just cause to suspend grievant Virginia Borgardt.
2. That the County had just cause to terminate grievant Virginia Borgardt.

Dated at Madison, Wisconsin, this 5th day of November, 1996.

4/ Given this misconduct, it is unnecessary to discuss Borgardt's alleged mistreatment of patient "F.B."

By Amedeo Greco /s/
Amedeo Greco, Arbitrator