

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL #662

and

CLAIREMONT NURSING FACILITY

Case 23
No. 54391
A-5508

Case 24
No. 54392
A-5509

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Ms. Leeann Anderson and Mr. Scott D. Soldon, on behalf of the Union.
Mr. Alan Brown, Consultant, on behalf of the Employer.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Employer", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Eau Claire, Wisconsin, on February 26, 1997. The hearing was not transcribed and the Union thereafter filed a brief which was received by April 21, 1997.

Thereafter, I by letter dated July 15, 1997, asked Employer representative Alan Brown whether he intended to file a brief and, if so, when he planned to do so. Having not received any response, I am issuing my Award based upon the present record.

ISSUE

The parties have agreed to the following issue:

Did the Employer have just cause to discipline grievants Linda K. Jensen and Patricia M. Bahr and, if not, what is the appropriate remedy?

BACKGROUND

The Employer operates a nursing facility in Eau Claire, Wisconsin, where grievants Linda K. Jensen and Patricia M. Bahr have been employed from 1992 and 1976 respectively. At the time of the instant grievances, they worked the 10:00 p.m. to 6:30 a.m. shift.

On the morning of May 11, 1996, 1/ both finished their shifts and punched out at the time

clock at 6:30 a.m. As a result, they were not "on the clock" after that point. Jensen and Bahr then went to the east wing of the facility on their way to the employee break room. There is a dispute over what transpired in the hall of the east wing.

Licensed Practical Nurse Cheri Haines testified here that she was in Room 304 attending to a patient behind a curtain and that she heard patient "A.Z." 2/, who is 99 years old, ask: "Could you help me to the bathroom?" Haines stated that she then heard Jensen - whose voice she recognized - reply: "Too bad." Haines admitted that she could not see the individuals who were talking at that point. Haines immediately left Room 304 and saw both Jensen and Bahr walk down the hall into the break room. Haines, who did not speak to either of them, then arranged for someone else on duty to take care of "A.Z."

Bahr and Jensen offered a different version of what happened. Both testified that Bahr was complaining to Jensen over having to work on her scheduled days off, thereby preventing her from making a planned trip to Minnesota. Bahr testified that Jensen replied: "Too bad." Jensen testified that she replied: "Too bad you can't visit." Both denied that this statement was directed to "A.Z." They also said that neither one of them responded to "A.Z." when she asked for help because they were precluded from giving any aid under the Employer's work rules which treat off-duty employees as visitors and because they did not know anything about "A.Z."s treatment program. Jensen also said there was no need to respond to "A.Z." because Haines was nearby and that she, Jensen, would have helped out if Haines had asked her.

Haines immediately reported this incident on May 11. Director of Human Resources Fred Poetsch on May 15, subsequently interviewed Jensen and Bahr regarding what happened on May 11. Jensen at that time stated that she was not sure whether she said "Too bad" because that is not something that she would tell a resident. Bahr said almost nothing in that meeting. After hearing their explanations, Poetsch decided to suspend each of them for three days and they both served three-day suspensions.

Bahr and Jensen grieved their suspensions and they ultimately succeeded in having their suspensions reduced to written warnings and in receiving back pay for the three days they were suspended. Administrator Bonnie Ackley testified that she set aside their suspensions because she thought that the Union at that point would drop the grievances.

Ackley admitted that there are no Employer policies which require off-duty employees to aid patients. However, she said that such employees are required to get aid. She added that Jensen and Bahr received written warnings for violating Rule (2)(e) of its policies which requires employees to treat patients with dignity.

Union Business Agent Michael Thoms testified that Jensen and Bahr would have been entitled to overtime under the contract if they aided "A.Z." when they were off-duty. He also said that he had previously complained to management over its failure to conduct proper investigations

before the Employer disciplines employees.

Ruth Garr corroborated Jensen and Bahr's testimony by stating that there are no Employer policies which require off-duty employees to either render aid to patients or get them aid.

POSITIONS OF THE PARTIES

In support of the grievances, the Union asserts that the written warnings are unjust because the Employer did not conduct a fair investigation before it disciplined the grievants; that the grievants, in fact, were not referring to "A.Z." when they walked by her on May 11; that neither grievant "had any duty to the resident because they were off duty"; and that the Employer is precluded now from arguing that the grievants violated the State of Wisconsin's nursing home regulations. As a remedy, the Union asks that the written warnings be rescinded.

The Employer, in turn, contended at the hearing that it had just cause to discipline the grievants because both refused to render aid to "A.Z.", and because both of them were guilty of patient abuse when they mocked "A.Z."s request for aid by replying, "Too bad".

DISCUSSION

I find, in accord with the Union's claim, that there are no valid Employer policies which required Jensen and Bahr to either render or obtain aid for "A.Z." on May 11. For while several Employer witnesses testified that such requirements exist, the Employer has not produced any written proof that employees are required to perform either of those duties when they are off the clock. I therefore credit the testimony of Union Steward Ruth Garr who testified about the absence of any such policies. As a result, the Employer lacked just cause to discipline either Jensen or Bahr over their failure to either render or obtain aid for "A.Z." on May 11.

The Union also complains that the Company's investigation was faulty and that the written warnings should be overturned on this basis alone. Thus, while Poetsch testified that he had not made up his mind on whether to discipline Jensen and Bahr before he interviewed them on May 15, the fact remains that he beforehand had prepared a written document pertaining to said discipline. His actions, while perhaps unintentional, raise the reasonable suspicion that he had decided to discipline them before he spoke to them. Any such predetermination runs counter to one of the most important procedural precepts of the just cause standard, i.e., that discipline can be imposed only after a full and fair investigation.

Nevertheless, Poetsch did speak to Haines before May 15 and he did not impose any discipline until after the grievants gave their explanations as to what had happened. Since Haines was the only other person on scene who was competent to testify as to what had occurred on May 11 (both parties agreed at the hearing that "A.Z." was not competent to testify), it is difficult to see what additional investigation Poetsch could have conducted before May 15. Moreover, it is

immaterial that Poetsch's initial recommendation for a three-day suspension eventually was reduced to a written warning since the severity of the penalty here is a separate question of whether the Employer conducted a fair investigation before it imposed any discipline. Given these latter factors, I conclude that the discipline should not be overturned on the ground that the Employer did fairly investigate this matter.

The only remaining basis for disciplining Jensen and Bahr thus turns on Jensen supposedly telling "A.Z.", "Too bad" when "A.Z." asked them for help. While Jensen and Bahr both claimed that Jensen at that point was only referring to the fact that Bahr had been forced to work on her scheduled days off and that Bahr had to postpone a trip to Minnesota, I discredit their testimony in favor of Haines' contrary testimony since Haines had no reason to shade her testimony.

In addition, Jensen and Bahr gave conflicting testimony as to what Jensen said. Jensen testified she said: "Too bad you can't visit." Bahr said Jensen simply said, "Too bad." Thus, Bahr contradicted Jensen on the most important issue herein - i.e., what and why Jensen said what she did.

Furthermore, neither Bahr nor Jensen on May 15 offered Poetsch the explanation offered here. Given their own contradictory testimony and Haines' credited testimony, I find that no such explanation was offered on May 15 because their story here is untrue. In their defense, the Union claims their reticence before Poetsch was caused by the fact that "Both were simply stunned and had to strain to recall the incident with 'A.Z.' on May 16". I disagree. Based upon their demeanor at the hearing and the totality of the record, it is clear that they did not offer the explanation offered here for one reason and one reason only: it was not true.

In light of the above, it is my

AWARD

That the Employer had just cause to discipline grievants Linda K. Jensen and Patricia M. Bahr; their grievances therefore are denied.

Dated at Madison, Wisconsin, this 5th day of August, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator