

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

COLUMBIA COUNTY EMPLOYEES,
LOCAL 2698, AFSCME, AFL-CIO

and

COLUMBIA COUNTY (HEALTH CARE CENTER)

Case 179
No. 54384
MA-9663

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
appearing on behalf of the Union.

Mr. Donald J. Peterson, Corporation Counsel, Columbia County, appearing on behalf of
the County.

ARBITRATION AWARD

Columbia County Employees, Local 2698, AFSCME, AFL-CIO and Columbia County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union and the County jointly requested that the Wisconsin Employment Relations Commission appoint Thomas L. Yaeger, an arbitrator from its staff, to resolve the Tracy Krueger grievance. Hearing in the matter was held on November 13, 1996, in Portage, Wisconsin. The parties made oral arguments at the close of the hearing in lieu of filing briefs.

ISSUE:

The parties stipulated the issue before the undersigned is:

Did the County have just cause to issue the three (3) day suspension against the grievant for conduct on or about November 22, 1995? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contact (sic) and applicable law. These rights include, but are not limited to the following:

. . .

- D) To suspend, demote, discharge and take other disciplinary action against employees for just cause;

. . .

BACKGROUND:

The grievant, Tracy Krueger, has been an employe of the Columbia County Health Care Center since June 3, 1992. She was employed as a Certified Nursing Assistant (CNA), assigned to work the second or afternoon shift at the Center. On November 22, 1995, the grievant was working the second shift, and was teamed with CNA Poppie. Sometime between approximately 7:00 and 9:00 p.m. that day, while putting residents to bed, Poppie and Krueger went to change and turn resident ND. Poppie gave a statement later that evening to Nursing Manager Manicki that while they were working with resident ND, Krueger, when the resident opened her mouth to talk, firmly placed her hand over the resident's mouth so she couldn't speak. Poppie's statement to Manicki also indicated that the resident appeared startled by Krueger's action and made no further attempt to vocalize; Krueger then removed her hand from the resident's mouth.

Manicki, on November 30, asked Krueger about Poppie's report to her concerning that incident. Krueger denied that she placed her hand over the resident's mouth so she couldn't speak. Manicki then referred the matter to her supervisor, Nursing Director Kotowski. Kotowski also investigated the allegations and spoke with Krueger. Based upon her investigation of the allegations she determined that Krueger had violated resident ND's rights and County policies on the evening of November 22, 1995. Due to the grievant's prior disciplinary record, Kotowski suspended Krueger for three days without pay. That suspension was grieved and is now the subject of this arbitration proceeding.

The County argues the case comes down to one of credibility. While the County appreciates the Union's concerns about hearsay testimony, the balance of credibility favors the County. It believes the two Nurse Managers and the Social Services Director were credible

witnesses. There would have had to have been a grand conspiracy against the grievant to find her testimony credible. That, the County believes, was not the case.

The County also acknowledges there may be a question concerning what constitutes rough treatment of a resident, even though the grievant denies she was in any way rough with residents. And, even if the incidents do not rise to the level of abuse in the eyes of the State Department of Health and Social Services, Bureau of Quality Assurance (BQA), there was a violation of the County policy concerning resident rights. The grievant was charged with violation of resident rights, not resident abuse.

The County argues that if the Arbitrator finds the charge against the grievant is true, then there was just cause for the three (3) day suspension without pay in view of her prior disciplinary record. She had previously been given a verbal warning on September 20, 1995, and a written warning on November 1, for similar incidents of misconduct. These were not grieved. Furthermore, those disciplinary actions also resulted in Krueger being transferred out of the building wings where the incidents occurred.

The County believes the grievant was aware of the policies and rules regarding employee responsibilities and resident rights. The County argues it had no other recourse, beyond the training and counseling it had given the grievant after the prior incidents, but to impose more severe discipline for this latest incident. Therefore, the County believes it had just cause to suspend Krueger, and thus the grievance should be denied.

The Union, on the other hand, concludes there is no testimony from eyewitnesses to the alleged incident. The County has only a hearsay statement from CNA Poppie, but this was rebutted by the direct testimony of the grievant. The Union also argues that there was no eyewitness testimony relative to the other incidents for which the grievant received a verbal and written warning.

The Union believes this case is an example of the problems that arise from allowing hearsay testimony. It asserts the grievant does not have to provide an explanation for why the allegation was made. The burden is on the County to prove the event occurred. The County witnesses only testified as to what they were told, but the only eyewitness to testify as to what occurred in the resident's room was Krueger. Hers is the only credible evidence of what occurred.

The Union concludes the County did not prove the grievant committed the offense with which she was charged, and thus has not established it had just cause to suspend her for three days. Therefore, it believes the Arbitrator should sustain the grievance, order the discipline removed from her file and make her whole.

DISCUSSION:

This case presents the difficult question of how an arbitrator should handle hearsay testimony. This is a very common issue in arbitration proceedings and one that has been extensively written about. In the instant case, the Union objected to the introduction into evidence of three employes' written statements as to conduct by the grievant which they had observed. The Arbitrator, in agreeing to admit the statements, agreed with Union counsel's claim that they were hearsay statements with respect to whether Krueger engaged in the conduct alleged because the statements and the eyewitness employe was not being called to testify concerning the statement. In ruling them admissible I stated to both counsel that if there was contradictory direct testimony that direct testimony would prevail over the hearsay written statements in my evaluation of whether it was proven the alleged incident occurred.

Those hearsay statements related to both the incident leading to Krueger's three-day suspension and two other incidents. The Union has argued that the undersigned should find generally that the County did not prove that the incidents that resulted in the grievant's prior discipline, as well as the three-day suspension, occurred. For many years, it has been an accepted principle of grievance arbitration that an arbitrator will not review the propriety of prior disciplinary action taken against an employe, in an arbitration of a subsequent discipline, where that disciplinary action could have been, but was not grieved. (United Engineering & Foundry Co., 50 LA 118 (Stouffer, 1968); McDonnell Douglas Corp., 51 LA 1080 (Bothwell, 1968)) In such cases, the facts giving rise to that prior discipline are accepted as being correct, and therefore the employe's prior discipline is not subject to attack. Consequently, in this case, because Krueger did not grieve her prior verbal and written warnings they are appropriately before this Arbitrator, and the facts giving rise to them are accepted as stated in the disciplines.

However, there remains the most troubling question of this proceeding. Did the County prove that Krueger placed her hand over resident ND's mouth to prevent her from talking. Director of Nursing, Kotowski, testified that she based her decision to suspend the grievant solely on Poppie's report of Krueger allegedly placing her hand over the resident's mouth, and her prior disciplinary record.

The only evidence in this record concerning that alleged incident is the testimony of Manicki and Butowski concerning the hearsay statement of Poppie that she witnessed Krueger place her hand over the resident's mouth. But, Krueger testified that she did not place her hand over the resident's mouth. The credibility of Manicki and Butowski are not in dispute; however, their investigation and conclusions are footed on Poppie's hearsay statement. Poppie did not testify as to the incident, and Krueger never admitted it. Consequently, I am confronted with the dilemma of crediting a hearsay statement over uncontradicted direct testimony refuting that statement by the only other eyewitness.

The Union correctly noted in its closing argument that the case, as tried, presents a classic example of the problems associated with allowing hearsay statements into evidence. Simply

defined, a hearsay statement is one made by someone other than a testifying witness which is offered in evidence to prove the truth of the matter asserted in the statement. Evidence in Arbitration, Hill and Sinicropi, 1980. It is generally accepted by arbitrators that they are not constrained by the same strict rules of evidence that are followed by the courts. Consequently, arbitrators generally do not reject relevant and material evidence to a dispute, even though it may be hearsay and does not fall within one of the recognized exceptions to the hearsay rule. Generally, this occurs in order to allow the arbitrator to obtain a full understanding of the dispute. Some arbitrators, when ruling on hearsay objections, state they "will admit the evidence for what it is worth." In the instant case, in ruling upon the Union's objection to the admission of Poppie's statement, the undersigned advised the parties that while it was being admitted over the Union's objection, unrebutted direct testimony would be credited over hearsay statements. Thus, consistent with that warning at the time of hearing, I am not going to credit Poppie's hearsay statement over Krueger's testimony wherein she denied she placed her hand over the resident's mouth.

The rationale for doing so is that arbitrators are suspicious of such hearsay statements, particularly where they go to essence of the charge, e.g. "she placed her hand over the resident's mouth." The reason they are viewed as having little or no credibility is because the declarant has not been made available for cross examination and the veracity of the statement cannot be tested. Thus, the accused has no opportunity to challenge the credibility of the assertion. The declarant cannot be questioned about, for example, where was she when she observed the event, how certain was she that it occurred, what was her relationship with the accused, if Krueger had placed her hand on the resident's face, was it done with intent to stop her from talking, what were the circumstances surrounding the incident or any other of a myriad of questions that might be asked to test the veracity of Poppie's statement. Also, due process considerations dictate that the individual accused of misconduct should have an opportunity to cross-examine his/her accuser.

In this case, even after my ruling, Poppie was not called to testify by the County. The undersigned is not aware that she was unavailable or unable to testify. Consequently, for all of the above reasons, in this circumstance, with full knowledge of the consequence of my decision, I have not credited Poppie's hearsay statement. And, the consequence of not crediting the hearsay statement is a finding that the County has not proven Krueger committed the act for which she was disciplined. The only direct evidence on the point, after disregarding Poppie's hearsay statement, is the grievant's testimony that she did not do what the County charged. And, because the County has not proven that Krueger acted inappropriately, they have not established just cause existed to suspend her for three days without pay.

Therefore, based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The County did not have just cause to suspend Krueger for three days without pay for

conduct on November 22, 1995. Consequently, the County shall immediately remove the three-day suspension from her disciplinary record and make her whole for the three days' lost pay and any associated fringe benefits.

Dated at Madison, Wisconsin, this 12th day of August, 1997.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator