

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**POLK COUNTY GOLDEN AGE MANOR EMPLOYEES,
LOCAL 774-A, AFSCME, AFL-CIO**

and

POLK COUNTY

Case 92
No. 54505
MA-9705

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, P. O. Box 364, Menomonie, Wisconsin 54751, for Polk County Golden Age Manor Employees, Local 774-D, referred to below as the Union.

Mr. Robert L. Hachey, Polk County Corporation Counsel, Polk County Courthouse, 100 Polk County Plaza, Suite 40, Balsam Lake, Wisconsin 54810, for Polk County, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the 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 requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Sharon Parson, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on January 30, 1997, in Balsam Lake, Wisconsin. The hearing was not transcribed, and the parties filed briefs April 2, 1997. The parties reserved the right to file reply briefs, but did not file any. I confirmed the close of the record in a letter to the parties dated September 22, 1997.

ISSUES

The parties stipulated the following issue for decision:

Did the Employer have just cause to discipline the Grievant for alleged patient abuse regarding Lillian Fox?

RELEVANT CONTRACT PROVISIONS

ARTICLE II - MANAGEMENT RIGHTS

Section 2.01 Management Rights Recognition

The Union recognizes the lawful management rights repose in the County which include:

. . .

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

. . .

ARTICLE XXVII - DISCIPLINE - DISCHARGE

Section 27.01 Employer Authority

The parties recognize the authority of the Employer to discipline, discharge, or take other appropriate disciplinary action against employees for just cause.

. . .

BACKGROUND

The complaint of abuse involving Lillian Fox, a resident at the County's Golden Age Manor nursing home, was initiated by Christi Hendricks, a County Social Worker. Hendricks testified that she first learned of the incident through a rumor relayed to her by a Nursing Assistant. She documented the complaint on a "RESIDENT COMPLAINT FORM" dated December 6, 1995, 1/ which states:

. . .

Social Worker was notified on 12-5-95, of a rumor on the floor that . . . (the Grievant) had told resident Lillian Fox that if she used the call light again, she would slap her hand. Nursing Assistant Tammy Harrison was a witness to this event.

Investigation/Response:

Social Worker talked with nursing assistant Tammy Harrison who was a witness to this event. About 3-4 weeks ago, during the week on the day shift, Tammy was working with (the Grievant). It was a slow time of the day, somewhere between 1:30 pm and 2:30 pm so they were not very busy. Lillian Fox had been using her call light quite a bit during the day. (The Grievant) went to answer the light and Tammy followed her into the room. (The Grievant) apparently went over to Lillian who was laying in bed, took her call light away from her and put it into the drawer of the bedside stand, and stated "If you touch that light again I'll break your fingers." The witness stated that Mrs. Fox did not appear to be overly upset by this but just looked at her in a peculiar way as if she did not understand. (The Grievant) then left the room and did not inquire about why Mrs. Fox turned on the call light. Nursing Assistant Tammy then went over, gave Lillian back the call light and inquired about what type of assistance she needed.

When Social Worker went in to talk with Mrs. Fox, who is quite forgetful. (sic) She had no recollection of the incident and stated that "most every one is nice to me here".

Hendricks eventually turned this form over to a five person committee for a determination of the appropriate response. The committee met on December 6 and 7, and decided to suspend the Grievant. The balance of the background to the grievance is best set forth as an overview of witness testimony.

Tammy Harrison

Harrison testified that on or about November 9, she was walking from the break room and passed Fox's room. She looked into the room and saw the Grievant, roughly five to eight feet from her, bending over Fox, who was seated in a wheelchair. The Grievant told Fox that if she used the call light again, the Grievant would break her fingers. Harrison stated the Grievant appeared to be angry or frustrated as she spoke to Fox. The Grievant ultimately took Fox's call light and put it into Fox's nightstand drawer, then closed it. After the Grievant left the room, Harrison entered and returned Fox's call light to the top of the nightstand.

Harrison spoke of the incident with a co-worker that day or the following day. She was unsure of what to do, but when informed prior reports such as hers had not been acted on, decided she would not report the incident.

Hendricks summoned Harrison to her office, and showed her the complaint form set forth above. Harrison informed her the report was inaccurate because it placed Fox in her bed. Hendricks informed Harrison that she would receive a written warning for not reporting the incident immediately. Hendricks did not speak to her after this meeting. Harrison noted she knew

the Grievant only as a co-worker.

The Grievant

The Grievant has been employed at Golden Age Manor since October of 1988. Fern Skoug, the Manor's Director of Nurses, summoned her to a meeting in Hendricks' office at roughly 11:00 a.m. on December 6. The meeting involved the Grievant and a committee of five Manor managerial employees, including Skoug, Gary Taxdahl, the Manor's Administrator, and Hendricks. She was shown the complaint report set out above, while Hendricks read it. She was not offered a Union Steward, and was quite upset.

The Committee asked the Grievant what had happened, but she could not remember anything. She indicated that she might have been kidding Fox, and that she thought she had a good relationship with Fox. After this, the members of the committee other than Skoug and Taxdahl left. Skoug or Taxdahl informed her that she would receive a five day suspension. The Grievant protested.

Skoug or Taxdahl then gave the Grievant an "EMPLOYEE COUNSELING FORM," dated December 6, which stated:

#1 On Sat., Dec 2, 1995, an employee from 3-11 shift offered to work 7-3 as we were short. Her partner on North wing was the above named employee who promptly informed the 3-11 N/A that, "I have my people and you have yours so don't bother me." This 3-11 N/A said, "I'm not familiar with 7-3, so may need help." She was told -- "You have to learn sometime."

#2 This above named employee was heard to say in the break room that she was tired of N/A's tattling to Fern and was going to start breaking some necks. She went on to say, there was one N/A that was not reporting her anymore as she told her she'd break her neck in 6 different places.

#3 This employee also takes extra cigarette breaks, even tho she has been told she cannot do this. Told another N/A I take my breaks whenever I want.

The Grievant acknowledged incident #2 occurred, but happened years ago. She acknowledged she had taken extra cigarette breaks, but denied the other allegations made in #1 and #3 of the counseling form. She was then informed to come back at 2:00 p.m. She did so, and brought a Union Steward. The complaint form prepared by Hendricks had been amended to place Fox in the wheelchair. After some discussion, the Grievant was again informed of her suspension.

On December 11, 1995, the Grievant and her Union representatives met with Taxdahl. At that meeting, the Grievant was shown the complaint form which had been sent to the State of Wisconsin. That form was signed by each member of the committee, and dated December 7, 1995. The form had a typewritten reference to "a five day disciplinary suspension" changed,

in handwriting, from "five" to "three (3)." She also received a copy of an "EMPLOYEE COUNSELING FORM," dated December 6, 1995, which included the incidents set forth above and the following additional paragraph:

This will be a 3 day suspension which also is inclusive of resident abuse. See attached form. Employee has 3 days to appeal this decision.

At this meeting, the Grievant was informed her statements to Fox, not the three incidents reported on the counseling form, were the basis for the suspension.

Sometime in the processing of the grievance, the Grievant filed the following written response to the suspension:

I went back to check the charting to see what day this incident could have occurred (sic). I remember the incident, but I knew I had never worked on W1 with Tammy (Lillian Fox is on our group called W1). My partner that day was Barb D. on W1, and Tammy worked on W2 with Sandy Y. There are storage rooms, etc., between these 2 groups all down the hallway, & you cannot see the W1 rooms from W2, or vice versa.

...

On this day, I was sitting at the desk doing my charting when I heard a buzzer go on. I looked at the board and could see it was room 208. I went down to answer it, assuming it was Lillian Fox. Some days about this time she puts her call light on thinking it has something to do with the light that is at the head of her bed. She was sitting in her chair in front of her night stand and the call light was hanging from the top drawer of the night stand, or in her hands. (I remember this incident, her being in her chair.) I asked her if she needed something or if she wanted to go to the bathroom. She said no to both and said something about the light, which did not make sense. I asked her if she wanted to go out to the activity room. She said no. I know that I did not place the call light in her drawer or tell her that I would "slap or break her fingers." Lillian is a sweet confused lady. And I especially would not say anything of that kind if another nurses aide was in the room. I asked Lillian if she wanted to watch T.V. with her roommate. She seemed content with that, so I turned her chair around to face the T.V. and left the room. (Tammy was not in the room. If she had been and what she said occurred had occurred, I would have stumbled over her in my haste to leave the room, or she would have stumbled over me in her haste to protect Lillian from me.) When I got about 20 feet up the hall from the room, I met Tammy hurrying down the hall. She asked if I needed help and I said no. I cannot say if she continued on into Lillian's room. Also, I

would not

have gone with Tammy into the room. Lillian Fox is a one person transfer. I would either have told Tammy that I would get the light or that she could answer it and she could buzz the call light if she needed help.

. . .

But I know from my experience of viewing Tammy at the times I have worked on the same wing as she, that I do not have respect for Tammy's behavior (swear words, threats of suing or getting even, words that seem to me to be untrue or bragging.) I guess I remember this incident because I do not trust or respect Tammy. A couple of days after I was presented with these charges, I went into the smoking room before work and Tammy was in there by herself. She told me that she had said something out on the floor to someone else (about me) and before she knew it she was "coerced" into giving these allegations, but a minute later she threatened me. . . . Tammy knows how to look out for Tammy, and I have become the scapegoat.

Taxdahl, according to the Grievant, threw the statement back at her, then stated it was not proof and that the suspension stood.

The Grievant's testimony tracked her written statement. She did add that Fox tended to turn her call light on at roughly the same time each day, apparently believing the call light control was for her room lights. She also acknowledged she may have made a statement, in jest, about Fox's hands. She was not formally notified that her suspension would be three days until December 21.

Fern Skoug

Skoug has been the Manor's Director of Nurses for roughly twenty years. Skoug reviewed the Grievant's evaluations from 1991 through 1996. Those evaluations document satisfactory or better performance with some documented concern regarding the Grievant's ability to cooperate with other employes and abruptness in handling residents. She acknowledged the Grievant has not been disciplined prior to the incidents posed here.

Skoug prepared the two counseling forms the Grievant received. She acknowledged that she had not heard the statements recorded as incidents #1 and #2, and that she could not remember who reported the incident. She testified that "I don't really know why" she included the allegations noted as incident #3 on those forms.

Skoug saw her role on the committee to be to follow through on the allegation of resident abuse. She was unwilling to testify that the Grievant lied regarding the incident, and could not say why she favored Harrison's account of the incident over the Grievant's.

Christi Hendricks

Hendricks noted Taxdahl made the decision to reduce the suspension from five to three days. She also noted this was done to better effect the purposes of progressive discipline. She spoke with Harrison by phone before the committee met, and could not recall whether she met with the Grievant on December 6 or December 7. The counseling forms issued to the Grievant were not placed before the committee, and played no role in the suspension as far as she was concerned. She noted she credited Harrison's account over the Grievant's due to "clarity, the way she expressed it." Hendricks felt that Harrison must have been in the room at the time to have as vivid a recollection as she related to Hendricks.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidentiary background, the Union notes that the Grievant is a long-term employe with a good work record and no history of discipline. The County's investigation into the alleged abuse was little more than an effort "to find mud to add to the patient abuse charge." Even this effort could produce nothing of substance.

The discipline eventually turns on a credibility determination. An analysis of the testimony of the two witnesses to the event will not, according to the Union, yield "enough credible evidence . . . to find that this resident has been abused by the grievant." The Union concludes that "the grievance must be upheld, all documentation related to this matter should be removed from (the Grievant's) file and the employee made whole for the loss of . . . pay and benefits."

The County's Brief

After a review of the evidentiary background, the County notes that the conflicting testimony offered by Harrison and the Grievant is not the only evidence regarding the incident. The Grievant's written statement acknowledges that the Grievant did believe Fox had used her call light inappropriately in the past. The Grievant also made a statement which implies she may have said something inappropriate to Fox. Since Harrison had "no run-ins or grudges" with the Grievant, it follows that she had no reason to fabricate her account. Her delay in reporting the incident is unremarkable, and occurred only "because she was new on the job." That she has received discipline for not promptly reporting the incident underscores that she has no reason to lie.

Beyond this, the Employer urges that the Grievant's past evaluations offer some indication she can be abrupt with residents and prefers to work alone. The evidence, including witness testimony, is sufficiently credible "to support the employer's disciplinary action" against the Grievant.

DISCUSSION

The stipulated issue turns on whether the County had just cause to discipline the Grievant. In the absence of a stipulation by the parties concerning the standard appropriate to a just cause analysis, the determination of cause must address two elements. First, the County must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the County must establish that the discipline imposed reasonably reflects that interest.

The stipulated issue highlights that the application of the first element focuses on the alleged abuse of Fox. As preface to examining this issue, however, it is necessary to address the allegations of the two counseling forms issued the Grievant. None of those allegations, outside of the reference to the alleged abuse on the second form, affords any basis to support the Grievant's discipline. The Grievant's acknowledgement of certain of those accusations cannot make up for the lack of any evident link in time or in substance between those allegations and the alleged abuse of Fox. The presence of these otherwise unfounded allegations serves, if anything, to cast doubt on the significance of the County's allegations of resident abuse.

The evidence does, however, warrant assessing the alleged abuse independently of the allegations of the counseling forms. Hendricks' testimony establishes that the committee did not consider the counseling forms in assessing the allegation of abuse. Beyond this, the Grievant was informed that the alleged abuse of Fox was the key component of the discipline.

The evidence regarding the alleged abuse is troublesome, but is sufficient to establish the existence of a disciplinary interest in the Grievant's handling of Fox. While the exact conduct involved cannot be precisely identified, the evidence supports a conclusion that the Grievant treated Fox gruffly, and spoke to her in a threatening fashion.

Harrison's testimony on this point cannot be dismissed as incredible. Her account was, as Hendricks noted, vivid and detailed. Beyond this, she had no reason to fabricate the account. There is no indication of ill-will on her part toward the Grievant. Nor can her reporting of the incident be dismissed as manipulated. She was disciplined for not reporting the incident, and was not offered any inducement for belatedly reporting it.

More significantly, the Grievant's testimony does not afford a persuasive rebuttal of Harrison's account. The most striking aspect of the Grievant's account is that it is detailed and effectively tracks Harrison's. This, however, underscores the reliability of Harrison's account. The Grievant did not learn of the accusation until a month after the incident. If nothing remarkable happened in Fox's room, there would be nothing for the Grievant to recall about that

shift, much less to recall in detail. That she recalled a shift on which nothing out of the

ordinary happened is, standing alone, remarkable. That her recall is detailed is more remarkable. That the detail tracks Harrison's account is too remarkable to warrant concluding Harrison and the Grievant had not viewed the same incident.

The areas of agreement between Harrison's and the Grievant's accounts are too great to be dismissed as coincidental. Harrison informed Hendricks that Fox had not been in her bed at the time of the incident. The Grievant confirmed this orally and in writing. Both accounts have the Grievant going into Fox's room to address a summons from the call light. Both accounts place the Grievant in the room, hovering over Fox's wheelchair, addressing Fox, then leaving the room without doing anything involving her care. That Harrison would recall these events after a one month lapse is not surprising. She perceived the encounter as abusive, and this made it something other than an ordinary shift. That the Grievant would recall the events after a one month lapse is surprising if those events were routine. That she would recall not only that Harrison was not in Fox's room, but also where Harrison was in the hallway during a shift on which nothing in particular happened is even more striking. If the encounter in Fox's room was uneventful, there is no apparent basis for the Grievant's recalling it in any detail. Nor is there any apparent basis for her recall to track Harrison's. The most persuasive inference from the two accounts is that the Grievant and Harrison viewed the same incident.

Thus, the County has demonstrated the existence of conduct on the Grievant's part in which it has a disciplinary interest. It is now necessary to determine if the three day suspension reasonably reflects that interest. There are significant problems in reconciling the reasonableness of the three day suspension with the County's disciplinary interest.

The conduct involved in the Grievant's handling of Fox is imprecise. Even under Harrison's account, the nature of the abuse is problematic. It is apparent she believed she witnessed improper conduct on November 9. The degree of that impropriety would appear more easily overstated than understated. Harrison hesitated to report the incident. That reluctance would appear to manifest doubt concerning the underlying severity of the Grievant's behavior. More significantly, Harrison did nothing to intervene until the Grievant had left the room. This is not reconcilable with a concern for Fox's immediate safety. That Harrison was not concerned with Fox's safety is further manifested by her immediate response. She did not find it necessary to defend Fox. Rather, she entered the room and acted to soothe her feelings.

The ambiguity in defining what happened in Fox's room surrounds and complicates the County's response to it. It is apparent Harrison perceived coercion, reflecting either the Grievant's "anger" or "frustration." There is, however, a difference between an offhand comment uttered in frustration and the deliberate communication of a threat of physical injury.

This difference received, however, no express consideration in the managerial evaluation of Harrison's account. Hendricks' report treats the reference to a slap of the hand as synonymous with a threat to break Fox's fingers. Skoug was not willing to expressly credit Harrison's account over the Grievant's.

The imprecision in the County's evaluation of the Grievant's conduct is complicated by procedural irregularities in the imposition of discipline. The investigation of the incident was cursory. It is not clear whether Hendricks secured the Grievant's side of the story prior to the imposition of discipline. Beyond this, the inclusion of the unsubstantiated assertions of the employe counseling forms manifests something less than a disinterested search for the facts surrounding the incident.

These problems complicate the assessment of the penalty. It is not apparent what level of abuse the County sought to hold the Grievant accountable for. Beyond this, her detailed recall, treated above as a significant indicator of the reliability of her account, is arguably a foreseeable response to an unsubstantiated series of accusations. From her perspective, the County's investigation could be characterized less as a search for truth than for a scapegoat. This perspective cannot be lightly dismissed.

An allegation of abuse is sufficiently significant to warrant a good faith attempt to determine relevant fact; to evaluate that fact to isolate disciplinable behavior; and to impose discipline against specifically identified conduct consistent with the evidence acquired. The record in this case strains each of these points.

The strain regarding these points is sufficiently significant to warrant lessening the suspension imposed. The Award entered below does not, however, do so. The reasons supporting this conclusion should be detailed. The County's inquiry, if cursory, was made in good faith. Beyond this, the County had, in Harrison's account, sufficient evidence to warrant a conclusion that abuse had occurred. It is not clear when the County first permitted the Grievant to respond to the charges. It appears to have been late in the process, but the evidence would indicate that the County delayed the imposition of discipline until it had her account. That the County understood there was imprecision in identifying the underlying behavior is apparent in the reduction of the suspension from five to three days. Against this background, it is apparent the County concluded that a disciplinable event had occurred, and that it should be handled more severely than the written reprimand issued Harrison for failing to report it. This conclusion, in light of the stipulated issue, cannot be considered unreasonable.

The stipulated issue does not include a question regarding remedy. I interpret this to reflect the parties' desire to have the three day suspension evaluated as an all or nothing proposition. As noted above, I have doubt on the propriety of a three day suspension on this evidence. However, the reasonableness of some form of suspension has been demonstrated.

AWARD

The Employer did have just cause to discipline the Grievant for alleged patient abuse regarding Lillian Fox.

Dated at Madison, Wisconsin, this 8th day of October, 1997.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

ENDNOTES

- 1/ References to dates are to 1995, unless otherwise noted.

RBM/mb
5562.WP1