

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1162, AFSCME, AFL-CIO

and

GREEN COUNTY

Case 137

No. 55566

MA-10048

Appearances:

Thomas E. Larsen, Staff Representative, Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, WI 53511-3808, appearing on behalf of the Union.

Brennan, Steil, Basting and MacDougal, S.C. by **Mr. Howard Goldberg**, 433 West Washington Avenue, Madison, WI 53703, appearing on behalf of the Employer.

ARBITRATION AWARD

Local 1162, AFSCME, AFL-CIO, hereinafter referred to as the Union and Green County, hereinafter referred to as the Employer or the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a commissioner or member of its staff to hear and decide a grievance filed by the Union. The undersigned was so designated. Hearing was held in Monroe, Wisconsin, on November 6, 1997. The hearing was not transcribed, the parties filed post-hearing briefs, and the record was closed on December 10, 1997.

ISSUE

The parties agreed to the framing of the issue as follows:

Did the Employer violate the collective bargaining agreement by disciplining the grievant, Carrie Shippey, on July 7, 1997 without just cause? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

**ARTICLE VI
Grievance Procedure**

6.01 In case any dispute or misunderstanding relative to the provisions of this Agreement arise, it shall be handled in the following manner.

All grievances subject to the Grievance Procedure must be commenced within fourteen (14) days of the date of the events giving rise to the grievance, or within fourteen (14) days of the date the grievant obtains knowledge of the facts giving rise to the grievance. In all events, no grievance may be commenced later than one hundred eighty (180) days after the events giving rise to the grievance. The running of the one hundred eighty (180) days limitation period shall not be deemed a waiver of subsequent grievance of the exact same nature which may occur at a later date.

STEP 1. Any employee who has a grievance shall report such grievance to their proper supervisor, who shall thereupon attempt to make [a] mutually satisfactory determination within a reasonable length of time, not, however, to exceed five (5) calendar days. If the grievance pertains to subject matter that the employee's supervisor has no authority to correct, then the grievance may be commenced at Step 2.

STEP 2. In the event that no mutually satisfactory decision has been reached in said period of time, the employee shall then refer the grievance to the Union on a written form provided by the Union. The Union shall thereupon bring the issue before the Nursing Home Administrator within ten (10) calendar days of the completion of STEP 1. The Nursing Home Administrator shall respond within ten (10) calendar days.

STEP 3. If the parties cannot reach a mutually satisfactory resolution, the Union shall within ten (10) calendar days, request that the grievance be brought before the County Personnel Committee. A meeting between the Union and the Personnel Committee shall be held at a mutually agreeable time within twenty (20) days of the meeting.

STEP 4. If the County and the Union cannot reach a mutually satisfactory decision within thirty (30) days, the Union may request that the Wisconsin Employment Relations Commission appoint an arbitrator to hear the matter. If the Commission finds it necessary to appoint an arbitrator not a member of the Commission staff, the parties shall equally share the expense of the arbitrator so appointed. The decision of the arbitrator shall be final and binding on both parties.

RELEVANT EMPLOYER POLICIES

RESIDENT RIGHTS

The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. A facility must protect and promote the rights of each resident, including the following rights:

...

ABUSE

The resident has the right to be free from verbal, sexual, physical or mental abuse, corporal punishment and involuntary seclusion.

...

QUALITY OF LIFE

The resident has the right to receive courtesy and respect, and the right to dignity, self-determination, and participation within an environment that promotes quality of life. . . .

STANDARDS OF CONDUCT

All members of the Pleasant View staff are expected to conduct themselves in a professional manner and to maintain particularly high standards of conduct. Both at work and off duty, the manner in which you conduct yourself reflects Pleasant View Nursing Home's reputation.

NURSING HOME ETIQUETTE

...

Each employee should always be pleasant, courteous, alert and helpful to everyone - residents, visitors and co-workers.

DISMISSALS

For these reasons employees are subject to immediate dismissal from their duties at Pleasant View Nursing Home:

...

- 4. Verbal or physical abuse of residents or employees.

BACKGROUND

On July 7, 1997, the grievant, a two-year certified nursing assistant (CNA) at the Pleasant View Nursing Home (a State-licensed facility operated by Green County), was given a three day suspension without pay for "disrespectful, rude remarks and treatment to a resident during care."

The suspension was also imposed for alleged "rough handling" of the same resident (hereinafter Patient O) to whom the offending remarks had allegedly been made.

The remarks for which this discipline was imposed as well as the rough handling are alleged to have occurred on July 4, 1997. According to the written communication advising the grievant of her suspension, the offensive remarks consisted of comments such as "no one likes you," "you're mean person," and "we CNA's flip a coin to see who has to take care of you."

The suspension was served by the grievant on July 7, 8, and 9, 1997.

The resident to whom these remarks were allegedly addressed and victimized by the alleged rough handling is a woman in her nineties. Although suffering from certain physical infirmities not unusual in a person of this age, she is described by several persons as lucid and mentally competent, but sometimes critical and judgmental, and sometimes difficult and insulting to the CNAs who provide her daily care. The Alleged Resident Abuse Report (Employer's Exhibit 5) made in connection with the incident in question describes Patient O as "alert and oriented." The report also describes her as afflicted with physical maladies including osteoporosis and glaucoma.

According to the County, this matter was first reported to Registered Nurse (and Nursing Supervisor) Matilda Birkett by Linda Boss, another registered nurse, to whom the patient had complained. Nurse Birkett has been a registered nurse since 1987 and has been employed by Pleasant View for about seven years. After the patient's complaint was relayed to her, Nurse Birkett then talked directly with the complaining nonagenarian resident on the day following the incident. According to Nurse Birkett, the resident stated the grievant had told her that she (Patient O) was mean and that no one liked to care for her.

Nurse Birkett reported the matter to the Home's administrator, Donald Stoor. A social worker, Lynn Andrews, described as an experienced and reliable professional, was assigned to discuss the matter with the resident. Patient O repeated to the social worker what she had told Nurse Birkett, adding that she wouldn't have minded if the grievant had described her as "ornery," but that she took umbrage at the term "mean." Andrews' written report of Patient O's allegations contained no reference to "coin flipping." Andrews quoted Patient O as alleging the grievant had told her she was ". . . the meanest person here and then said many more things." Andrews reported that Patient O went on to say that ". . . Annie (CNA Annie Baldwin) wasn't saying anything except to agree with Carrie. . ."

Erica Curran was an additional source of information to Nurse Birkett on this matter. Ms. Curran, another CNA, has been employed by Pleasant View for a little more than one year. She told Nurse Birkett about a conversation she had initiated with the grievant two days earlier. Ms. Curran explained her interest in speaking with the grievant was triggered when, according to Ms. Curran, Patient O reported to Ms. Curran that the grievant had told Patient O that she was mean, that the CNAs didn't like to care for her, and that the CNAs flipped quarters to see who would have to care for her. Ms. Curran said she approached the grievant and told her what Patient O had alleged. According to Ms. Curran, the grievant acknowledged having made these remarks to Patient O. Ms. Curran said she reported both her conversation with the grievant and subsequent

questioning of the grievant to Nurse Birkett because the resident had made a complaint, mentioned a name, and "we are told to report this to our supervisor." She claimed she delayed reporting the matter for two days because 1) her regular supervisor was not present and 2) she didn't regard the matter as serious enough to report immediately. Ms. Curran acknowledged that Patient O can be difficult and fussy.

According to a written report prepared by Nurse Birkett, Nurse Birkett was under the impression that Erica Curran had overheard the alleged conversation between the grievant and Patient O at the time she disciplined the grievant.

On July 9, 1997, at the request of Pleasant View management, Ms. Curran prepared a written statement about her supposed conversation with the grievant. In this statement Ms. Curran quoted Patient O as alleging the grievant had told her she was mean and no one wanted to take care of her. Ms. Curran did not quote Patient O as alleging any "coin-flipping" comment had been made. According to Ms. Curran's statement, the grievant volunteered that she had told Patient O that the CNAs ". . . flip coins to answer her call light."

After Nurse Birkett had talked directly to Patient O, discussed the matter with facility administrator Don M. Stoor, reviewed the social worker's report, and listened to Erica Curran, she again discussed the matter with Mr. Stoor. Following these discussions, Nurse Birkett summoned the grievant to a meeting to be held the afternoon of July 7, 1997. Present at the meeting were the grievant, Frank Degenhardt (the grievant's union steward), and Pam Lawoskie with Nurse Birkett. Nurse Birkett said the decision to discipline the grievant was made by herself, Pleasant View Administrator Stoor, and Lawoskie. Nurse Birkett acknowledged the discipline decision had been prior to meeting with the grievant and, in fact, had been written out prior to the meeting and was presented to the grievant at the meeting's onset. At the meeting the grievant denied making the comments alleged. Although another CNA, Annie Baldwin, had also been present when the grievant made the alleged remarks to Patient O, that nursing assistant was not interviewed or questioned *prior* to the meeting of Nurse Birkett *et al* with the grievant.

When the CNA Baldwin was subsequently interviewed by Nurse Birkett, however, she also denied the grievant had made the comments she was accused of making. Neither did Ms. Baldwin believe Patient O or the grievant were angry. Ms. Baldwin added that Patient O didn't seem to like her, and had referred to her as "Miss Prissy-Pants." Ms. Baldwin did not recall any "devil-child" conversation taking place in Patient O's room on the day in question.

In a written statement to grievant's union representative, Ms. Baldwin reported that on the day in question she and the grievant were with Patient O to give her a bed bath, with Baldwin on one side of the bed and the grievant on the other. As the two removed the patient's stockings, the patient reported that her heels were sore and expressed the wish that the two nursing assistants would have sore feet and heels. Ms. Baldwin wrote that her response was to say, " You shouldn't wish that on anyone." According to Ms. Baldwin's written account, the grievant then said (to the patient) "That's why nobody wants to come and take care of you because you treat them so mean." Ms. Baldwin's written account showed no further conversation or incidents taking place with this patient.

At hearing, Ms. Baldwin denied any "coin-flipping" comments were made in Patient O's

room by anyone. She explained that later in the evening on the day in question, she, the grievant and CNA Erica Curran were at the Nursing Station in the hallway when Patient O's call-light went on. When there was no immediate response from any member of the threesome, Ms. Baldwin said the grievant facetiously inquired whether they were waiting to flip a coin to see which of them provided the requested care to Patient O.

At hearing, the grievant denied making the comments Patient O attributed to her. According to grievant's testimony, while she and Ms. Baldwin were giving the patient a bed bath on the day in question, the patient asked them to be careful of her heels because they were sore. The grievant said the patient made no complaints about the way the nursing assistants handled her. The grievant reported the patient expressing the hope both nursing assistants would turn out like the patient, i.e., with a sore back and heels. The grievant said Ms. Baldwin's response to the patient was to say she shouldn't wish that on anyone. The grievant acknowledged her own response to the patient was to tell her it was hard for the grievant to give her care when the patient was so mean to the grievant. The grievant denied telling the patient that no one liked her or saying anything about the CNAs flipping coins to determine which one of them had to take care of the patient. The grievant acknowledged that if she had made the comments to Patient O that were attributed to her, the comments would constitute verbal abuse.

The grievant explained this colloquy was preceded by personal inquiries to her by Patient O who had apparently become aware that the grievant had given birth to a child out of wedlock. The grievant said that Patient O asked about the child and referred to the child as a "devil-child." The grievant said she responded by saying her personal life had nothing to do with the patient. According to the grievant, it was at that point the patient expressed the hope that both CNAs presently assisting her would turn out to have physical maladies like those from which the patient suffered - including sores all over their bodies.

The grievant said she asked Patient O why she (the patient) didn't like the grievant. "I wanted to know why she (patient) didn't like me," the grievant testified. "I didn't want to take her attitude with a grain of salt. A grain of salt didn't help. I'd told (the patient) before that she was being mean to me. I was curious why she didn't like me."

According to the grievant, Patient O told her she didn't like the grievant because the grievant was mean. The grievant told the patient that in fact the patient was mean to the grievant.

The grievant testified that Patient O had originally seemed to like her, but that attitude seemed to deteriorate. The grievant said she had reported the patient's apparent dislike of her to Nurse Birkett and was instructed to always take another CNA into the patient's room when she had to provide care to the patient, an instruction the grievant said she always followed.

The grievant also denied the conversation reported by fellow-CNA Erica Curran. The grievant's version of the conversation she had with CNA Curran began with Curran telling her that Patient O had complained (to Curran) about the grievant. The grievant said she responded by saying, "What else is new?" The grievant denied any discussion with CNA Curran about grievant's

conversation with Patient O. The grievant said the only time she talked about "coin flipping" was at the Nurses' Station when only CNAs Baldwin and Curran were present. The grievant knows of no

difficulties she has had with CNA Curran. She also stated she does not know Ms. Curran well and does not socialize with her.

Nurse Birkett described the grievant as a good employee who is dependable and does good work. She believes grievant's alleged conduct is out of character for the grievant. Nurse Birkett also acknowledged that the grievant had complained about Patient O in the past and that her advice to the grievant was to take someone else in the patient's room with her. She said she further advised the grievant to leave the patient's room if things started to get out of hand. Nurse Birkett further acknowledged that Patient O can be difficult and that she didn't think Patient O liked the grievant as well as other CNAs.

POSITIONS OF THE PARTIES

The Employer contends that the remarks of the grievant to Patient O constitute verbal abuse and were a very serious matter. The Employer postulates that the grievant became upset when Patient O referred to grievant's illegitimate child as a "devil child," and that Patient O's comments caused the grievant to become angry with her. The Employer argues that the evidence in the case is overwhelming that the grievant acted in an inappropriate way in her dealings with Patient O, and that knowledgeable persons agree that the grievant's actions constitute "verbal abuse." The Employer believes the most damaging testimony against the grievant came from CNA Baldwin whose (nearly) contemporaneous memorandum of the incident gives her version good credibility. The Employer quotes Baldwin's notes as indicating that the grievant told the patient that the patient's comment (wishing her afflictions on the CNAs) was ". . . why nobody wants to come and take care of you because you treat them so mean." The Employer points out that its rules provide that "verbal abuse" is of such a serious nature that it can result in immediate discharge and that grievant acknowledged receiving copies of these rules. The Employer notes that even the grievant agreed that if she said all the things she was alleged to have said to Patient O, her statement was verbally abusive. For these reasons the Employer believes the punishment it imposed on the grievant was appropriate and the grievance should be denied.

The Union argues that the actual events in question are not clear. It further attacks the fairness of the Employer's investigation of the incident, pointing out that the Employer initially was under the impression that CNA Curran had actually witnessed the event in question. The Union disputes the Employer's contention that grievant's comments to Patient O constituted "verbal abuse." The Union points out that Patient O is known as a difficult patient to care for, and that grievant's statement to her was intended merely to convey the difficulty Patient O was causing by Patient O's conduct toward the staff. The Union argues that telling a resident that certain conduct is unacceptable does not constitute "verbal abuse." The Union further notes that the Employer has produced no evidence in support of its allegation against the grievant of "rough handling," and that that allegation was dropped by the Employer in its report to the Bureau of Quality Assurance. The Union concludes that the labor contract provides for progressive discipline: first step - oral warning; second step - written warning; third step - second written warning or suspension not to

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exceed seven days; fourth step - an additional suspension or termination. The Union argues that only in exceptional cases should the discipline commence at the second or higher step. The Union believes that grievant's suspension should be revoked and the grievant made whole for all lost wages and benefits.

DISCUSSION

The details of this case do not appear in sharp relief.

Hearing testimony was not consistent. Witnesses ostensibly on the same side gave conflicting versions of the same incident. Other witnesses gave hearing testimony in conflict with prior written statements they had made.

Even the Employer made, prepared in writing, and delivered its discipline decision 1) before even discussing the incident in question with the grievant or, for that matter, an experienced CNA who was known to have witnessed the incident for which the grievant was disciplined, and 2) while it was still under the mistaken belief that a third CNA who had been interviewed was a direct witness to the event.

Testimonial conflicts notwithstanding, what is clear is that an "incident" offensive to Patient O took place in Patient O's room while she was being attended by the grievant and CNA Baldwin. The employer contends that that incident consisted of both verbal abuse and rough handling of the patient. Inasmuch as there is not a scintilla of evidence in support of Patient O's complaint of rough handling, that allegation will not be given further consideration.

The question becomes solely whether the colloquy between Patient O and the grievant constitutes just cause for the Employer to discipline the grievant.

It is undisputed that Patient O expressed the wish that the two CNAs attending her would be afflicted with the same painful ailments from which she suffered. I am also inclined to credit the grievant's testimony that in grievant's presence Patient O had earlier referred to the child born to grievant out of wedlock as a "devil-child," although it is not clear on what occasion Patient O offered this observation. Finally, it is also undisputed that the grievant responded to Patient O's unpleasantness.

At a minimum, the grievant asked Patient O why she was mean to grievant. If CNA Baldwin's testimony is credited, the grievant also advised the patient that the patient's meanness was the reason that "nobody wants to take care of you." In view of the testimony of both Baldwin and the grievant it is neither clear nor plausible that the grievant added the "coin-flipping" comment attributed to her.

Grievant's desire to respond immediately to Patient O's provocative remark(s) is understandable. Yet, a resident's verbal abusiveness of a CNA does not justify a verbal riposte by the employee. In the instant case, grievant's response, whether deemed relatively mild or verbally abusive, appears to have constituted a source of emotional pain to the resident. Under the circumstances, if the grievant "couldn't take her (Patient O's) attitude with a grain of salt," she

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should have recognized that "things were beginning to get out of hand" and left the room as she had been instructed by Nurse Birkett.

While following that instruction and leaving the room may have been awkward to follow since the bed-bath procedures for Patient O had already begun, it was clearly the prudent course of

action for the grievant to follow. Nothing in grievant's job description requires her to respond to a patient's verbal abuse; nothing in this grievant's occupational background qualifies her to deal personally with that provocation. Had she left the room and reported the incident to her supervising nurse, if the incident were deemed serious enough, it could have been taken up with the patient by the facility's social worker.

The grievant did not follow Nurse Birkett's instruction. For this reason, the Employer had just cause to discipline her.

Several factors suggest mitigation: 1) CNA Erica Curran didn't regard even her apparently enhanced understanding of grievant's comments to Patient O as serious enough to warrant an immediate report; 2) since the Employer had not interviewed either the grievant or CNA Baldwin prior to determining the discipline to be imposed on the grievant, the Employer was unaware of the context in which grievant's comments had been uttered; 3) there is no evidence of any "rough handling" of the patient; 4) the grievant is described by her supervising nurse (Nurse Birkett) as a good employee who is dependable and does good work; 5) according to the grievant's supervising nurse, the comments attributed to the grievant were out of character for her; 6) there is no evidence that grievant has ever been previously disciplined by this Employer.

Under all of the circumstances, the evidence suggests that a three-day suspension and loss of pay was excessive for grievant's failure to leave Patient O's room when the patient became unpleasant and things started to get out of hand.

Based on the credible evidence adduced and considered, I find a written warning to be sufficient.

AWARD

The Employer had just cause to discipline the grievant. However, the three-day suspension imposed by the Employer is reduced to a written reprimand and the Employer shall make the grievant whole for loss of wages and holiday pay, together with any benefits to which the grievant would otherwise be entitled but for the suspension. Any record of grievant's suspension shall be deleted from her personnel record and a written reprimand consistent with this award shall be inserted in lieu thereof.

Dated at Madison, Wisconsin this 10th day of February, 1998.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator

ENDNOTES

1/ The Employer's preparation and delivery of its disciplinary action against the grievant without first interviewing both the grievant and the other CNA present (Baldwin) suggest a rush to judgment unimpeded by considerations of due process. Due process is nothing more than fundamental fairness. It merely requires that both sides of a story be learned and fairly weighed before judgment is imposed. Inevitably, its absence serves only to reduce the credibility of the judgment reached, even if that judgment can be otherwise defended.