BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SKAALEN SUNSET HOME, INC.

and

DISTRICT 1199W/UNITED PROFESSIONALS FOR QUALITY HEALTH CARE

Case 45
No. 55487
A-5610

Appearances:

Ms. Kathy Christensen, Member/Organizer, District 1199W/United Professionals for Quality Health Care, 1619 Monroe Street, Madison, Wisconsin 53711-2021.

Ms. Kathy Horton, Assistant Administrator/Human Resources Director, Skaalen Sunset Home, Inc., 400 North Morris Street, Stoughton, Wisconsin 53589.

ARBITRATION AWARD

On August 19, 1997 District 1199W/United Professionals for Quality Health Care filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint a member of its staff to hear and decide a grievance pending between the parties. The matter was subsequently assigned to the undersigned and the matter was heard on October 29, 1997. Briefing was completed on November 25, 1997.

This dispute involves the discharge of T.W.

BACKGROUND AND FACTS

The Home and the District have been signatories to a series of collective bargaining agreements. The relevant provisions of the applicable agreement are set out below. This grievance involves the discharge of T.W. who was terminated by letter on July 25, 1997.

The grievant has been employed by Skaalen since August of 1996 as a Certified Nursing Assistant. Until the suspensions related to the instant termination she has not been disciplined and has received excellent evaluations. The grievant has been used to train other new Certified Nursing Assistant hires and had been utilized in a made-for-television recruiting advertisement by Skaalen. There had been no complaints about her behavior by patients or their families.

On July 1, 1997 T.W. and another Certified Nursing Assistant, M.M. went to toilette patient F.J. who had had a bowel movement accident. On July 8, 1997 M.M. wrote a statement (Employer Ex. #1) and on October 29, 1997 M.M. testified that on July 1, when T.W. saw the size of F.J.'s bowel movement accident T.W. called F.J. "a fucking pig", ripped the pad out from F.J.'s pants and dropped bowel movement all over the floor. M.M. stated that then T.W. gritted her teeth and pretended that she was going to pull F.J.'s hair. M.M. stated that she told T.W. to leave the room and she (M.M.) cleaned F.J. up. M.M. later reported the incident to management. Management suspended T.W. pending investigation. Upon learning of this matter, District 1199 asked fourteen of T.W.'s coworkers to answer nine written questions relative to T.W.'s behavior. The questionnaires (Union Ex. #1) were circulated by J.D., a district delegate who also witnessed the respondents' signatures. On July 25, 1997 T.W. was terminated by Kathy Horton, Director of Personnel by letter which stated: "I have examined all of the affidavits presented by the Union and have determined that there is enough evidence to terminate your employment effective immediately."

At hearing the employer called five witnesses. The first was M.M. who first reported T.W.'s conduct to management. In addition to the conduct on July 1, 1997 M.M. testified that on another occasion, in response to patient F.B. who spouts profanity, T.W. said "at least I'm not a fucking drunk." M.M also testified that T.W. was unnecessarily rough with patient F.B., letting him full backward into the pipes behind the toilette used for his care.

The second witness, Certified Nursing Assistant V.V., testified that she worked with T.W. since March, 1997 and although she never heard T.W. direct profanity toward a patient, she has heard T.W. tell patient A.B. – "God, you stink, god you stink" over and over. Witness V.V. also testified that she saw T.W. put patient F.J. who was in a wheel chair, in the hall outside the dining room in a way that almost caused the wheel chair to tip over, and leave her there alone. Witness V.V. testified that patients and family had not asked about T.W. but that coworkers inquired about her.

Witness T.M. testified that she has worked at Skaalen for six years and has worked with T.W. but has never heard her use profanity in the presence of or toward a patient.

Witness K.W. testified that she has worked for Skaalen and has heard T.W. repeat profanity back to a patient who spouts profanity and has heard T.W. tell the same patient

that she has terrible breath. K.W. also testified that she heard T.W. tell patient H.A., who

had her call light on, that "I was there five minutes ago and I won't come back again." K.W. went in and took care of H.A. who was wet.

The last employer witness was C.B., a Registered Nurse and unit manager for unit four. She testified that she is responsible for the care plans of the patients and the training of the Certified Nursing Assistants. C.B. is the manager to whom M.M. first reported the incident of July 1, 1997 regarding the profanity directed toward patient F.J. and the feigned pulling of F.J.'s hair by T.W. C.B. further testified that that complaint was the first and only complaint she received regarding T.W.

District 1199 called two witnesses. The first is J.D. a housekeeper and union delegate who investigated this matter on behalf of District 1199 and T.W. J.D. procured fourteen statements constituting Union Ex. #1, from coworkers relative to T.W. between July 14 and July 16, 1997. J.D. testified that from her investigation she concluded coworkers on unit four were hostile toward T.W.

T.W., the grievant, testified that she was suspended July 8, 1997 and that she believes that coworkers may be hostile to her because she expressed concerns to supervisory Registered Nurse C.B. about her suspicions that coworkers were rough with and bruising patients. T.W. denied ever swearing at or in the presence of patients. Regarding the incident with F.J. on July 1, 1997, T.W. stated that M.M. never told her to leave the room; that she (T.W.) did the whole clean up procedure and that M.M. did not help. Regarding the assertion that F.J. was placed on the toilette in a rough manner, T.W. testified that she (T.W.) has weakness in her left arm and shoulder, that she had to use her left side on this occasion and that therefore maybe F.J. did go to the toilette a little faster than usual.

Regarding the allegation that she was short with and ignored H.A., T.W. testified that she was with another patient when H.A. put her light on and that she told H.A. she would be right with her.

Regarding the incident testified to by V.V., that T.W. put F.J. in the hall outside the dining room and isolated her, T.W. testified that she did not recall closing the dining room door to keep her out.

Such other facts as necessary will be set out in the discussion.

ISSUE

The parties agreed to the following issue:

> Did the employer violate the collective bargaining agreement when it terminated the grievant and, if so, what is the remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE XV

Discharge and Discipline

Section 1. The Home may discharge, suspend or otherwise discipline for cause any employee who has satisfied his/her probationary period, subject to the grievance procedure. Normally such discipline shall include the sequence of verbal warning, written warning, suspension and termination. If the Home decides to suspend an employee, such suspension shall commence as soon as reasonably possible following the decision to suspend, and the term of the suspension shall, to the extent that scheduling will reasonably permit, be served as one continuous time period. The Home shall notify any bargaining unit employee of their right to union representation at any disciplinary meeting, or any meeting that will result in discipline against that employee, and will arrange that representation with the Union if so requested.

POSITIONS OF THE PARTIES

Position of the Employer

It is the position of the employer as set out at hearing and in brief that Skaalen Sunset Home has the right to expect employees to treat residents with dignity and respect, that T.W. knew these expectations and that her conduct constitutes abusive behavior which violates the employer's standards.

Relative to the discrepancy between the witnesses' version of the facts, the employer argues that T.W. has an obvious reason to deny the charges since she knew she would be discharged if the facts were true. The coworkers have nothing to gain by falsely reporting T.W. and District 1199's speculation that it was a vendetta was not borne out by the evidence.

Finally, it is not safe to assume that Alzheimer's patients don't hear or comprehend what is said in their presence and regardless, Skaalen's policy is that all residents should be treated with the same level of respect. This has been a consistent policy as is shown by the decision of Arbitrator Nielsen's award in SKAALEN SUNSET HOME, INC., CASE 44, NO. 49484, A-5089, SEPT. 20, 1993.

Position of the Union

The Union asserts that the grievant's report of increased patient bruises and skin tears and her concerns about a specific Certified Nursing Assistant, make it likely that retaliation and jealousy are behind these incidents. Union witness J.D. testified that it was her suspicion after taking the fourteen statements that there was a vendetta.

In the alternative, the union points out that Wings A and B of Unit 4 are for "special needs" residents that are very demanding leading to great stress and requiring management

to move workers off the wings to give them a break. Grievant has only been moved off the wing twice. The grievant has been evaluated as excellent, has never been counseled or disciplined, and has a good reputation with residents and families.

The union recounts the testimony regarding the three alleged incidents and concludes that the incidents have been blown way out of proportion and are motivated by jealousy.

DISCUSSION

The contract between the parties provides that the Home may discharge for cause. Discharge is sometimes referred to as the "capital punishment" of labor relations because its consequences are so serious. The employer is therefore held to the burden of proof relative to both matters for which proof is necessary: first proof of the alleged wrongdoing and second if the wrongdoing is proved, proof of the appropriateness of the penalty.

Regarding the alleged misconduct, the allegation of July 1, 1997 was not only the first to be brought to the employer's attention, but is arguably the most serious. Witness M.M. testified that T.W. called patient F.J. a "fucking pig" for soiling herself. T.W. denies swearing then or any other time. I do not find T.W.'s denial to be credible.

I find M.M. to be a credible witness. Her demeanor was appropriate; it was clear she took no pleasure in testifying against the grievant. She answered the questions directly and looked the questioner in the eye. There is no apparent motive for M.M. to lie about this incident; none has been offered and she is not the Certified Nursing Assistant about whom T.W. raised concerns. In fact, there is no evidence that M.M. knew that T.W. raised concerns about any coworker. There is no evidence that the concerns of bruising that T.W. expressed to supervisory Registered Nurse C.B. ever got back to other Certified Nursing Assistants.

In an effort to defend T.W. the union delegate asked fourteen coworkers to fill out questionnaires regarding T.W.'s conduct at work. Question 3 asked the coworkers if they ever heard T.W. "swear at" use "four letter words to" or "speak to or within the hearing of a resident in a vulgar or demeaning manner". Seven of the coworkers answered no to each element of question 3 but the other seven coworkers answered yes to at least one element of the question, including four who answered that they heard T.W. swear at a resident.

Either these answers are false or they indicate a pattern of verbal behavior consistent with the "fucking pig" allegations of M.M. There is nothing about this evidence that would substantiate the suggestion that the answers are as a result of jealousy. They are detailed and don't appear orchestrated. Therefore I cannot conclude that they are as a result of a vendetta against T.W.

The evidence supports a finding that on July 7, 1997, T.W. called resident F.J. a "fucking pig" for soiling her pants.

The same can be said of the other alleged incidents, that is, that the relaters have no apparent interest in fabricating the events and the grievant has a substantial interest in denying or minimizing the events. However, two of them; placing the patient in the wheelchair in the hallway and the delayed response to the patient who was constantly on the

light, are as much mistakes in judgment as misconduct. The other incidents constitute misconduct but are not as grave as the incident of July 1, 1997 and the evidence is not clear relative to whether the employer knew of them when it made the discharge decision.

We turn now to whether the discipline is appropriate to the misconduct. A threshold question is whether the employee should have known such conduct could result in discharge. I am persuaded that T.W. did know that such conduct would result in severe discipline if reported. First all the witnesses testified that they were expected to treat residents as if they were their own family members. While there is no written standard of behavior in the record – there is absolutely no confusion about this by the witnesses, including T.W. Secondly, the employer has filed with the arbitrator a discharge grievance arbitration decision, Case 44, No. 49484, A-5089 (9/93), involving the same employer, the same union and the same kind of conduct (verbal abuse) in which the arbitrator found just cause and noted that his decision was consistent with two other cases of verbal abuse where termination resulted. The language giving rise to the termination in Case 44 is no more reprehensible than that used by the grievant on July 1, 1997.

Therefore I am satisfied that the employer has consistently had a policy of zero tolerance of verbal abuse of residents by the use of profane, foul or denigrating language directed to or in the presence of residents. The policy is not unreasonable and I cannot find that the discipline is excessive, an abuse of discretion, or arbitrary and capricious.

AWARD

The grievant was discharged for just cause. The grievance is denied.

Dated at Madison, Wisconsin this 26th day of March, 1998.

James R. Meier /s/

James R. Meier, Arbitrator

ENDNOTE

1/ The employer attempted to enter information into the record regarding T.W.'s licensing status. The union objected. I sustain the objection and have excluded it from the record.

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