

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL 346

and

**VILLA MARINA HEALTH AND
REHABILITATION CENTER, INC.**

Case 1

No. 55394

A-5597

(Grievance of Joan Johnson)

Appearances:

Falsani, Balmer, Berglund and Peterson, by **Mr. Timothy W. Andrew**, on behalf of the Union.

Ruder, Ware & Michler, by **Ms. Cari L. Westerhof**, on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Employer", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Superior, Wisconsin, on November 6, 1997. The hearing was transcribed. Both parties thereafter filed briefs and the Employer filed a reply brief that was received by January 9, 1998. Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Was the discharge of grievant Joan Johnson for just cause and, if not, what is the appropriate remedy?

BACKGROUND

The Employer operates a skilled nursing facility in Superior, Wisconsin, which houses some long-term patients who are severely disabled.

One of those patients, here called "M" to protect her privacy, has a reputation for being very belligerent and very difficult to handle. That is why aides have been instructed to always work in pairs when caring for "M", who has dementia and hence was incapable of testifying here.

Grievant Johnson and Jennifer Carlson, (now Yadon), both certified nursing aides ("CNA's") were caring for "M" on June 24, 1997, 1/ by trying to put on her pants and by stringing a catheter tubing through her pants leg. Carlson at that time was trying to hold down "M", as Johnson worked with the catheter. Both Johnson and Carlson testified that "M" twice kicked Johnson; once in her chest and once in her throat.

They sharply disagree, however, as to what happened next. Johnson, a 12-year employee with no record of patient abuse, said that "M" "kicked me pretty hard" and that she then said, "Geeze, Marion" and that she pushed down "M"'s leg with her "open hand". Carlson, who had been working for only six months, testified that Johnson said, "You son-of-a-bitch, Marion", and that Johnson then punched "M"'s between the knee and ankle with a closed fist. Carlson said that Johnson then grabbed her own throat and went over to a mirror to see where "M" had kicked her. Johnson denied going over to the mirror to check on her throat.

Carlson then left "M"'s room. She testified that she shortly thereafter heard screaming coming from "M"'s room; that she returned to "M"'s room to see what was happening; that she saw Johnson talking to CNA and Union Steward Sandy Hillenbrandt; and that Johnson told Hillenbrandt "I was going to be 'narcing' on her" (i.e. reporting her), and that she, Johnson, was in "big trouble". Both Johnson and Hillenbrandt - who are friends - denied being in the room together at that time and both denied that Johnson ever made the statements to Hillenbrandt which Carlson attributed to her. Johnson, who said her neck was red, did not file an incident report detailing how "M" had kicked her even though she was required to do so under the Employer's policy.

Carlson, who said she was scared to do so, did not immediately report that day's incident with "M" to anyone else even though all CNA's under the Employer's policies are required to immediately report all instances of patient abuse. Carlson - who had called in sick the day before - on Sunday, June 29, subsequently met with Director of Nursing Cathy DeRosier, who also happens to be her sister, at a restaurant to announce that she was immediately quitting her job effective that day. When pressed by DeRosier as to why she was quitting, Carlson reluctantly reported that Johnson had abused "M" June 24 and that she, Carlson, was fearful that other employees would retaliate against her.

DeRosier that day reported Carlson's comments to Administrator Leann Nichols who was in her cabin and who subsequently investigated what had occurred when she returned to work. When "M" was examined, there were no marks or bruises on her leg and she had no recollection of the incident. Both Johnson and Hillenbrandt during the investigation denied Carlson's version of what she had reported. Nichols subsequently suspended Johnson on June 29 and - after she had completed her investigation - terminated Johnson effective July 16.

POSITIONS OF THE PARTIES

The Union asserts that the Employer lacked just cause to terminate Johnson because she, in fact, did not strike or swear at patient "M". It thus maintains that "there was no objective evidence that abuse occurred"; that Johnson has no prior history of patient abuse; that Johnson's testimony is corroborated by Hillenbrandt; that Johnson made no effort to hide what happened; that "Carlson was not credible"; and that the Employer's "investigation was not conducted fairly or objectively." As a remedy, the Union asks for Johnson's reinstatement and a backpay award.

The Employer, in turn, contends that it had just cause to discharge Johnson because it has met its burden of proving that she engaged in patient abuse. It thus argues that it completed a "full and fair investigation" and that Carlson should be credited over Johnson because she had no reason to lie.

DISCUSSION

The Union is correct in pointing out that some parts of the Employer's case simply do not hold water. For example, the Employer makes much of the fact that Johnson tried to transfer to housekeeping at the time of the incident; that Johnson and Hillenbrandt were seen arguing in the parking lot after one of the grievance steps; that Johnson was upset on the day of the incident; and that Johnson sought reinstatement in her first grievance after she had been suspended. While one can argue that all of this shows Johnson's state of mind, it hardly constitutes the kind of objective evidence needed to support a finding of patient abuse.

Nevertheless, the Employer conducted a fair and objective investigation in spite of these flaws since it interviewed Carlson, Johnson, and Hillenbrandt and since it withheld a final decision on Johnson's employment status until after its investigation was completed. Hence, very little weight can be given to the fact that Administrator Nichols did not consider the absence of any bruises on "M" in her discharge decision. While Nichols should have considered that fact, her failure to do so simply goes to the weight of the evidence supporting the Employer's termination decision. It does not, however, so taint the Employer's discharge decision so that it can be overturned on this basis alone.

The real problem in the Employer's investigation was the fact that Carlson waited so long to report Johnson, thereby making it impossible to examine "M"'s leg for bruises until Monday, June 30. The Union rightfully complains that had Carlson complained on June 24 - the day of the alleged incident - it would have been very easy that day to see whether "M"'s leg was bruised. However, it is also true that Johnson herself did not fill out a written incident report on what had happened on June 24, as she was required to do under the Employer's policy. Had she done so, it is entirely possible that "M" would have been examined on June 24. Johnson's failure to fill out an incident report thus helps neutralize the fact that "M" was not examined until five days later.

This case thus stands or falls on Carlson's credibility. If she is believed, the discharge stands. If she is not, the discharge must be overturned.

Given the highly credible way in which she testified and her actions at the time, I credit Carlson and hence discredit Johnson (and Hillenbrandt). I do so because it is very clear that Carlson had no reason to fabricate her testimony and because the record shows that she was truly upset over what she saw on June 24 when she and Johnson were caring for "M". That is why she decided to immediately quit her employment and that is why it was so difficult for her to tell DeRosier, her sister, the real reason why she was doing so.

In addition, some of Johnson's story is inherently implausible. Carlson testified that after "M" kicked Johnson, she, Johnson, went over to a mirror to view her throat. Johnson denied ever going over to the mirror. However, Johnson testified her throat was red that day. That being so, how did she know it was red if she did not view it in the mirror in "M"'s room? Are we to believe that she waited until after she left "M"'s room to check on her throat? That hardly seems likely since the need to view her injured throat was most immediate right after "M" kicked her. This represents an added reason to credit Carlson.

The Union argues to the contrary by suggesting that Carlson has lied because she "no longer wished to do the demanding work of a . . . CNA," which is why she called in sick on June 29. There, in fact, is not one iota of evidence to support this claim or any other reason as to why Carlson would lie. Absent any such evidence, I credit her account and find that Johnson did, indeed, curse at "M" and hit her with her fist. Since this constitutes patient abuse, the Employer had just cause to terminate Johnson.

In light of the above, it is my

AWARD

That the discharge of Grievant Joan Johnson was for just cause; the grievances are therefore denied.

Dated at Madison, Wisconsin, this 1st day of April, 1998.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

ENDNOTES

1/ Unless otherwise stated, all dates hereinafter refer to 1997.

