BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC

and

GRANCARE, INC.
d/b/a NORTHWEST HEALTH CARE CENTER

Case 10
No. 56302
A-5668

Case 11
No. 56303
A-5669

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Matthew R. Robbins**, appearing on behalf of the Union.

Mr. Mark Radmer, Administrator, appearing on behalf of the Employer.

ARBITRATION AWARD

Local 150, Service Employees International Union, AFL-CIO, CLC, hereinafter referred to as the Union, and GranCare, Inc. d/b/a Northwest Health Care Center, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide two grievances over separate discharges. The undersigned was so designated. Hearing was held in Milwaukee, Wisconsin, on June 11, 1998. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on August 21, 1998.

BACKGROUND

The grievants, Ann Maney and Ronica Little, were terminated by the Employer on November 11, 1997, for sleeping while on duty. Ann Maney was hired on January 11, 1988, and Ronica Little was hired on May 8, 1990, and both were employed as Certified Nursing Assistants (CNA's) by the Employer and both worked the third shift.

Mary Humphrey, a charge nurse on the third shift, testified that on November 10, 1997, she was called into the dining room where she observed Ann Maney sitting in a chair asleep and was asked by the charge nurse to wake her up. She complied and woke Maney at 5:10 a.m. Maney denied she was asleep and testified that she was in the lobby at 5:10 a.m. and started her final rounds at 5:18 a.m.

Humphrey testified that on November 11, 1997, the charge nurse came and got her and they went to the upper dining room where she observed Ronica Little sitting in a rocking chair and appeared to be asleep and Humphrey woke her. Little denied sleeping.

Humphrey testified that she had seen other employes nod off and they were never disciplined. Little testified that all the employes including the nurses and the charge nurse dozed off on occasion with the exception of Kathy Bell. On November 11, 1997, both grievants were discharged for sleeping on duty. Each filed a grievance which was processed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Was there just cause for the discharge of the grievants?

If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE X
DISCIPLINE AND DISCHARGE

SECTION 1. JUST CAUSE. After completion of the probationary period, no employee shall be disciplined or discharged except for just cause.

EMPLOYER'S POSITION

The Employer contends that the grievants were discharged for just cause because they were observed sleeping on duty by two different staff members. The Employer notes that its policy is that sleeping on the job justifies immediate discharge. The Employer points out that it operates a 24-hour-a-day skilled nursing facility which requires staff on duty at all times. It asserts that it has limited staff on the third shift and providing nursing care requires extensive and sometimes immediate attention and for this reason, it has a policy which justifies immediate termination for sleeping on the job.

The Employer recounts that on November 10, 1997, Ms. Maney was observed sleeping by two nurses, Humphrey and Curtin and on November 11, 1997, Little was observed by the same two nurses. It alleges that both were awoken by Humphrey and each employe displayed sleeping behavior, "snoring," "eyes closed," "head down on the table," or "head back in a rocking chair."

The Employer argues that the two defenses lack merit. The Employer claims that the defense that they were not sleeping at all is untrue as shown by the testimony of RN Humphrey. The second defense, that others found sleeping were not terminated, is questioned by the Employer because the Employer has terminated employes for sleeping on duty, though not in all cases. Furthermore, it points out that the Company handbook states that sleeping on duty justifies termination and both grievants were aware of this policy.

In conclusion, the Employer contends that it had just cause to discharge the grievants for sleeping on duty, an offense that can seriously threaten the welfare of residents in a nursing facility. It argues that this is such a serious offense that it is not lessened by the grievants' years of service. It maintains that sleeping on duty is a serious work rule violation and the decision to terminate their employment should be upheld.

UNION'S POSITION

The Union claims that the Employer's case rested solely on Mary Humphrey's testimony and severe questions were raised concerning her credibility. The Union also asserts that the discharge of the grievants for sleeping on the job conflicts with the treatment of other employes. It notes that while the Employer's rules provide that sleeping on the job is improper, such conduct does not require discharge but the discipline is dependent upon all the circumstances.

With respect to Humphrey's credibility, the Union notes that she worked under the RN in charge of the night shift, Ethel "Mickey" Curtin, who was out to get rid of the grievants. The Union relies on the testimony of the Union Steward who investigated the grievance during the course of which she spoke with Humphrey and Humphrey told her that Little was

not asleep and was ambiguous with regard to Maney. It observes that Humphrey explained to the Steward that Curtin wanted to get rid of the grievants and Humphrey did not want to get involved.

The Union argues that even if the grievants had dozed off, discharge is not justified. It observes that they work on the third shift from 10:00 p.m. to 6:00 a.m. and between rounds they sit in the dining room reading or doing other things to pass the time. It notes that they are simply available if the nurse requests their assistance and there are no set break times. It contends that it is not surprising that employes will nod off from time to time in the early morning hours. It states that this is common and includes nurses as well as CNA's. It asserts that Nurse Curtin even left the floor and slept which incident was reported to higher management. The Union claims that Curtin allowed Delrose Cain to doze off so long as Cain would go to bingo with her after work.

Despite the Employer's policy on sleeping on the job, the evidence established that only one employe was discharged. It observes that in that case, the employe was found sleeping in a resident's room with the curtains drawn and the covers over her. It maintains that there is no comparison between sleeping in a resident's bed and an employe who dozes off briefly.

The Union also points out that a Robin Holland who had less than 90 days of seniority was found sleeping in a chair in a resident's room and received a warning notice. It asserts that the instant case involves two long-term employes who, at best, briefly dozed off between rounds, and given Humphrey's contradictory statements, it is doubtful they were asleep, and, given the treatment of Holland, the discipline cannot stand. It notes that the Employer had the burden of proving just cause for the discharges and it failed to carry its burden with respect to the facts or to justify the severe and disparate punishment given to the grievants. It seeks reinstatement of the grievants and that they be made whole for all losses.

DISCUSSION

Sleeping on the job, particularly at a skilled nursing facility, is a serious matter and has been likened to theft of company property because if a sleeping employe is permitted to do so, the employe is rewarded for not working. Sleeping on the job is a serious offense but it does not necessarily call for immediate discharge. A number of matters have been raised by this case. The first is whether the evidence even established that the grievants were sleeping on the job. The Employer submitted some documents with its brief. These documents were not admitted into evidence and it is inappropriate to consider them and they cannot be considered as proof of anything. Additionally, RN Curtin never testified at the hearing so the Employer's proof is the testimony of RN Humphrey as well as the exhibits admitted into evidence at the hearing. With respect to Ann Maney, I credit Humphrey's testimony that she heard Maney snoring and observed her sitting in a chair in the dining room with her head down and Humphrey had to awaken her. As to Ronica Little, Humphrey testified she appeared to be

asleep with her head back and her eyes closed. The Employee Handbook (Ex-9) lists unacceptable modes of conduct which includes sleeping or appearing to be asleep while on duty. In Little's case, the proof established that she appeared to be asleep.

The next issue is whether discharge is warranted for the grievants' conduct. Generally, arbitrators distinguish between employes who make preparations and deliberately sleep in an obscure location from employes who inadvertently doze off or nod off. This distinction is noted in SOUTHWESTERN ENGINEERING CO. 95 LA 1006 (SUARDI, 1990) citing CROWN CORK AND SEAL, 64 LA 734 (STILWELL, 1975), who stated:

> One who deliberately seeks out a secure hiding place to avoid detection and proceeds to deny management of his services wilfully and maliciously is not the same as one who through circumstances of his work or other situations falls inadvertently to sleep without intention of defrauding management.

It would appear that in an earlier case, a CNA who was found sleeping in a resident's room at 11:00 a.m. with a blanket over her, with the privacy curtain drawn and a wet floor sign by the door and who was discharged falls in the first category of deliberately and secretively sleeping on the job (Ex-10). On the other hand, an employe who was found sleeping in a chair in a resident room with her head down over folded arms on an overbed table was merely given a warning notice (Ex-11), would fall in the second category.

In the instant cases, the evidence did not establish that the grievants made any attempt to surreptitiously seek out a sleeping place; rather the evidence indicates that this was in the category of accidental or inadvertent dozing off. Additionally, there was no proof that either had neglected her duties. Under these circumstances, immediate discharge is not appropriate. The Progressive Discipline Procedure states:

> Moreover, it is stressed that all disciplinary situations must be evaluated in light of their individual circumstances, including the employee's overall record of performance. Therefore, the list provides only a guide as to what discipline may be appropriate for the situations listed and as to what discipline may apply for situations not listed. (Ex-8).

Where discipline may be appropriate, it requires an evaluation of all the circumstances. Here, the evidence failed to show that the grievants had anything but a clean record and no evidence of irresponsible conduct related to sleeping on the job. At most, the evidence was that the grievants dozed off or appeared to be asleep in a situation that is consistent with unintentional nodding off to sleep. Under these circumstances, immediate discharge is not appropriate.

Furthermore, the evidence in the instant case indicated that all but one employe dozed off on occasion including the nurses and, in particular, Humphrey and Curtin. Humphrey was not recalled to rebut this testimony. The evidence indicated that RN Curtin not only slept on the job but condoned certain CNA's sleeping on the job. Under these circumstances, where sleeping on the job was condoned, the Employer had the obligation to warn employes that it no longer condoned sleeping on the job, even inadvertent nodding off, before it could invoke immediate discharge. Without such notice, discharge would be completely unfair and unwarranted so as to violate the basic tenets of just cause. GREAT PLAINS BAG CORP., 83 LA 1281 (LAYBOURNE, 1984).

The Employer did not have just cause to discharge the grievants. The evidence established at best that the employes inadvertently dozed off or appeared to be sleeping. In similar circumstances, employes received merely a warning notice and given the past acceptance of condoning nodding off and the failure to discipline anyone for doing this in the past, the grievants' summary discharge cannot stand. They are to be immediately reinstated with back pay. The only discipline warranted is a warning notice.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The Employer did not have just cause to discharge the grievants. The discharges shall be reduced to warning notices. The Employer shall immediately reinstate the grievants to their former positions and make them whole for lost wages and benefits, less interim earnings and unemployment compensation received, if any. The undersigned will retain jurisdiction for a period of thirty (30) days for the sole purpose of resolving any disputes with respect to the remedy herein.

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

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator

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