

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**GREEN COUNTY PLEASANT VIEW HOME EMPLOYEES,
LOCAL 1162, WCCME, AFSCME, AFL-CIO**

and

GREEN COUNTY

Case 142
No. 58525
MA-10977

Appearances:

Mr. Greg Spring, Research Analyst, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. William E. Morgan, Green County Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

Green County Pleasant View Home Employees, Local 1162, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Green County, hereinafter referred to as the County, 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 County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Monroe, Wisconsin on April 20, 2000. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on May 23, 2000. The parties reserved the right to file reply briefs but only the Union filed one, which was received on June 6, 2000 and the record was then closed.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The grievant was employed as a certified nursing assistant (CNA) at the County's Pleasant View Nursing Home. On December 2, 1998, the grievant was suspended for resident abuse. (Ex. 4). On December 9, 1998, the grievant was terminated. (Ex. 6). The discharge was grieved on December 14, 1998 (Ex. 2). On December 22, 1998, the grievance was denied by the Administrator of Pleasant View Nursing Home (Ex. 3). On February 26, 1999, the County's Personnel Committee denied the grievance (Ex. 8). The parties agreed not to proceed to arbitration pending the State's determination as to the grievant's status on the CNA registry (Exs. 9, 10).

On April 26, 1999, the Bureau of Quality Assurance of the Department of Health and Family Services, State of Wisconsin, informed the grievant that it had concluded that there was probable cause to believe the incident did occur and the grievant's conduct met the definition of abuse in Section HFS 13.03(1)(a) of the Wis. Adm. Code (Ex. 7). The letter also notified the grievant of her right to appeal and the procedure for doing so. On April 29, 1999, the County considered that arbitration would not be necessary based on the April 26, 1999 letter. (Ex. 11). The grievant filed an appeal of the Bureau of Quality Assurance's finding to the Division of Hearings and Appeals which issued a decision on November 12, 1999 reversing the determination of the Bureau of Quality Assurance (Ex. 12). The Bureau petitioned for a rehearing and that was denied on December 23, 1999. The grievant requested to be reinstated, which was denied by the County.

ISSUE

The parties were unable to agree on a statement of the issue. The Union states the issue as follows:

Did the County violate Section 7.06 of the collective bargaining agreement by refusing to reinstate the grievant with back pay?

If so, what is the appropriate remedy?

The County states the issue as follows:

Is the State of Wisconsin, Department of Health and Social Services, Bureau of Quality Assurance, the "State" as referred to in Section 7.06 of the Agreement, such that the parties are bound by its decision?

If not, what is the appropriate remedy?

The undersigned adopts the Union's statement of the issue.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VII Discharge and Suspension

. . .

- 7.06 CNA Registry. If a grievance is filed concerning an employee discharge which is subjected to registry review under state or federal law, arbitration of the grievance shall be held in abeyance pending a decision by the State. If the Employer suspends an employee during its investigation of conduct alleged to violate registry rules, the suspension will be with pay until the Employer makes its decision. The parties will be bound by the State's decision on whether the employee committed abuse. If the State finds that no abuse occurred, a discharged employee shall be reinstated with back pay.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the language of the agreement is clear. It asserts that under Section 7.06 the parties agreed to be bound by the State's decision. It submits that there is only one decision in the record and that is of the Division of Hearings and Appeals which has not been overturned and is the final decision of the State. The Union refers to that decision which is that the grievant did not abuse the resident and this is the official position of the State including the Bureau of Quality Assurance and the end result is the same as if the Bureau had initially determined that the allegation was unsubstantiated.

It argues that the evidence establishes that there was no discussion between the parties to limit the identity of the "State" to mean solely the Bureau of Quality Assurance. It points out that the Bureau is only one division of the State and the Bureau determination was appealed and the final determination made by another state agency was that no abuse occurred and that decision was made by the State. It seeks what the parties bargained for, which is, if the State finds no abuse, as it did here, the grievant should be reinstated with back pay.

The Union, assuming *arguendo* that Section 7.06 is ambiguous, claims that the intent is clear that the parties substituted a due process hearing before the state for the due process hearing provided by the grievance procedure. It points out that no hearing is held before the

Bureau's determination and the first opportunity to present evidence and cross-examine witnesses is at the appeal hearing and to hold that the "State"'s decision is made prior to an appeal for a hearing would result in a harsh, nonsensical result and also would constitute a significant forfeiture. It notes that the Bureau's determination may be based on inaccuracies which can only be uncovered in a due process hearing. The Union claims that it would never agree to allow an unjust discharge to remain uncorrected when the Bureau based its determination on misinformation. The Union insists that the clear intent of the parties be given effect by reinstating the grievant with back pay.

It concludes that the County's refusal to reinstate the grievant violates Section 7.06 and it seeks an order reinstating the grievant with back pay.

County's Position

The County contends that where it refers to "the State" in Section 7.06, it was the intent of the parties that the language be interpreted to mean the Bureau of Quality Assurance. The County acknowledges that the language in Section 7.06 is not as clear as it might otherwise be but the Union's interpretation is contrary to logic and the past interpretation of the contract by the parties. It submits that the language was added in 1992 as a result of the administrative rule changes regulating the CNA Registry and there was concern how the Administrative Code would impact the contractual rights of the parties. It notes that the Union argues for an expansive definition of the word "State" in Section 7.06 to include judicial systems but the Bureau of Quality Assurance is charged with investigating abuse allegations and maintains the registry review.

The County states that the Bureau of Quality Assurance has expertise in the field of conducting investigations into resident abuse and in the past, the County conducted its own investigations. It claims that if an incident of abuse was substantiated at the County level, it needed to be reported to the Bureau of Quality Assurance for its own independent investigation. It insists that once the County decided on termination, it would be held in abeyance pending the investigation of the Bureau but not beyond the time of the initial determination and decision by the State. It maintains that it is not unusual to rely on an outside agency for its expertise.

The County contends that the title of Section 7.06, "CNA Registry" is indicative of the parties' intent. It submits that a careful reading of Section 7.06 reveals that it refers solely to the Registry review process which does not entail any appellate review. It argues that if the parties intended to hold any grievance in abeyance pending appellate review, they would have stated so and the absence of such language is telling. It claims that any other interpretation would render the language superfluous and language should not be interpreted to render it

meaningless and any interpretation other than that urged by the County would do just that. It points out that if an allegation of abuse is substantiated by the CNA Registry, the individual is prohibited from working as a CNA, so if the language means something other than the County's interpretation, it is merely stating the obvious, that the individual is no longer employable, which was not the intent of the language. It avers that the parties did not have significant discussions or disagreements when this language was agreed to because the impact was thought to be minimal. The County insists that there was no need to transfer its authority to a third party if doing so was going to drag out the decision for months or years. It argues that once the Bureau of Quality Assurance made its decision, the parties were bound by it. It states that if the grievant disagreed with the Bureau's decision, that is a separate matter between the Bureau and the individual and the County has no authority to participate before any higher appellate authority. Arguably, according to the County, if the Bureau's decision is overturned, the County could reinstate the employee if it so chose but is not obligated to do so under Section 7.06. It alleges that further litigation only determines whether the CNA will continue to be eligible to work and not whether the County acted appropriately in its investigation and determination. It asks that the grievance be denied.

Union's Reply

The Union objects to the County's attachment of exhibits to its brief which appear to be exhibits introduced at the hearing but renumbered. It points out that an exhibit referred to as 2-B was not introduced at the hearing and is irrelevant and must be disregarded.

The Union argues that the County's analysis of Section 7.06 is incorrect. It notes that the County's brief correctly states that the grievance was held in abeyance pending determination by the State as to the grievant's status on the CNA Registry. It refers to the Department of Health and Family Services' rules on how entries are made on the registry, particularly HFS 13.05(7)(c), which prevent the Bureau's decision from becoming final in case of an appeal until the Division of Hearings and Appeals reaches a determination. It maintains that the parties in Section 7.06 agreed to live by the determination of the State on discharges involving the registry, and the County does not want to live up to its end of the bargain.

The Union observes that the County argues that the Union's interpretation of the word "State" is too broad and would include the U.S. Supreme Court; however, the Union has not made such an argument and it is not necessary to do so and it need not be addressed. It points out that this case involves the decision as to whether the "State" determined whether the grievant was guilty of abuse and the Division of Hearings and Appeals found the grievant was not, and no Circuit Court, Court of Appeals, or Supreme Court made any decision; rather, the decision was by a State agency, so clearly it was the "State" that determined she was not guilty of abuse.

The Union disputes the County's assertion that there is a past practice that the parties accept the determination of the Bureau of Quality Assurance. It states that the evidence established that this was the first case appealed to the Division of Hearings and Appeals, thus there is no past practice. The Union also argues that past practice is not applicable because the language of Section 7.06 is clear, i.e., if the Registry prohibits an employee from working in a nursing home, the Union will not process a grievance to arbitration and if the Registry does not prohibit the employee from working in the facility, the County will reinstate the employee with back pay. It rejects the County's claim that the Division of Hearings and Appeals only gives the grievant the right to reapply for her position as Section 7.06 does not require her to reapply; rather, it requires the County to reinstate the grievant with backpay.

It concludes that the County's refusal to reinstate the grievant is in violation of Section 7.06 and it requests that the grievant be reinstated with back pay.

DISCUSSION

Where the language of the parties' collective bargaining agreement is clear and unambiguous, it must be given effect. An arbitrator cannot ignore clear cut contract language and must enforce the terms even though the results are harsh or contrary to the original expectations of one of the parties. The language of Section 7.06 of the parties' agreement is clear and unambiguous. Section 7.06 provides that if a grievance is filed concerning an employee discharge which is subjected to registry review under state or federal law, arbitration of the grievance shall be held in abeyance pending a decision by the State. Section 7.06 states that the parties will be bound by the State's decision on whether the employee committed abuse. It further provides that if the State finds that no abuse occurred, a discharged employee shall be reinstated with back pay. The County argues that the term "State" means the Bureau of Quality Assurance. If the parties had intended this, they could have clearly expressed this by specifying the Bureau rather than the State. The reference to the State must be used in its normal sense being the State of Wisconsin which includes the various departments and agencies into which the State is organized. Thus, the term "State" clearly means more than the Bureau of Quality Assurance. The reference to registry review means more than just the determination of the Bureau of Quality Assurance but includes the appeals process set forth by the Administrative Code related to the registry. See Chapter HFS-13 (Ex-16A).

The evidence established that the parties were concerned about receiving conflicting decisions from an arbitrator who might find no abuse and the State who would place the CNA on the Registry. The arbitrator likely would require reinstatement, yet a CNA on the Registry cannot work in a nursing home facility. To avoid this conflict, the parties agreed to be bound by the decision of the State. The evidence failed to establish that the length of the proceedings for having an abuse determination and appeal was a factor in crafting the language of Section 7.06. If that was intended, the parties could have easily stated so in Section 7.06.

In the instant case, the State did not place the grievant on the CNA registry for abuse, so the State found that no abuse occurred and the County is obligated under Section 7.06 to reinstate the grievant with back pay.

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

AWARD

The County violated Section 7.06 of the parties' collective bargaining agreement by refusing to reinstate the grievant with back pay, and therefore, the County shall immediately reinstate the grievant to her former position and make her whole for all backpay and benefits less any interim earnings or unemployment compensation received, if any. If the grievant received Unemployment Compensation which is offset from back wages, the County shall reimburse the Department of Workforce Development the amount offset. The undersigned will retain jurisdiction for a period of thirty (30) days from the date hereof solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin this 17th day of July, 2000.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator

