

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SHEBOYGAN COUNTY HEALTH CARE FACILITIES EMPLOYEES,
LOCAL 2427, AFSCME, AFL-CIO**

and

SHEBOYGAN COUNTY

Case 325
No. 58639
MA-11013

Appearances:

Ms. Helen M. Isferding, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ms. Louella Conway, Personnel Director, Sheboygan County, appearing on behalf of the County.

ARBITRATION AWARD

Sheboygan County Health Care Facilities Employees, Local 2427, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Sheboygan 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 a discharge. The undersigned was so designated. Hearing was held on May 17, 2000, in Sheboygan, Wisconsin. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on July 5, 2000.

BACKGROUND

The Grievant was hired in May, 1996, by the County and worked in Dietary as a student food service worker at the Rocky Knoll Health Care Facility. The Grievant became a

Certified Nursing Assistant in April or May, 1999, and thereafter worked as a part-time CNA at Rocky Knoll. On December 16, 1999, the Grievant was terminated for resident abuse. (Ex.-3) The reasons for her termination were that she allegedly slapped an elderly woman resident, resident X, while transferring her into bed at about 8:00 p.m. on November 25, 1999, and for tilting a male resident, resident Y, in a wheelchair from an upright position to nearly lying on his back several times in succession on December 6, 1999. (Ex.-3) These incidents were first reported on December 10, 1999. (Ex.-19) The Grievant denied slapping any resident and could not recall repeatedly tilting any resident in a wheelchair. (Ex.-20, 21) The discharge was grieved and appealed to the instant arbitration.

ISSUE

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

Did the County violate the collective bargaining agreement when it disciplined the Grievant on December 16, 1999?

If so, what is the appropriate remedy?

The Union stated the issue as follows:

Did the County have just cause to discipline and discharge the Grievant?

If not, what is the appropriate remedy?

The undersigned frames the issue as follows:

Did the County have proper cause to discharge the Grievant on December 16, 1999?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or

suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due to him/her for such period of time involved in the matter.

County's Position

The County contends that its witnesses, Celine Schmidt and Lauri Ford, are credible witnesses and the Grievant's credibility is questionable. It points out that the evidence failed to establish any animosity between either Schmidt and the Grievant or Ford and the Grievant and the Union's attempt to show personal animosity does not reflect what truly happened. It argues that the Grievant gave inconsistent statements about work on Schmidt's district and the wheelchair incident does not square with Ford's testimony. It asserts that the testimony of Lee Ann Bastion is questionable in that the two or three times that she worked at Rocky Knoll fails to prove she ever worked with Schmidt. It terms this is a ploy to create animosity where none exists and the testimony must be disregarded.

The County points out its legal responsibility in operating a nursing facility as set forth in the Wisconsin Statutes and Wisconsin Administrative Code HSS-132, which requires it to properly care for its residents. It notes the law also provides for resident rights. It observes that HSS-132 defines abuse and the behavior of the Grievant in hitting a resident with an open hand constitutes abuse and is an intolerable infraction which cannot be allowed to occur ever again.

The County observes that in an abuse situation, the facility is required to report the alleged abuse and an investigation is then conducted by the State of Wisconsin. It states that such a report was made in this case and the State investigated and concluded there was insufficient evidence to prove the Grievant's conduct met the definition of abuse; however, the County has an obligation to investigate and terminate any employe for any resident abuse. It notes that the Personnel Committee offered the Grievant reinstatement with a suspension and a last chance agreement.

The County asserts that it has published Personnel Policies which all employes receive (Ex.-11) including the Grievant as she signed that she read and understood them (Ex.-12) and the Grievant received ongoing training with regard to resident rights. (Exs.-13, 14, 15 and 16) The Grievant, according to the County, did not follow her training but struck a resident with an open hand and such behavior cannot be tolerated.

The County claims the appropriate discipline for the Grievant's conduct in striking a resident is termination. It argues that the penalty imposed should not be disturbed by the Arbitrator as the rights of the residents must be protected and the County has to be vigilant to insure incidents such as this do not occur. It insists that it acted properly in discharging the Grievant.

In conclusion, the County maintains that the credible evidence is clear that the Grievant hit a resident which is so serious it cannot be tolerated. It claims the Grievant was aware that mistreatment of residents was prohibited and the County had no alternative, and after investigating the situation, acted fairly in disciplining the Grievant. It requests that the grievance be denied.

Union's Position

The Union contends that it will prove the unjust termination of the Grievant by applying "no" to the seven tests of just cause. With respect to the forewarning of the consequences of the misconduct and whether the rule or order was reasonable, the Union argues that the answer is "no" as the Grievant had never been disciplined before and the lack of a "resident abuse" definition, other than the statutory definition, under which she was found not guilty. It concludes that a rule against resident abuse is reasonable but it needs to be made known to employees.

As to conducting a fair investigation, the Union states that the answer is a definite "no." It submits that the County did not give sufficient information about the incidents to the Grievant in order for her to be able to adequately respond. It claims that the County had Schmidt and Ford redo their statements and did not share these with the Grievant nor did the County talk to all the witnesses. It states that the Chief Investigator was the Director of Nurses, Charlene Baumgartner, who was biased because she opined that it made no difference how long one can wait to turn people in for abuse, yet the County's policy requires immediate reporting and neither Schmidt nor Ford were punished for not immediately reporting the alleged abuse. It concludes that the County did not make a good faith effort to investigate the matter before disciplining the Grievant.

With respect to proof that the Grievant was guilty as charged, the Union notes that the County has the burden of proving that the discharge was proper. It observes that the State found no evidence of patient abuse, yet the County reached a different conclusion. It challenges the credibility of Schmidt because of her failure to report it promptly and certain negative incidents that tainted her relationship with the Grievant. It insists the delay in reporting the alleged incident does not smell well and it insists that friction between Schmidt and the Grievant motivated the report. It submits that the Grievant said something to Schmidt about carrying her own work and this was the motive for Schmidt to report the Grievant. As to Ford's motivation, the Union again points to Schmidt who confided in Ford and they decided to go to Baumgartner together. It notes that Ford did not complain about the wheelchair incident first but made a general complaint that the Grievant was too friendly with the male residents. The Union suggests that this allegation was not believed by the County as there is no further mention of it.

The Union challenges Schmidt's credibility on the following grounds:

1. She couldn't remember when she reported the Grievant to Baumgartner.
2. Instead of Thanksgiving, she wrote "the last time I worked with . . ."
3. She originally put forth an accusation she never supported such as verbal abuse of the resident. It also notes the absence of testimony that Schmidt raised any objection to the alleged abuse when it supposedly occurred.
4. The differences in Schmidt's two written statements.
5. The differences in time in the two written statements.
6. The error in the second statement as she could not have been on the resident's right side.
7. Schmidt never saw a slap but states she heard it.
8. Schmidt made unsupported allegations that the Grievant was rough with residents.
9. Schmidt makes a mountain out of molehill on the "nail cutting" work place joke.

The Union also claims that Ford's statements and testimony do not support resident abuse. Ford testified that tipping the wheelchair was at arm's length and there was no verbal response to this by her or the resident and she expressed no concern to the Grievant. It observes that initially, the incident was stated to have occurred on December 8, 1999, later changed to December 6. The Union points out that Ford did not think what she saw was resident abuse. It also noted that Ford confirmed that it could happen that wheelchairs get caught in the lift apparatus and must be tilted back to free them. It concludes that there are too many inconsistencies in the statements, conflicting testimony and unsupported demonstrations to the accusations to support resident abuse. It insists the County failed in its burden of proof.

As to equal treatment, the Union notes that neither Schmidt nor Ford reported resident rights abuse immediately, so why didn't they receive a discipline?

As to the penalty, the Union maintains that where the allegation is unfounded, the employee will be reinstated with back pay. It submits the termination is unfounded. The Union's final conclusion is that there are enough inconsistencies to make a case of resident abuse unbelievable. It asks that the grievance be sustained and the Grievant made whole.

County's Reply

The County contends that the Union's brief makes several points that are totally incorrect. One of these, according to the County, is that the Grievant was not made aware of

the discipline for resident abuse. The County refers to Ex.-12 which bears the Grievant's signature acknowledging that she read and understood the policies and a copy outlining "Resident Rights," so she was aware of the policies and level of discipline for resident abuse.

The County disputes the assertion that Schmidt and Ford redid their statements after the Grievant's discharge as the record establishes that they were done by December 13 and the Grievant was not terminated until December 16, 1999. The County claims that the Union brought in the testimony of Bastian to confuse the issues and to attempt to create a belief of animosity between Schmidt and the Grievant. It submits that Bastian's testimony is not credible and nothing supports a conclusion that there was any animosity between the Grievant and Schmidt.

The County denies that Ford's statement on inappropriate behavior by the Grievant was deemed false as Baumgartner counseled the Grievant on these issues and as it was difficult to follow up this charge because the residents could not verify them, so no further discipline was taken. The County maintains that Baumgartner was not the accuser as stated by the Union and she acted in her capacity as Director of Nurses to investigate all reports of improper conduct.

It labels as absurd the Union's assertion that because the demonstration did not include a "slap," it never happened because that would be an admission on the Grievant's part, yet in the Grievant's testimony, she admitted putting her hand to the resident's face and said, Whoa X, let's calm down. It points to Schmidt's testimony that she saw and heard the slap. It claims that Schmidt did not make up this story and the Union is simply attempting to cover the true facts of the incident.

The County insists that the State did not clear the Grievant and stated that their decision did not address any work rule violations or standards of behavior that may be determined by the County.

The County re-emphasized that it had proper cause to discipline the Grievant and it met the standards of just cause. It submits that the wheelchair incident occurred as described by Ford and the slapping incident also occurred. The County asserts that the Personnel Committee's actions were justified and proper and were not arbitrary or capricious. It contends that the facts support the County's actions and the grievance must be denied.

Union's Reply

The Union had the following concerns about the County's brief:

It disputes whether Schmidt saw a slap as this is not stated in the written statements and her testimony was that she was bending over lifting the resident's legs into bed when it allegedly happened, so she couldn't see.

It does not recall any testimony by Schmidt of any concern about the Grievant.

The Union disputes the County's assertion that during Baumgartner's investigation the Grievant was given a summary of the complaints, as it was only after the Union steward pried did the County give the Grievant any particulars and never gave her a summary of the statements before the Grievant wrote her reports.

The Union notes that a second meeting was held with the Personnel Committee but did not state the new evidence which the Union questions was even considered.

The Union disputes whether Schmidt decided to report the incident before she talked to Ford, rather the Union understood that Schmidt and Ford made the decision together to go to Baumgartner.

Contrary to the County's assertion, the Union never questioned the working relationship between Ford and the Grievant.

The Union disputes the County's version of whether Bastian saw Schmidt or not.

The Union questions why the County cited a different statute than Sec. 149.151 for the definition of resident abuse as Sec. 149.151 appears in the Personnel Policies Manual which was received by the employes.

The Union questions the County's statement that the Personnel Committee addressed the violation using the same approach as the State because different conclusions were reached by the Committee and the State.

The Union reiterates that if Ford and Schmidt knew the policy and reported the incidents, why did they not do so immediately as the policy says?

The Union also disputes the County's version of who was responsible for the resident and noted that the word "smack" was never used in the testimony.

The Union points to the lack of any evidence that residents' nails were cut to discipline them nor was this allegation mentioned in the discharge letter.

The Union admits that the Grievant was allegedly counseled for talking about call lights of a resident in front of residents but that was a different scenario that talking about "nail clipping" with peers at the desk.

The Union asks that this objection be considered as well as the arguments in the Union's initial brief and the grievance be sustained.

DISCUSSION

The issues in this case are whether the Grievant slapped resident X on November 25, 1999, and whether on December 6, 1999, she tilted resident Y several times from an upright position in a wheelchair to nearly lying on his back. These are the only bases set forth in the termination letter. (Ex.-3).

The basis for the slapping charge is the testimony and statements of Celine Schmidt. The Grievant denied ever slapping any resident. Did the Grievant slap the resident? The case is one of credibility. If Schmidt is believed, then it is obvious that the Grievant assaulted an elderly resident and this would constitute resident abuse for which termination would be appropriate. On the other hand, if the Grievant is believed, then nothing happened and discharge would be inappropriate as no abuse occurred. Despite arguments to the contrary, the evidence failed to establish any animosity between the Grievant and Schmidt. Based on the demeanor of the witnesses, both appeared credible and truthful. Obviously, the Grievant has an interest in retaining her job and reputation and denying any misconduct would protect her interest. There seems to be no reason for Schmidt to make up the slapping incident. What is troubling to the undersigned is the delay in reporting this. The County's Personnel Policies at page 2 under Section B provides:

B. TREATMENT OF RESIDENTS

Per Wisconsin Statutes 149.151 unreported witnessed mistreatment or misappropriation of property can be deemed as liable for the same allegation. Any witnessed mistreatment of a resident or misappropriation of property shall be discreetly reported to the Supervisor immediately or you may be considered an accomplice to the act.

By not reporting the incident immediately, the resident could not be examined for injuries or bruising or marks, which would verify a slap. A delay from November 25, 1999, to December 10, 1999, to report the slapping of a resident certainly lessens the credibility of Schmidt. Additionally, Schmidt never said anything at the time the alleged slap occurred. She never said, "Don't do that." or "Why did you do that?" or "What happened?" Simply nothing was said. There was no expression of shock, no showing of upset, just no reaction whatsoever. Again, this passivity for a more seasoned CNA is hard to understand and calls into question her credibility. The delay in reporting and the lack of any response when the alleged incident occurred leads the undersigned to question the credibility of Schmidt.

In a discharge case, the County has the burden of proving its case. Here, the Grievant is just as credible in denying the incident as Schmidt is in making it. Any stake in the outcome by the Grievant is certainly offset by Schmidt's delay in reporting the incident and her inaction and reaction to it. As there were only two persons present with opposite stories, neither of which is more credible than the other, it must be concluded that the County has failed to carry its burden of proving the Grievant slapped resident X.

With respect to the wheelchair incident, the evidence established that the wheelchair has to be tilted to properly move the patient from the lift to the wheelchair. Additionally, Ford agreed that the front wheels of the wheelchair can get hung up on the lift and only by tilting it back can it clear the lift. Ford felt that this might be unsafe and made her nervous. The movement of the wheelchair in this case has not been established to be abuse of a resident.

The conclusion reached by the undersigned is that the preponderance of the evidence in this case fails to prove that any resident abuse occurred, and therefore, the discharge was not warranted.

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

AWARD

The County did not have proper cause to discharge the Grievant on December 16, 1999. The County shall immediately reinstate the Grievant to her prior position and make her whole for all back pay 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 letter of discharge shall be expunged from the Grievant's file. 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 31st day of July, 2000.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator