

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 150, AFL-CIO, CLC**

and

**EXTENDICARE HEALTH FACILITIES, INC.,
d/b/a MONROE MANOR NURSING AND REHABILITATION CENTER**

Case 3
No. 59040
A-5857

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, by **Atty. Matthew R. Robbins**, for the labor organization.

C. William Isaacson, Senior Labor Counsel, Extendicare Homes, Inc., d/b/a Monroe Manor Nursing and Rehabilitation Center, 111 West Michigan Street, Milwaukee, Wisconsin 53203, for the employer.

ARBITRATION AWARD

The Service Employees International Union Local 150, AFL-CIO, CLC and Extendicare Health Facilities, Inc., d/b/a Monroe Manor Nursing and Rehabilitation Center are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which the employer concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance relating to discipline and discharge. The Commission designated Stuart D. Levitan to serve as the independent arbitrator. Hearing in the matter was held in Monroe Wisconsin on October 20, 2000; it was not transcribed. The employer and union filed written arguments on November 9 and November 24, respectively, and mutually waived reply briefs.

ISSUE

The parties stipulated to the issue as, “was there just cause to discharge the grievant, Pat Salathe, on March 31, 2000? If not, what is the remedy?”

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 10 – SUSPENSION, DISCHARGE, RESIGNATION

Section 10.1 – The Employer may discipline an employee for just cause, but in respect to discharge shall give a warning of the complaint against such employee in writing, and a copy of the same to the Union, except that no warning notice needs to be given to an employee if the cause of the discharge is for such reason as:

- a. dishonesty
- b. drinking or possession of illegal drugs or being under the influence if illegal drugs or alcohol while on company property
- c. recklessness that could result in an accident to a patient.
- d. abuse of a patient, verbal or physical
- e. sleeping on the job
- f. leaving patients unattended
- g. disclosing privileged information
- h. the second time an employee does not report unavailability for work at least one (1) hour before starting time. However, no such action shall be taken if the employee can show to the reasonable satisfaction of the Employer that s/he was physically prevented from coming to the nursing home due to illness or other emergency.

The Union will be notified in writing within three (3) working days after an employee is discharged.

Section 10.2 – Should the Union wish to contest a discharge, suspension, or termination, written notice thereof shall be given to the Employer within fifteen (15) calendar days, in which event the issue thereafter shall be submitted to, and determined, under the grievance procedure specified in Article III, Section 3.1, commencing Step 2 of this Agreement. Failure to give this notice bars the Union and the employee from further action.

...

BACKGROUND

This grievance concerns the termination on March 31, 2000 of Patricia Salathe from her position as a certified nursing assistant (CNA) at Monroe Manor, a nursing and rehabilitation center in Monroe, Wisconsin. Salathe had worked for the facility since October 1994, and was terminated for purportedly being physically unable to perform the essential duties of her position, following an on-the-job injury.

On November 3, 1998, while moving a resident from the bathroom to a shower chair, Salathe heard something “pop” in her left shoulder. On November 6, she was diagnosed as having suffered a “shoulder strain,” and assigned to sedentary duty as part of a transitional duty program.

On November 11, the diagnosis was given as “frozen shoulder,” and Salathe was cleared to return to work immediately, performing light and medium duty, with the further restrictions of no reaching above her left shoulder, and no lifting of weights greater than 20 pounds with her left arm.

On November 18, Salathe was directed to undergo physical therapy one to three times a week for six to eight weeks. She was cleared to continue transitional, light duty.

On December 15, the light duty restriction remained, with the reminder of the further restriction against raising the left arm above the shoulder. On the Physician Report of the Work Capacity, a question mark appears alongside the Medium Duty task of “getting resident out of bed into wheelchair or gerichair using lift and assistance.”

The Physician Report on February 15, 1999 assigns the ailment the more formal name of Abrasive Capsulitis (frozen shoulder), continues Salathe on transitional sedentary and light duty, and reaffirms the restriction on raising her left arm above the shoulder or lifting more than 20 pounds. The report of May 19, 1999 was essentially the same. A report on May 26, 1999 reaffirmed “no reaching above shoulders/L” and “not to lift over 20 pounds.” These restrictions were reaffirmed in a report dated July 27, when Salathe was continued on transitional sedentary and light duty

On September 30, 1999, the “no reaching above shoulders/L” and “not to lift over 20 pounds” limitations were determined by her health care provider to be permanent. Salathe was cleared to continue at work performing all sedentary, light and medium duty assignments except for “getting resident out of bed into wheelchair or gerichair using lift and assistance.”

The parties stipulated that, “to the best of the employer’s knowledge, from December 1 1998 to March 31, 2000, the grievant performed the duties of a CNA like any other CNA.” The parties also stipulated that Salathe’s limitations on raising her left arm above her shoulder or lifting more than 20 pounds with her left arm are permanent.

On March 31, 2000, the employer’s insurance carrier, Argonaut Insurance Company, wrote to Salathe as follows:

Pleased be advised that Nolan Segal, M.D. has determined that as of June 25, 1999 you have reached maximum medical improvement. You are entitled to permanent partial disability benefits for 10% disability for your left shoulder.

Your weekly permanent partial disability rate is \$179.00 weekly, which at 10% totals fifty (50) weeks, totaling \$8,950.00. This will be paid out bi-weekly from June 25, 1999 through and including June 8, 2000.

Enclosed you will find a check in the amount of \$7,160.00 for the period June 25, 1999 through March 31, 2000 totaling 40 weeks of permanent partial disability. Leaving 10 remaining weeks to be paid out on a bi-weekly (\$358.00) basis.

Please call should you have any questions.

Upon receipt of this report, the employer terminated Salathe. As explained by the employer on the Employee Separation Report, the reason for the discharge was “no position avail(able) for perm(anent) l(ight)t duty.”

Salathe grieved the discharge on April 4, 2000, asserting that the termination did not meet the just cause standard reflected in the collective bargaining agreement. On April 6, by Laurice L. Hillman, the employer replied as follows:

Ms. Patricia Salathe’s employment with Monroe Manor was terminated because she was unable to do the essential job functions listed in the job description. We do not have permanent modified duty. The termination was just.

Since at least 1995, the position of CNA as reported to the Unit Nurse Manager, as part of the Nursing Service department, with the following Job Description in place at all times relevant:

JOB DESCRIPTION

TITLE: Certified Nursing Assistant

REPORTS TO: Unit Nurse Manager

DEPARTMENT: Nursing Service

I. SUMMARY OF POSITION:

Performs resident care activities and related nursing services necessary in caring for the personal needs, safety and comfort of residents as assigned. Assists in providing a physical, social and psychological environment which will allow the resident to achieve the highest level of functioning. Performs duties in accordance with established nursing objectives, standards, facility policies and procedures, and residents rights.

II. MAJOR RESPONSIBILITIES:

CNA's, in providing daily care to residents, are constantly on their feet and regularly engage in lifting (some residents may weigh up to 300 pounds), bending stooping, twisting, pushing and pulling. Tasks marked with an asterisk (*) are those that regularly require these physical activities, although because resident may need care and assistance at any time, CNA's may be unexpectedly be required to do these physical activities at any time.

A. Essential Functions

1. Personal Care

- *a. Bathe residents in bed, shower or tub. Must be able to operate whirlpools or other types of specialty tubs. Clean tubs after each use.
- *b. Shampoo residents' hair in bed, shower or tub. Groom residents' hair as resident desires and assist with makeup as needed.
- *c. Shave residents as needed.

- *d. Brush teeth or dentures of residents at least daily.
 - *e. Clean and cut fingernails and toenails as necessary.
 - *f. Dress residents in clean and appropriate clothing.
2. Admission, Discharge, Transfer
- a. Assist in the implementation of admission, discharge and transfer of residents according to facility procedure.
3. Resident Rights
- a. Know the residents' rights. Help the residents exercise and/or protect their rights.
 - b. Report residents' complaints to the nurse manager.
 - c. Maintain confidentiality of resident information.
4. Resident Independence
- *a. Assist and encourage residents to achieve their highest level of independence in activities of daily living.
 - *b. Promote resident mobility through proper transfer techniques to/from bed, wheelchair, stretcher.
 - *c. Assist with daily range of motion and promote exercises. Assist with ambulation as needed.
 - *d. Assist with daily ADL retraining and rehabilitation programs as indicated.
 - *e. Maintain good body alignment and proper positioning of residents.
 - *f. Assist and encourage bed residents to change position at least every two hours.

*g. Transport residents.

5. Nutritional Need

*a. Assist and/or prepare residents for meals. Assist to dining room as necessary.

*b. Distribute and collect trays.

*c. Feed, assist, and encourage residents to achieve their highest level of independence.

*d. Assist residents in use of self-help devices.

e. Observe residents for difficulties in chewing or swallowing while eating.

f. Report and document nutritional and fluid intake.

g. Serve nourishments.

h. Keep fresh drinking water at bedside and encourage fluid intake as instructed.

6. Elimination – (Monitor elimination status of residents.)

*a. Offer and remove bedpans and urinals.

*b. Assist residents in use of commode.

c. Assist with bowel and bladder training program.

*d. Check, change and clean incontinent residents.

*e. Give enemas as directed.

f. Document and report bowel and bladder patterns.

*g. Collect urine and stool specimens as requested.

*h. Give catheter care; measure and record intake and output.

7. Vital Signs

*a. Take, record and prepare vital signs and weights.

8. Infection Control

a. Practice proper hand washing technique.

b. Follow universal precautions procedures: use required personal protective equipment.

9. Safety - Assure a safe, clean, and comfortable environment for the resident, staff, and visitors.

a. Place call lights within reach of residents and answer call lights promptly.

*b. Follow procedures for the restraint proper program.

*c. Know and implement facility safety rules.

d. Demonstrate proper use of equipment. Report equipment needs or repairs.

*e. Clean equipment and utility areas as assigned.

f. Ensure adherence to smoking policies.

g. Report any incidents or accidents of residents, staff, or visitors to the supervisor.

*h. Keep the resident living area neat and orderly; personal care items stored properly; clothing hung in closets or placed in soiled bins as appropriate.

*i. Make residents' bed, including changing linens as necessary.

- *10. Evacuation/Disaster Plan (Perform duties, which may include transporting residents, as assigned in Facility Disaster Plan)
- 11. Observations and Reporting
 - a. Attend shift report at beginning and end of each tour of duty.
 - b. Perform and document resident care activities according to written and verbal instruction from the charge nurse.
 - c. Coordinate care needs with resident activities.
 - d. Report changes in behavior or condition to supervisor.
- 12. Care Plans

Assist in development and implementation of resident care plans.
- 13. Hospitality

Maintain a friendly, helpful attitude toward residents, their families, staff, volunteers and visitors.
- 14. Orientation and Inservice

Participate in required orientation and inservice programs and attend staff meetings as requested.
- 15. Assistance

*Provide assistance to other staff as necessary.
- 16. Participate in Continuous Quality Improvement teams as requested.

B. Marginal Duties

1. Report residents' needs for personal belongings to appropriate persons.
2. Assist and encourage residents to participate in activity programs and special therapies as directed by the nurse manager and prescribed by the physician.
- *3. Care for and apply prosthetic devices as instructed.
4. Complete ancillary charge tickets for nursing supplies used.
5. Perform other duties as assigned and consistent with level of preparation and experience.
6. Admission, Discharge, Transfer

Assist in the implementation of admission, discharge and transfer of residents according to facility procedure.
7. Ability to relate positively, effectively and appropriately with residents, families, community members, volunteers and other facility personnel. Possess special interest in, and a positive attitude about, working with long-term care residents and the elderly.

III. QUALIFICATIONS

A. Required

1. Meet all health requirements imposed by law.

EDUCATION

1. Completion of a nursing certification program or proof of valid certification.

EXPERIENCE

1. Long-term care experience desired.

KNOWLEDGE, SKILLS, & ABILITIES

1. Ability to read, write, speak and understand English.

The designation of “essential” and “marginal” functions is for purposes of compliance with the Americans with Disabilities Act. Employees holding this position will be required to perform all job duties, consistent with this law.

POSITIONS OF THE PARTIES

In support of its position that the discharge was with just cause, the employer asserts and avers as follows:

The grievant was terminated because of a permanent restriction not to lift over 20 pounds or raise her arm above her shoulder, limitations which precluded her getting a resident out of bed into a wheelchair or gerichair using life and assistance. She was terminated because of her physician-mandated permanent restrictions, in that she could not perform the essentials of the job.

Management has the right to terminate employees whose physical condition renders them unable or unfit to perform their jobs, or employees whose condition renders them unduly hazardous to themselves or others. Both instances would apply here – particularly with the 20 pound limitation. Assistance could not properly and safely be rendered to a falling or fallen resident – an essential duty to the job of nursing assistant. This meets the requirement of just cause.

The union is not claiming the medical restrictions are not correct. They are a given in the situation. An individual with these restrictions cannot be allowed to work as a nursing assistant because the individual cannot be relied upon to protect the patients or themselves from harm.

The employer seriously erred in allowing the grievant to work for the months that she did following her injury. It is crucial to understand that because no harm resulted, this fact cannot furnish a rationale to continue such a risk. The fact that during the timeframe she worked either by disregarding the restrictions

or not testing them does not change the restrictions and their potential harm to her or the resident. To allow her to resume the normal duties of a nursing assistant would constitute a clear and present danger potentially leading to heightened responsibility if a mishap occurred either to a patient because of it.

There are several compelling reasons why allowing an individual to return to a position whereby the only medical evidence available clearly shows the person cannot fully handle the position, given their present restrictions cannot be allowed.

This would produce an element of massive uncertainty if a clear medical restriction cannot be considered as a necessary guideline; it would take away the protection that is afforded patients in not having them attended by caregivers fully able to furnish the necessary physical help in an emergency; it would improperly modify the contract by requiring the company to create a modified limited duty position where one does not currently exist; the presence of an employee working despite a restriction, which later resulted in a bad outcome, would create a foundation for litigation against the nursing home under the current onslaught of plaintiff's litigation against nursing homes.

While it is tragic that the grievant's limitation prevents her from holding a job, it would be more tragic if a caregiver's restrictions led to harm or failure to help a patient. A nursing home's primary responsibility is to its residents, and the needs of the patient must take priority over those of the caregiver in this setting. If by some miracle the grievant would not have the limiting restriction, she could resume her employment. But now, the existing restriction prevents her from performing the essentials of the job, and to allow an exception would create a totally unacceptable risk to the geriatric and weakened patients.

Accordingly, the grievance must be denied.

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

The evidence illustrates a complete failure by the employer to meet its burden of proving just cause for discharge. The employer's assertion that the employee's work restrictions precluded her from performing the duties of the job is contradicted by the fact that the grievant performed those duties from November

1998 until her discharge in March 2000. There is absolutely no evidence that she did not safely perform her job duties. In fact, the parties stipulated to the opposite.

It appears from the record that the sole motive for the discharge was retaliation for an award of worker's compensation benefits to the grievant. But there was no evidence presented that the grievant was unable to perform the duties of her job over a prolonged period of time after the injury or that there was a safety hazard.

The medical reports are consistent as to the nature of the restrictions, but there is no showing that the restrictions prevented her from performing her duties as a certified nursing assistant. Given the prolonged period of time – 20 months -- in which the grievant performed all of her job duties without incident, the grievance should be sustained. There is simply no evidence to support a just cause finding for the discharge.

DISCUSSION

The hornbook analysis of this issue, which the employer has submitted to assist my research, accurately summarizes the conflict before me: “There are many cases upholding management’s right to terminate employees whose physical condition renders them unable or unfit to perform their job,” the text informs. “On the other hand, there are many cases in which the arbitrator required management to return an employee to work where the evidence indicated that the employee was not so affected or disabled as to be unable to perform the job satisfactorily or safely....” *How Arbitration Works*: Elkouri and Elkouri, 5th Edition, ABA Section of Labor and Employment Law, pps. 792-793.

Of all the cases cited, METROPOLITAN SPORTS FACILITIES COMMISSION, 90 LA 868 (Bognanno, 1988) seems particularly apt. In that case, a general maintenance worker who had sustained two serious work-related injuries was able to perform mostly stationary duties during the five years following the injuries. In the fall of 1986, the employer was informed that the grievant had reached the maximum medical recovery and that he would not be able to perform the full set of responsibilities associated with his position classification. Yet the employer took no action until it discharged the grievant the following summer. In sustaining the grievance and overturning the termination, the arbitrator explained as follows:

The difficulty with the Employer’s position rests in the timing of the Grievant’s medical evaluations and the manner in which he was terminated. The Employer did not adequately explain the delay between the last medical evidence – dated

September 1986 – and the date of the discharge – July 23, 1987. The undersigned is altogether unclear why the Employer waited until the date of discharge in the face of the medical evidence which it relies so heavily on in this case. The record strongly suggests, however, that the decision was made without careful consideration of the actual limitation imposed on the Grievant and his expected job performance. 90 LA at 870.

The parallels between this case and the one before me are obvious. The record before me shows that the employer was aware on or about September 30, 1999 that Salathe's physical limitations – no lifting the left arm above the shoulder, no lifting more than 20 pounds with that arm -- were permanent. As of that date, the employer was also alerted that Salathe would continue to face difficulty moving residents from bed to wheelchair.

Yet despite this clear medical advice, the employer took no action, waiting until the March 31 correspondence from its insurance carrier. The employer seeks to address this issue by stating that it “seriously erred” in allowing Salathe to remain at work, and urges that “this fact cannot furnish a rationale to continue such a risk.”

But in making this argument, the employer has a further problem – there is nothing in the record to indicate that the purported risk is as it says it is. Indeed, the record suggests just the opposite, by the parties' stipulation that Salathe worked from December 1998 to the day she was discharged “and performed the duties of CNA as any other CNA.” As a distinguished arbitrator wrote in a similar case,

There exists in this instance *an actual history* of many months during which the Grievant actually demonstrated on the job that not only could he perform satisfactorily but that he was accident-free. If, as the saying goes, “the proof of the pudding is in the eating,” this would seem to be it! (emphasis in original).
VULCAN MOLD & IRON CO., 42 LA 734 (Sembower, 1964)

There is no question that an employer may, under certain circumstances, terminate an employee who is physically unable to perform the necessary duties of her or his position. But in order to prevail in such an action, the employer must demonstrate that the employee, is indeed unable or unfit to perform. In the case before me, the employer neither conducted an independent investigation to assess the grievant's fitness for duty, nor presented evidence at hearing on that point. The mere existence of the restrictions themselves, even unchallenged as they are, do not, by themselves, establish the necessary link to an inability to perform the necessary tasks of the position.

I appreciate the concern the employer raises about our increasingly litigious society. However, my function is not to weigh prospective tort liability matters, but to interpret and apply the terms of the existing collective bargaining agreement. That agreement provides that the employer needs just cause to discharge a post-probationary employe such as Salathe. The employer has failed to meet its burden in this regard.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The employer shall rescind the discharge, remove references to the discharge from the grievant's personnel file, and make the grievant whole for lost wages and benefits, minus appropriate offsets. To resolve any disputes that may arise over the implementation of this remedy, I shall retain jurisdiction until the parties jointly release me.

Dated at Madison, Wisconsin this 19th day of December, 2000.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

