BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1667, AFSCME, AFL-CIO

and

VERNON COUNTY

Case 135
No. 61520
MA-11966

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Mark B. Hazelbaker, Attorney at Law, appearing on behalf of the County.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2000-2002 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to hear the grievance of Susan Evenson. A hearing was held on October 25, 2002, in Viroqua, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by December 20, 2002.

ISSUE

The parties ask:

> Did the Employer, Vernon County, have just cause to discharge Sue Evenson on May 8, 2002? If not, what is the appropriate remedy?

BACKGROUND

The Grievant, Susan Evenson, has been a certified nursing assistant at Vernon Manor for eight years before her discharge on May 8, 2002, for an alleged incident of physical abuse of a resident known here as "Morris." The resident had large bruises on his arms from the Grievant's handling of him on May 4, 2002.

The Grievant had frequently taken care of Morris and described him as a jovial person. She was taking care of Morris on the evening of May 4th when the incident in question happened. She was working the 2:00 p.m. to 10:00 p.m. shift and taking care of him after supper. She took him to the bathroom first, then took his hearing aid out and put in on the cupboard. She proceeded to put him to bed, getting him out of his wheelchair first. The Grievant had him put his left hand on the railing of the bed. Morris usually refused to use a gate belt or transfer belt and the Grievant was not using the belt on May 4th. The Grievant was on his side, and she told him to go up on the count of three. He got up to a standing position, and according to the Grievant, he let go of the rail and started to fall. The Grievant had to make a split second decision of letting him fall forward or catching him. She stated that his weight was going forward, so she grabbed him by both arms and braced him with her knee and swung him into the bed. The Grievant testified that if she had not grabbed him by his arms, he would have fallen flat on his face on the floor. The Grievant stated that he seemed to be in a good mood, that both of them joked about it a little. Another staff member came in and helped her move him properly in the bed.

Carrie Baumgartner is a social worker at Vernon Manor. She was called at home on May 5th by a nurse who reported that Morris said a nursing assistant was rough with him the night before when putting him to bed. Baumgartner spoke with Morris to find out how he got the bruises on his arm. She testified that Morris said a nursing assistant was in a hurry and rough with him, that he was going to help with the transfer into bed, but she grabbed his arms off the side rail and put him into bed. He also told her that the nursing assistant was rough in general, that she had taken off his hearing aid in a rough manner, that it fell on the floor and the battery came out. The battery was replaced in the morning. On May 5th, Baumgartner took five color photos with a digital camera of his arms, showing the bruises. Baumgartner believed that Morris was mentally competent at that time, though he may not have been competent at the time of the hearing.

The Director of Nursing at the Manor is Merna Fremstad. She testified that some elderly residents bruise more easily than others do and need to be handled carefully. Morris had been there for more than a year at the time of the incident in question, and he was not a resident that bruised easily, although elderly people generally bruise more easily than younger people do. Morris was 89 years old. He was not on any medication nor had any medical condition that would have contributed to bruising.

The Administrator of Vernon Manor, Nancy Witthoft, interviewed the Grievant the day after the incident. Witthoft asked the Grievant if she knew of anything that happened when putting Morris to bed, and the Grievant could not remember anything that happened to him. The Grievant said she took his hearing aid out and put him to bed. Witthoft then showed the Grievant the pictures of the bruises on his arms, and the Grievant became flustered. Witthoft suspended her for three days and asked the Grievant to go home and think about what happened and write down anything she recalled. The Grievant submitted a hand-written document on May 6th which then described the incident, wherein she wrote about Morris

beginning to fall. Witthoft found the Grievant's written account to be inconsistent with the Grievant's oral statements when she was interviewed. In particular, the Grievant did not mention in her oral interview that Morris may have been leaning or falling. Witthoft found that the written account had changed from the account given in the oral interview.

Baumgartner was present when the Grievant was interviewed by Witthoft. Baumgartner recalled that the Grievant said she had some trouble putting Morris to bed on the evening of May 4th, but the Grievant did not recall anything out of the ordinary. The Grievant did not mention that she had to grab Morris when he started to fall. The Grievant testified that she was stunned when called in about the incident. The Grievant was shown the pictures and had not seen those bruises before. There were no previous allegations that the Grievant handled residents in a rough manner.

On May 10th, Witthoft wrote a letter to Morris' family to apologize for the bruises to him. At the same time, Witthoft reported the incident to the Bureau of Quality Assurance, which is part of the Department of Health and Family Services.

An investigation was done by the Bureau of Quality Assurance, which concluded that there was insufficient evidence to prove the alleged conduct met the definition of abuse, per Chapter HFS 13 of the Wisconsin Administrative Code. The definition of abuse under HSS 129.03(1) is the following:

> . . . conduct evincing such willful and wanton disregard of a client's physical and mental needs and interests as is found in deliberate violations or disregard of client rights, or in carelessness or negligence of such degree or frequency as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the aide's duties and obligations to the client. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertency or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not deemed to be abuse. Abuse includes neglect and mistreatment. . . .

In its letters of findings, the Bureau of Quality Assurance states that its decision does not address any work rule violations or other standards of performance which may be at issue.

The Grievant received satisfactory and very good evaluations for several years, and the only fault noted was too much use of sick leave. The Grievant was not previously disciplined for anything similar to this incident. Witthoft did not look at prior performance evaluations. She made a judgment based on the incident itself, and she determined that the incident was severe enough to warrant termination.

THE PARTIES' POSITIONS

The County

The Employer asserts that the evidence shows that the Grievant abused the resident called Morris. He was interviewed by social worker Baumgartner when he complained about being treated roughly by an aide. There were bruises on his forearms, and he claimed that he received them from the aide that had put him to bed the night before. He told Baumgartner that the aide grabbed him because he was not moving fast enough. He also complained that she took his hearing aid out roughly, causing the battery to pop out. The battery was lost and had to be replaced, which corroborates his account. He had substantial bruises which were photographed. He was clear about his statements and denied that he was falling or that he lost his balance. Baumgartner found him competent to render such observations and thought he had his faculties intact on the date in question.

The Employer argues that the evidence, although hearsay, should be admissible as a hearsay exception. Morris' statement was an excited utterance, which was given while still under the stress of the event described. Also, because of his fragility as a nursing home resident, he should be viewed as unavailable. Section 908.04(1) defines unavailability as situations in which a declarant is unable to be present or testify because of then-existing physical or mental illness or infirmity. Baumgartner should be allowed to testify as to his statements. The Courts have recognized that social workers are competent to testify in circumstances which make it difficulty for the witness to be present. The trier of fact can allow any hearsay statement to come in, provided it has comparable guarantees of trustworthiness. Baumgartner has no reason to provide false testimony, while the Grievant has an obvious motive to deny abusing the resident.

Also, the Employer urges allowing hearsay testimony because the Manor is required by state law to advocate on behalf of residents and protect them. Administrative agencies should not base a decision solely on uncorroborated hearsay, but here the hearsay testimony is corroborated by the bruises on the resident's arms and the lost hearing aid battery. The pictures establish that the resident was handled with enough force to cause injury. With that corroboration, the resident's hearsay utterance is entitled to be weighed against the statement of the Grievant.

The Employer believes that the injuries were the product of rough treatment, not of negligence. They were the result of a flash of impatience by the Grievant. There was no medical condition that would account for the bruising. A large amount of force was used, and it is hard to believe that this could have happened accidentally. The resident denied losing his balance and denied needing any assistance. The Employer believes that the resident did not move fast enough for the Grievant when she was putting him to bed and that she responded by grabbing his arms and forcing him into bed, causing the bruises.

The Employer asserts that the nursing home cannot afford to be known as a place in which either abusive or highly negligent employees get away with mistreating or injuring residents. Resident abuse is so unacceptable that it must be an industrial capital offense. Nursing home care is a matter of life and death for the residents. The Employer is justified in erring on the side of protecting residents. Although the Grievant has served eight years without being written up, no one gets a free shot at abusing a resident. The Employer is justified in discharging the Grievant for a first incident based on the severity of the incident itself.

The Union

The Union asserts that the County did not produce the resident in question to testify and that it had a standing objection to the hearsay nature of the County's testimony. The Union was not able to cross-examine the resident or establish his competency. The County admitted that he was probably not competent to testify at the time of the hearing. By failing to produce the witness to the event, the County has not proven that the Grievant should have been discharged for physical abuse of a resident.

The Union notes that the Grievant did not see any bruises on the resident during the evening of May 4th. She was trying to help him into bed when he became unsteady, so she grabbed his other arm to keep him from falling or leaning. She asked another aide to help her after the resident was already in bed, and she did not see any bruises. Something else could have occurred between 7:30 p.m. on May 4th and 6:00 a.m. on May 5th to cause the bruises.

Also, the Union argues that the issue was submitted to the Bureau of Quality Assurance and the Bureau did not render a finding of abuse. Even if the resident's bruises were caused by the Grievant's actions, those actions cannot be considered to be abuse. She was attempting to prevent injury rather than cause it. The Director of Nursing testified that older people tend to bruise easily. Grabbing an older person's arm to prevent him or her from falling could produce bruises. The alternative was to let the resident fall to the floor.

The Grievant testified that she did not intend to harm the resident. The record shows no indication that she is the kind of person that would abuse residents. She has never been disciplined and her performance evaluations show fairly high scores, except for attendance. The Union does not know what to make of the hearing aid issue. No one appears to know how the battery got lost.

The Union submits that there was not a finding of abuse by the State, and that there should not be a finding of abuse under arbitral authority. The Union asks for a make whole remedy.

DISCUSSION

There is always a problem in one-on-one situations, even between two employees, both competent and available to testify. Credibility determinations have to be made, and they are all the more difficult in these situations where residents are often incompetent to testify, either at the time of the incident or later. However, one must balance the rights of the employee against the rights of the resident. Both have important rights at stake here – the right of the resident to be free from physical or verbal abuse by his caretakers, and the right of an employee to a job, to be free to perform that job without unsubstantiated allegations of abuse.

The Employer urges the Arbitrator to accept hearsay evidence in this case to support its belief that the Grievant acted in haste and caused the bruises. The resident was not offered as a witness. Hearsay is routinely rejected, at least as proof of the matter asserted, because it is inherently unreliable, and the adverse party has no opportunity for cross-examination. There are, of course, many exceptions to the no-hearsay rule. The Employer first asserts that one exception in this case is the excited utterance exception. However, the utterance needs to be during or soon after a startling event to be admissible. The exception cannot be used in this case because the utterance came more than 12 hours after the Grievant put the resident to bed.

It is true that hearsay may be admissible under Sec. 908.04(1)(d), Stats., which defines unavailability of a declarant as being unable to testify due to existing physical or mental illness or infirmity. And any hearsay statement may come in provided it has comparable circumstantial guarantees of trustworthiness (under Sec. 908.045(6) and Sec. 908.03(24), Stats.)

The Employer argues that there are guarantees of trustworthiness here. First, it notes that Baumgartner had no reason to provide false testimony. It is not Baumgartner's testimony that is suspect, however – it is the resident's statement that is being weighed. The resident has reason to shade the truth. There is much humiliation in not being able to care for one's self, and it is dehumanizing to have to be helped with the simple personal matters of daily living, such as going to the toilet and getting into bed. People do not like to admit that they fall or are weak or forgetful. The Arbitrator needs to weigh some of those factors against the Grievant's testimony.

The Employer also asserts that the hearsay testimony is corroborated by the bruises on the resident's arms and the lost hearing aid battery. The bruises do not corroborate the hearsay testimony that the Grievant was in a hurry. Her testimony that she had to grab him to keep him from falling is just as likely, if not more likely, than the story that she grabbed him because he was too slow getting into bed. The bruises are a result of the Grievant grabbing him – the question is – why did she grab him by his arms? Was he falling or was she in a hurry and he was too slow?

While the record shows that there was no medical condition that would account for bruising, the resident is also 89 years old and at such an age, people bruise more easily. The Grievant's strength – used to keep him from falling – could have easily bruised him. The pictures of the bruises are consistent with the Grievant's version of grabbing his arms to keep him from falling. The bruises are not so severe that they would show other signs of abuse or be inconsistent with the Grievant's explanation of what happened when the resident began to fall.

It is harder to believe that the Grievant was impatient, grabbed the resident and forced him into bed roughly than it is to believe that the resident was in a position to fall, and the Grievant stopped it by grabbing him and getting him into bed. For one thing, the Grievant's testimony was believable. While the Employer discounts her testimony because she did not recall the falling incident when initially questioned, the Grievant also credibly testified that she was quite stunned when questioned about possibly causing bruises to the resident. Additionally, Baumgartner recalled that the Grievant said she had some trouble putting Morris to bed on the evening when she was interviewed. The Grievant also called another aide into the room to help get the resident properly positioned on the bed, which indicates that the way the Grievant put him there to keep him from falling resulted in him being in the wrong place on the bed. Finally, the Grievant has a long and good track record of handling residents well at this nursing home, and it is unlikely that she suddenly snapped and abused a resident.

Even if Morris were to testify before me and made the same statements he made to Baumgartner, I would have to weigh his testimony against the Grievant's testimony. The Grievant was a credible witness, and the only chink in the armor, so to speak, is the fact that she did not initially recall the falling incident, although she did say she had trouble putting him to bed, as Baumgartner recalled. It is certainly understandable for an aide who has worked competently with elderly people for many years to be quite taken aback at being questioned about potentially abusing one of them. Nonetheless, when she collected her thoughts, she was able to describe in detail the position of the resident, his movements, her movements, which all happened rather quickly. That such an incident happened so quickly may have made Morris believe that she was being impatient. All things considered, I credit the Grievant's testimony and find that she was trying to help the resident from falling. The record does not support the allegation that there was rough handling because she was in a hurry.

Accordingly, I find that the Employer did not have just cause to discharge the Grievant. I believe that the Grievant did not intend any harm and may have help prevent harm to the resident. She was performing a difficult job to the best of her ability by herself. She reacted to a potentially harmful situation with enough force to keep the resident from falling and enough force to bruise his arms in the process. I find that no discipline is warranted under these circumstances.

AWARD

The grievance is sustained. The Employer, Vernon County, did not have just cause to discharge Susan Evenson on May 8, 2002. The County is ordered to immediately offer Susan Evenson reinstatement to her former position or a substantially equivalent position and to make her whole for all losses by paying to her a sum of money, including all benefits, that she otherwise would have earned from the time of her termination to the present, less any amount of money she has earned elsewhere.

The Arbitrator will retain jurisdiction over this matter until March 1, 2003, solely for the purpose of resolving any disputes over the scope and application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 10th day of January, 2003.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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