BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1667, AFSCME, AFL-CIO

and

VERNON COUNTY

Case 134
No. 61519
MA-11965

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 Employer.

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 Dawn Ortiz. 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 18, 2002.

ISSUE

The parties ask:

> Did the Employer, Vernon County, have just cause to discharge Dawn Ortiz on April 29, 2002? If not, what is the appropriate remedy?

BACKGROUND

The Grievant is Dawn Ortiz, a certified nursing assistant for two years at Vernon Manor before her employment was terminated for an incident on April 27, 2002. The incident involved an allegation of verbal abuse to a resident called "Kenneth" in this award.

Sally Haynes has been a certified nursing assistant for one year at Vernon Manor. On April 27, 2002, Haynes was working with Kenneth, a resident who is hard to handle at times and strikes out at employees. Haynes testified that the procedure to handle residents who strike out is that the nursing assistant is supposed to back away and call another nursing assistant to intervene. It is not acceptable to hit back, as that would be abuse. It is not permissible to yell at a resident or threaten him or her.

After supper on April 27, 2002, Haynes was trying to take care of Kenneth when he struck out at her. Haynes backed away and called the Grievant into the room for help. Haynes hoped that Kenneth might settle down with a different approach. The Grievant had worked with Kenneth before and employees on the unit were aware that he could strike out at them. When the Grievant came into the room and she told him, "You don't hit women." Haynes said he was not mad, but he struck out at the Grievant again and hit her, and the Grievant told him, "Go ahead and hit me, I will hit you back and I don't care if I lose my job over this." Haynes said that the Grievant was pointing her finger at Kenneth's face, and made the same statement when another nursing assistant, Jennifer Engh, walked into the room. Haynes testified that the Grievant was very close to Kenneth's face when she pointed her finger at him. The Grievant did not back off or away from him but did not strike Kenneth. Haynes left the room.

The Grievant testified that Kenneth did not hit her on April 27th but that he had hit her in the past. She found that one would have to be a little verbal with him at times to settle him down. The Grievant was in the next room when Haynes asked for help. She heard Haynes say that he hit her, and the Grievant told Kenneth "You don't hit women." The Grievant said that he did not strike out or her or hit her. She said to Kenneth, "Do not slap anybody or I will slap." The Grievant did not slap or hit him. The Grievant stated that she left the room, and that Haynes was working with Grievant in the room. The Grievant was not aware of Jennifer Engh being in the room. The Grievant denied that she said, "I don't care if I lose my job," but she admitted saying "Go ahead and hit me." She was not sure of how loud she spoke to Kenneth.

The Grievant said that sometimes she has to get a little aggressive with Kenneth when he is being aggressive.

The Grievant was previously disciplined for verbal abuse in July of 2001. She was given a three-day suspension and was reassigned from nights to p.m. shifts. She did not file a grievance over this.

The Grievant was given a written warning on April 16, 2002, shortly before the incident in question, for failure to perform duties properly. The employee violation report states that the Grievant called Haynes "a bitch" when she gave her suggestions of what she should do. The Grievant said she called Haynes a "bitch" but that they were joking around all night long, and Haynes was calling her a "bitch" too, and that it was not that the Grievant disliked Haynes.

Haynes reported the incident with Kenneth to Violet Arneson, a registered nurse on the wing. Arneson's report states that:

> CNA Sally Haynes called Dawn Ortiz into resident room for assistance as he was being combative. Dawn said to resident, "You don't hit woman, go ahead and pop me. I'll pop you back. I don't care if I lose my job." This was said twice, the second time it was said Jennifer Engh had entered the room to help and heard Dawn say this.

Haynes testified that she probably reported that the Grievant said "pop" instead of "hit" when reporting the incident to Arneson.

Carrie Baumgartner, a social worker at the Manor, investigated the matter, and her statement regarding her talk with Haynes states:

> She reported that she was doing cares with a male resident in Room 424, he was acting as if he would be combative by raising his hands to hit or slap at her, so Sally Haynes asked for assistance from Dawn Ortiz. Dawn Ortiz entered the room and said to the resident "You don't hit women. Don't think about hitting me or I'll hit you back, I don't care if I lose my job." According to Sally Haynes, Dawn Ortiz used a very threatening voice and was pointing her finger at him as she was threatening him. At this point Jennifer Engh came to assist in the room and Dawn Ortiz again threatened the resident as reported above.

Jennifer Engh was no longer employed by the County at the time of the arbitration hearing and the Employer had no knowledge of her whereabouts.

The Administrator of Vernon Manor, Nancy Witthoft, did not report this incident to the State's Bureau of Quality Assurance. Witthoft decides whether to report cases of neglect, abuse, or misuse of funds. Witthoft had previously submitted a report on the Grievant, and the Bureau found insufficient evidence against her. When this incident arose, there was no injury or misappropriation, and Witthoft thought she would get the same letter from the State. Therefore, she decided to deal with the Grievant on the facility's own internal process. Witthoft decided that the Grievant's past record warranted a termination. The Grievant received a verbal warning on February 12, 2002, for complaints by co-workers for refusing to care for difficult residents and leaving rooms in a mess. She received a written warning on April 16, 2002, for reports from co-workers regarding safety concerns. She also received a written warning on the same date for abuse of sick leave. And she had a three-day suspension on July 16, 2001, for suspected abuse of two residents for verbal abuse and possible physical abuse of one of them.

THE PARTIES' POSITIONS

The County

The County asserts that it had just cause to discharge the Grievance for substantial verbal abuse on a resident. The discharge capped an unhappy work history which included uncontested discipline on prior occasions for verbal abuse of residents, together with serious questions about the Grievant's dependability, honesty, and attention to detail. The Grievant admitted saying to a resident, "You don't hit women. Go ahead and pop me and I'll pop you back. I don't care if I lose my job." Additionally, Haynes credibly testified that the Grievant shook her finger at the resident and yelled at him. Even under the Grievant's version, the conduct was abusive and warranted termination. The proper way to deal with the situation is to step back and defuse it. The confrontation was hostile, physical and constituted an assault on the resident, which under the legal standard, means placing another person in imminent fear of offensive bodily contact.

The Employer contends that while abuse of residents justifies termination on the first offense, this was not the Grievant's first offense. She was given a three-day suspension for verbal abuse of residents in 2001, plus a three-day suspension for abuse of sick leave in 2000. In 2002, she received written warnings for inattention to safety procedures and duties, abuse of sick leave, and inattention to duties.

The Employer believes the Arbitrator should address issues such as unemployment compensation benefits and decisions by the Wisconsin Bureau of Quality Assurance to give the parties guidance in future cases. Unemployment compensation determinations are based on whether or not a discharge meets the standard of misconduct, an intentional undermining of the interests of the employer. The standard for proving misconduct is higher than the just cause standard. However, the parties bargained for a just cause standard in their labor contract. Evidence of the determination of the Department of Workforce Development is irrelevant and probably prejudicial.

The same is true of the State's determination as to whether or not an incident of reportable abuse occurred. The parties did not negotiate to have the Bureau of Quality Assurance make these determinations. The BQA's findings are made without any confrontation rights, first-hand observation of facts and circumstances. It would seem incongruous to give weight in this proceeding to a determination with none of the procedural safeguards associated with arbitration or a fair hearing. Moreover, the parties have no control over what the legislature, administrative agencies or individual practices of administrative law judges. Over the last 20 years, obtaining a finding of misconduct has gone from being nearly impossible to almost a matter of course. The parties should not be at the mercy of the drift of an administrative agency.

The Union

The Union asserts that there is conflicting in the testimony of Haynes and the Grievant. Haynes testified that the resident struck the Grievant, while the Grievant testified that he did not hit her. They also disagreed on how often the Grievant made the alleged statements. It is clear that an incident occurred, but the question remains as to whether the Grievant's actions constituted just cause for discharge.

The Grievant was discharged for verbal abuse. The Wisconsin Administrative Code defines abuse as "willful and wanton disregard of a client's physical and mental needs and interests as is found in deliberate violations or disregard of clients 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."

The Union believes that the Arbitrator should consider the State's definition of abuse. Witthoft did not even submit this incident to the State for investigation because she did not think that the State, with its definition of abuse, would have found the Grievant guilty of abuse.

The Union argues that this case involves a judgment call in a volatile situation. The Grievant did not have much time to respond to the situation, and she may have appeared angry as that would be a natural reaction to the threat of being hit. If she were guilty of anything, it would be an error in judgment for making the statements she made. She did not hit the resident and had no intent to him. The State says that good faith errors in judgment are not abuse, and the Grievant's actions should not be deemed abuse.

DISCUSSION

While the Union has offered to make Engh available, it is unnecessary to have her testimony. The Grievant admitted making the statements that she is accused of making. She testified at one point that she did not remember saying, "Go ahead and hit me," but that she could have said it. I find her own testimony and Haynes' testimony sufficient to find that she made the statements to the resident that she is accused of making. It is a harder matter to discern whether she made those statements in a threatening manner or was yelling and pointing her finger at the resident. Nonetheless, the Grievant's statements to the resident are sufficient to warrant discipline.

Threatening to hit a resident is obviously verbal abuse, whether or not the resident was hitting anyone else. The Union asks the Arbitrator to adopt the State's definition of "abuse" and notes that Witthoft did not even submit this incident to the State because she did not think

the State would find the Grievant guilty of abuse under its standards. I find it unnecessary to use only the State's definition of "abuse" because the facility also has its own standards which are to be respected. It is possible for the Employer to find that the Grievant verbally abused the resident when the State would not make such a finding. The consequences differ – if the State found abuse, the Grievant could not work again as an aide. However, even if the County discharged the Grievant, she would still be able to work in another facility as an aide.

The parties bargained for a common "just cause" standard and no other standard. Therefore, the Arbitrator will confine her decision to the usual considerations in a just cause standard. Part of that standard includes a consideration of whether the punishment fits the crime.

An arbitrator should not second-guess every disciplinary action taken by an employer. If arbitrators were to always impose their own idea of the appropriate discipline when discipline is in fact warranted, unions would take every disciplinary case to arbitration, hoping to get a reduced penalty. The discipline should stand, unless it is clearly excessive, unreasonable, or management has abused its discretion.

In this case, discipline is clearly warranted. The Grievant used an improper procedure by her assertiveness in dealing with the resident who was striking out at aides. However, the capital punishment of termination is clearly excessive and unreasonable in light of the conduct and violation. Management has a right to be concerned that this employee has another disciplinary action on her record for suspected abuse of two residents. Moreover, the Grievant is not a long-term employee but has quickly accumulated various warnings as well as a three-day suspension for the possible abuse incident in July of 2001. The Grievant is developing a bad track record for an employee of only two years.

However, the Employer has jumped quickly to a termination, perhaps not just for verbal abuse but for absenteeism and other unsatisfactory reports, such as leaving rooms in a mess and safety concerns with her job performance. The Grievant was also receiving numerous complaints about her job performance from her co-workers. This all tends to show that this Grievant may not become a long-term employee at the rate she is collecting disciplinary notices. But I cannot find that termination is reasonable under the facts of this case. It is simply excessive for the violation, even including her prior record. The Grievant believed she was handled the resident in a manner that would calm him down. Whether it was effective or not, it was the improper method. The Grievant should have known better, since Haynes knew the proper procedure and she had not worked at the Manor as long as the Grievant. Nonetheless, the Grievant was trying to help Haynes calm down the resident who was out of control. Her method was wrong, even if it worked on that resident. The Employer determines what procedures may or may not be used with difficult situations. The Grievant's belief that one has to be more aggressive or verbal in those situations conflicts with the Employer's procedure, and the Grievant must adhere to the Employer's rules and procedures.

A suspension of 30 days is more appropriate than a termination, under all the circumstances. It puts the Grievant on notice that this is perhaps a last chance and another similar offense will cost her her job. The Employer should also consider some re-training of this Grievant, who believes it is appropriate to become "aggressive" with "Kenneth" when he is aggressive.

The Employer has also asked that the Arbitrator review the issue of evidence that the Grievant was granted unemployment compensation benefits. The Arbitrator, consistent with her practice, rejected such evidence at hearing, agreeing with the Employer in this case that such evidence is irrelevant and potentially prejudicial. The Arbitrator has never considered evidence of unemployment compensation benefits in any termination case and continues to believe that the parties should not submit such evidence. The exception is for impeachment purposes, when people have testified at one hearing contrary to their testimony at the arbitration hearing.

AWARD

The grievance is sustained in part. The County did not have just cause to discharge Dawn Ortiz on April 29, 2002. It did have just cause to discipline her and the appropriate discipline should be a 30-day suspension. As a remedy, the County is ordered to offer Dawn Ortiz immediate reinstatement to her position or a substantially equivalent position and to pay her a sum of money, including all benefits, that she otherwise would have earned from the time of her termination, minus the 30-day suspension, 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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