

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**THE WISCONSIN FEDERATION OF NURSES
AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO**

and

ST. FRANCIS HOSPITAL

Case 41
No. 61302
A-6019

Appearances:

Mr. Jeffrey P. Sweetland, Esq., Shneidman, Hawks & Ehlke, S.C., 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appeared on behalf of the Union.

Mr. Thomas W. Scrivner, Esq., Michael, Best & Friedrich, LLP, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202, appeared on behalf of the Employer.

ARBITRATION AWARD

On June 6, 2002, the Wisconsin Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO and St. Francis Hospital filed a request with the Wisconsin Employment Relations Commission seeking to have William C. Houlihan, a member of the Commission's staff, hear and decide a grievance pending between the parties. A hearing was conducted on September 6, 2002, in Milwaukee, Wisconsin. A transcript of the proceedings was taken and distributed by September 17, 2002. Post-hearing briefs were submitted and exchanged by October 28, 2002.

This dispute addresses the termination of L.S.

BACKGROUND AND FACTS

St. Francis Hospital, located in Milwaukee, Wisconsin, is affiliated with the Wheaton Franciscan Catholic order. The facility has 260 licensed beds, of which 150-170 are typically occupied.

The fifth floor, where L.S. was employed, is predominantly a post-surgical unit. That unit receives patients following orthopedic surgery, pediatric patients, medical overflow patients, and provides post-surgical telemetry (heart monitoring).

The grievant, L.S., was hired in October of 2000 to work as a Patient Care Associate. Patient Care Associates are hired to assist Registered Nurses in the direct care of patients. A Patient Care Associate (PCA) is responsible for the bedside custodial care of a patient. In that capacity, they bear responsibility for the hygiene of patients, bathing, incontinent care, oral care, and any responsibilities that go along with feeding a patient if necessary. The proper positioning, cutting up of patient's food, monitoring a patient's eating, monitoring what a patient has eaten, walking a patient, transferring a patient from bed to chair, turning the patient at prescribed times are included in a PCA's job assignment. PCA's empty drains, empty Foley catheters, monitor to make sure a patient isn't removing oxygen tubes, work with restraints, and monitor the status of hospital patients. A Patient Care Associate is a certified nursing assistant with additional training and responsibilities. L.S. worked the p.m. shift (3 to 11:30 p.m.).

On February 20, 2002, Kelejo Stephenson, a PCA working on 5 South, reported that the grievant had slapped patient 12-2. Ms. Stephenson claimed to have witnessed the slap. It was Ms. Stephenson's testimony that on February 20, she and L.S. were both working on 5 South. According to Ms. Stephenson, the Grievant approached her at approximately 4 - 4:15 p.m. and asked for her help in boosting a patient. Patient 12-2 had slid down his bed with his legs pinched between the side rails. Patient 12-2 was a 93-year old male suffering from hypoxia, and organic brain syndrome. He had recently been admitted. His hands were restrained in order to keep him from pulling out his intravenous lines and oxygen.

Ms. Stephenson testified that the PCA's positioned themselves on each side of the patient bed. She claimed that the grievant then lifted each of Patient 12-2's legs, and dropped them, one upon the other. According to her testimony, the grievant never lowered the bed rail to free the patient's legs. Thereafter, the PCA's untied the hand restraints which had been applied to Patient 12-2, and boosted the patient. When his hands were untied, the patient grabbed his diaper, held it tight, and refused to let go. The grievant got the patient's right hand off the diaper and re-restrained it. Ms. Stephenson could not do so. It was her testimony that the grievant reached across the bed and delivered a hard blow to the patient's hand which caused him to let go of his diaper. Ms. Stephenson then re-restrained the hand. She testified to a sharp slap, and also indicated that the grievant said that she was losing her patience.

Upon exiting the room, Kelejo Stephenson went to Stacie Barker, another PCA, and told Barker what had happened. It is her testimony that Barker told her to tell the charge nurse. Later in the day, Stephenson went to Margaret Gasiorowski, the charge nurse. Stephenson repeated her claim to Gasiorowski.

Ms. Stephenson followed up on this matter with Bonnie Krueger, an educator. Krueger asked Stephenson to draft a statement, which she did. Her statement is consistent with her report of the events.

The grievant's version of the events are markedly different. The grievant testified that she asked Ms. Stephenson for help somewhere between 9 and 10 p.m. The grievant testified that when the women arrived, the patient was slouched or sliding down on the bed, with his feet caught in the small space between the side rails. The grievant testified that she put the side rails down, picked up both of the patient's feet and swung them back onto the bed. At the time she lifted the legs, the grievant remarked that she was tired.

After the legs were placed back into the bed, the caregivers loosened the patient's restraints to boost him. The patient grabbed his diaper with both hands. The grievant, who was on the patient's right side, loosened the patient's finger from the diaper, and re-secured the hand. Ms. Stephenson was struggling to loosen the patient's grip on his diaper with his left hand. It was the grievant's testimony that she reached over and tried to pry the patient's left hand from the diaper. She was unable to do so. She testified that she told him to let go. She testified that she tapped his hand gently and told him to let go and was thereafter successful in removing his fingers from the diaper. Ms. Stephenson re-secured the left hand.

The grievant first heard of the existence of a complaint five days later, when she was called into a meeting with management. The meeting was an investigatory interview conducted by Christopher Morris, the Human Resource Director. Present were Linda Norton, the house supervisor, L.S., the grievant, and Mary Rolland, a respiratory therapist who was the union steward. The following is Ms. Norton's contemporaneous summary of the meeting, which was consistent with her testimony at hearing:

February 27, 2002

Questioning conducted by C. Morris. At first L. did not recall the patient and may have been answering questions regarding the patient in bed 1, so the list of questions was regenerated to reflect her recollection of events as pertaining to this patient. Room 5212-2. Union representation was secured by C. Morris for the employee.

L. acknowledged that she did work with this patient, however, she felt that the circumstances were not on Wednesday 2./20/02 as stated in the complaint. She stated that she asked a nurse extern, whose name she did not know, (Katie Sadowski was the nurse extern on duty that shift) for assistance with the patient. She stated that she needed help because the patient needed to be restrained with wrist restraints. She stated that the patient did not have a hold of his diaper at any time and that she did not have to loosen up his hands. She stated that she may at times open a patient's fingers to get them to release something they are clutching on to. She stated that she did not slap the hand of the patient at any time, that she would never do that. She did remember that he was confused and may have been somewhat difficult to deal with, however, she did not feel that he was difficult to deal with at that particular time. She acknowledged remembering that he put his legs between the railing of the bed, and that he needed to be boosted in bed. She denied commenting that she was becoming irritated with him.

Additional questions were asked regarding proper restraint usage, that applies to all patients, with re: to how often the restraints are loosened during a shift. General work questions were asked as well.

L. was informed that this was an entirely confidential matter and was asked to keep this issue confidential as well. She was told that she would be dismissed at that time without pay and that an investigation would take place as quickly as possible. She was informed that if the investigation was found to be in her favor, she would be paid for the time retroactively. She asked if she could know the name of the person who said she did this, and was told that at this time, all information was confidential, but that as the investigation occurred, she may be able to learn who it was.

Following the meeting, Stacie Barker was interviewed and a statement taken. On March 26, Margaret Gasiorowski was interviewed and a statement taken. On Sunday, February 24, Bonnie Krueger was interviewed.

The grievant was called into a second meeting which occurred on March 4. Ms. Norton, Mr. Morris, the grievant, and Jaci Ranft, a union representative, were in attendance. Ms. Norton testified that at the March 4 meeting, the grievant indicated the patient clutched his diaper, and that she began to unfurl his fingers, and that she did not become annoyed with him because he was not in an agitated state, and that she did not slap him. At the conclusion of this meeting, the grievant was terminated.

ISSUE

The parties stipulate the issue to be:

Was the grievant discharged for just cause?

If not, what, if any, remedy is appropriate.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 32

Discipline/Discharge

32.01.

Discipline/Discharge. The Hospital shall not discharge or discipline any employee except for just cause. A grievance over a discharge or suspension must be initiated at Step 3 of the problem-solving Procedure within eight (8) calendar days from the discharge or suspension.

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POSITIONS OF THE PARTIES

The Employer contends that the credible evidence regarding the care of Patient 12-2 establishes the grievant's misconduct. The Employer urges a credibility determination based upon the criteria set forth by Arbitrator Coyle in *SAFEWAY STORES*, 96 LA 304 (Coyle, 1990). Arbitrator Coyle set forth the following criteria, against which to assess credibility:

1. Relative strength of (the witness') recollections;
2. Consistency in testimony given on the same subject at different times during the hearing;
3. Consistency of testimony in statements on same subject in other forums;
4. Obvious bias, prejudice, or motive to misrepresent known facts;
5. Showing of emotional stress or other feelings that would impair ability to respond to questions carefully and accurately;

6. Evasiveness or refusals to respond without acceptable reasons;
7. Quality and reasonableness of testimony considered in its entirety in relation to other credible testimony; and
8. Existence of corroborating testimony.

The Employer contends that witness Stephenson's recollection of the events did not waver. The Employer contends that the grievant's testimonial recollection was neither consistent nor coherent. The Employer contends that the grievant's testimony changed, wavered, and reversed itself on many material points.

The Employer contends that the grievant's testimony relative to what happened with Patient 12-2 on February 20 was inconsistent on many material points. The Employer notes numerous detail inconsistencies relative to the grievant's recollection of the events of February 20.

The Employer notes that the grievant's testimony at hearing was different from her recollection of events as narrated at the February 26 investigation, and different yet from her recollection of events as narrated in the March 4, 2002 investigation. The Employer contends that the grievant's story increasingly acknowledges the existence of physical touching. The Employer contends that the evolution of the grievant's story is an effort to attempt to reconcile her testimony with that of Ms. Stephenson.

The Employer contends that the grievant has a motive to deny that she slapped a patient. Stephenson, on the other hand, has no motive to lie. She was a probationary employee with the hospital, who had no significant work dealing with the grievant prior to February 20.

The Employer characterized the grievant as defensive and evasive during her cross-examination. The Employer contrasts that with its perspective on Stephenson, who it regarded as responsive, alert and forthcoming.

The statements of Stephenson, Barker, Gasiorowski, Norton and Morris, and the testimony of Norton and Morris support Stephenson's consistent report and account of events. There is no corroborative support for the grievant's account.

The Union acknowledges that delivering a hard blow or slap to the patient just to release his grip on a diaper, coupled with roughly throwing his legs one at a time over a bed rail, would be patient abuse and just cause for discharge. However, there is no evidence or suggestion that one or two light taps to the patient hand, about which the grievant testified,

would be a violation of either patient rights or hospital rules. To the contrary, undisputed evidence established that such actions were entirely proper and consistent with hospital and professional standards. The Union contends that the burden is on the hospital to prove that the grievant gave the patient a hard slap, rather than one or two gentle taps to get his attention and cooperation. In the Union's view, this case turns entirely on the credibility of the two individuals, the grievant and Ms. Stephenson.

The Union notes that Ms. Stephenson's account of the events diverges from the grievant's in three respects. The first is their recollection of the time of the incident. The grievant's recollection that the event occurred after supper is consistent with her having discovered the grievant during one of her hourly checks. Ms. Stephenson's time frame would have placed it an hour after the start of the shift, a time when everyone would have been busy with their own patients.

Ms. Stephenson's story about the grievant's handling of 12-2's legs is highly improbable, if not physically impossible. Ms. Stephenson's description was inconsistent with the grievant's normal practice. Moving the legs separately, especially if the patient is combative, creates a greater risk that the patient could kick the caregiver with a free leg. Moving both legs together is easier on the caregiver's back and legs.

The Union contends that it would have been physically impossible for the grievant to handle 12-2's legs in the manner described by Ms. Stephenson. If both legs were initially wedged in the narrow space between the two side rails on the right side, the pelvis would have been turned to the right with the left leg on top. The Union contends it would have been impossible to lift the left leg, move it and drop it onto the bed with the right leg and foot still wedged in the rail.

The Union contends that Ms. Stephenson is one to catastrophize situations. The Union points to the testimony of a co-worker who recounted two occasions when she and another caregiver were working with combative patients who were hollering. According to this witness, Ms. Stephenson ran into the room, hysterically demanding to know what was going on. The Union believes that Ms. Stephenson is one who lets her imagination run wild. The Union believes that Ms. Stephenson is prone to exaggeration. The Union contends that there is no dispute that the grievant struck 12-2's hand in order to get him to release his grip on the diaper. The crux of this case is how much force did she use. The Union attacks Ms. Stephenson's recollection. The Union contends that she did not indicate any reaction by patient 12-2, no grunt, or expression of pain or surprise, or even a flinch of the hand. She did not even see a mark on his hand from the alleged slap. The Union contends that Stephenson has magnified the grievant's gentle tap on 12-2's hand into a hard slap.

The Union concludes that there is no evidence of patient abuse, and demands reinstatement and full back pay.

DISCUSSION

As presented, this dispute requires a credibility determination as to whether or not a hard slap was delivered. The parties to this proceeding stipulate that a hard, forceful slap is grounds for discharge. Ms. Stephenson testified unequivocally that such a slap was delivered. The grievant unequivocally denies that to be the case.

I believe such a slap was delivered. I credit Ms. Stephenson's account of the events. I do so because she was a new, probationary employee with no apparent motive to lie or fabricate the event. Upon witnessing the slap, she went to a co-worker the same day and sought direction. When directed to report up the chain of command she did so and followed up on the matter. She was an eyewitness to the event. The slap was delivered in her immediate presence. As described by her, the event was enough to prompt a report. Her account was of a dramatic and uncalled for blow. As she describes the event, it is something to induce concern, and to raise the question of whether or not it need be reported.

The grievant described a routine, unremarkable occurrence. Nothing described by the grievant would give rise to the slightest concern. It was the grievant's testimony that she acted completely within the bounds of appropriate caregiving procedure. If that is so, Ms. Stephenson's report would be entirely fabricated and malicious. Nothing in the record suggests any basis for such a conclusion. The Union offered testimony, which at best characterized Ms. Stephenson as alarmist, and overreactive. Assuming that to be the case, it does not explain the disparity in the testimony between Stephenson and the grievant. Ms. Stephenson testified that the grievant lifted the patient's legs one at a time and dropped one leg upon another. Ms. Stephenson testified that the grievant did not lower the side rail. The grievant testified that she did lower the side rail, and that she lifted the legs together. Their testimony is at odds. One is not an exaggeration of the other. Ms. Stephenson testified that the grievant delivered a hard, forceful slap, directed the patient to let go, and further indicated she was losing her temper. The grievant denied all of the foregoing. There is nothing in this record that would suggest that Ms. Stephenson has any motive to fabricate this story.

The grievant's story changed from the February 26 meeting to the March 4 meeting to the hearing. On February 26 the grievant could not recall the patient grabbing his diaper with his hands, the event that precipitated the alleged slap. I believe the February 26 meeting occurred too many days after the event. The grievant was not told who her accuser was or the allegation. I am prepared to accept that she was surprised, confused, and lacked a recollection of the event.

However, by March 4, the grievant had served a suspension. She knew what incident was involved, and she had a specific recollection that the patient had grabbed his diaper. According to the testimony and corroborative notes of management witnesses, the grievant did not then indicate that she reached across the patient. There was no indication that she tapped the patient's hands to communicate with him the need to remove his hand from the diaper. If, as she testified at the hearing, she reached across the patient to help her co-worker and tap the patient's hands gently, it is hard to understand why she would not so advise management at the point of her termination. Those facts would have provided an explanation in the face of a serious accusation. I do not believe that her silence on that topic can be attributed to surprise, confusion, or a lack of understanding as to the accusation.

I agree with the Employer that the grievant has changed certain elements of her story over the course of time. I also agree that those changes in detail appear to explain and/or address the charges against her.

The second area of dispute involves how the grievant handled Patient 12-2's legs. The testimony of Ms. Stephenson and the grievant are in direct conflict. The Union contends that it is impossible for Ms. Stephenson's account of how the grievant handled the patient's legs to be accurate. I agree that if the left leg was on top of the right leg, it would not be possible to drop the right leg directly on top of the previously moved left leg. It is possible that the right leg was dropped on, but an angle to the left leg already lying on the bed. I do not regard this as detracting from Ms. Stephenson's testimony. The focus of the investigation and the grievance procedure was the slap. The discharge was for the slap. I am satisfied that the slap occurred.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 29th day of April, 2003.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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