

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**SHEBOYGAN COUNTY**

and

**THE AMERICAN FEDERATION OF STATE, COUNTY  
AND MUNICIPAL EMPLOYEES, LOCAL 2427, AFL-CIO**

Case 346  
No. 62096  
MA-12155

---

Appearances:

**Mr. Michael J. Collard**, Human Resources Director, 508 New York Avenue, Sheboygan, Wisconsin 53081, appeared on behalf of the County.

**Ms. Helen Isferding**, District Representative, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appeared on behalf of the Union.

**ARBITRATION AWARD**

On February 10, 2003, Sheboygan County and Local 2427 of the American Federation of State, County and Municipal Employees filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint a member of its staff to hear and decide a grievance pending between the parties. The Commission appointed William C. Houlihan to hear and decide the matter. A hearing was conducted on May 3, 2003 in Sheboygan, Wisconsin. The proceedings were not transcribed. Post-hearing briefs and reply briefs were submitted and exchanged by July 3, 2003.

This Award addresses the termination of two employees, S.B. and S.W.

### **BACKGROUND AND FACTS**

Sunny Ridge Nursing Home is a skilled care, residential facility located in the City of Sheboygan, Wisconsin and operated by Sheboygan County. As of November 15, 2002, the grievants, S.B. and S.W. were Certified Nursing Assistants at Sunny Ridge. S.B. and S.W. worked second shift on 3 North. Residents of 3 North suffer from Alzheimer's disease and various forms of dementia.

On November 19, 2002, Sharon Martinez, a C.N.A. reported an incident, alleged to have occurred on November 15, 2002, to nursing supervisor Beth Reseburg. Reseburg, in turn, reported the matter to Marcia Adams, Director of Nursing. An investigation was conducted, a number of individuals were interviewed. Based upon this investigation, the Employer concluded that patient abuse had occurred, and discharged the two grievants.

The two grievants were discharged by letter dated November 22, 2002. Simultaneously, the Employer filed a report with the Bureau of Quality Assurance, Caregiver Regulation and Investigation section alleging that the two grievants abused residents of the facility. As of the close of the evidentiary record in this matter, there was no disposition as to those charges. Grievances were filed on December 5, 2002 on behalf of each of the grievants.

There is a critical dispute of fact as to the facts underlying the discharges. Those disputed facts are key as to whether or not patient abuse occurred. Competing accounts of the events of November 15 are set forth below.

Sharon Martinez has been employed by Sheboygan County as a Certified Nursing Assistant for three years prior to the incident in question. On November 15, 2002, Martinez was working on 3N. During the dinner hour, she was initially assigned to work with residents in a small dining room. When she was done there, she went into the main dining room to see if she could help. It was her testimony that she saw grievant S.B. take a wet napkin and throw it across the table at resident M.R., hitting her in the face. According to Martinez, resident M.R. began yelling, telling S.B. to stop. According to Martinez, grievant S.W. took a wet napkin and threw it at resident B.H., hitting her in the face. B.H. began yelling. Martinez indicated that grievant S.B. told her that they liked to get residents B.H. and M.R. to argue with each other, because they thought it was funny. According to Martinez, the two grievants continued to throw wet napkins at the two residents. Martinez testified that M.R. began yelling, "Goddamn. You always f----- do this." The two residents began yelling at one another. Martinez testified that the exchange of napkins continued, that the resident asked them to stop, and that they would not. She further testified that resident M.R. was very frustrated.

Martinez testified that the two grievants periodically looked around to see if anyone was walking in or around to observe them. She testified that Amanda Mueller was at her side, and observed the incident. Martinez testified that she did not want to get the grievants into trouble and so she did nothing. She subsequently talked with a co-worker on the day shift who counseled her to go to a supervisor.

Later in the evening on November 15, Martinez engaged the two grievants in a conversation relating to a bachelorette party occurring later in the evening. Martinez asked what was going on, and was told there was a party for another co-worker. She asked where, and was advised that it was in a bar. She asked if she could attend, and was told that the bar was open to anyone. Martinez did not attend the party because she did not feel welcome.

Amanda Mueller, who has been a C.N.A. employed by Sheboygan County since August of 2002, also testified. It was her testimony that on November 15, 2002, she was in the main dining room feeding residents when the napkin-throwing incident occurred. According to Ms. Mueller, she was feeding a resident, facing away from the grievants' table when the incident commenced. When she heard commotion, she looked around and saw the two grievants throw wet napkins at residents. It was her testimony that she saw S.B. throw a napkin at M.R., and hit her in the face. She also testified as to having seen S.W. throw a wet napkin at resident B.H. and hit her in the face. Her testimony was that the residents were agitated. She testified that this occurred over a period of 10 to 15 minutes, with repeated napkin throwing. She testified that the residents were agitated and that M.R. swore. She testified that the grievants were attempting to get the residents mad at one another.

Mueller testified that when she finished feeding her resident, she went over and stood next to Martinez, after Martinez entered the room. It was her testimony that Rochelle Pfeifer, another C.N.A., was feeding a resident at the same table with the grievants. It was Mueller's testimony that there were no other staff in the room at that time. She testified that Brenda Unhold, another C.N.A., who had been assisting in the resident's feeding, had left the room by the time the napkins were thrown. She also testified that Jeanne Anderson, the L.P.N. who was working at the nurses station, had left the area to pass medications at the time of the napkin throwing.

Amanda Mueller did not know Sharon Martinez at the time of this incident. It was Mueller and Martinez' testimony that they did not talk to one another about the incident. Mueller did not come forward to report the incident. Rather, the Employer approached her.

Rochelle Pfeifer, a C.N.A. who was seated at the table with the grievants, also testified. She testified that the grievants threw a wet napkin at one another, but not at a resident. Pfeifer acknowledges that resident M.R. said, "Goddamn it", and indicated that he was upset by the two grievants. She testified that no resident was hit by a napkin, but in her written statement indicated that "but I was not watching the whole time."

Brenda Unhold testified that she did not see Martinez come into the room, nor did she see napkins thrown. Jeanne Anderson testified that she did not see Martinez come into the room and that she did not see napkins thrown.

Grievant S.B. testified. It was her testimony that she saw grievant S.W. staring out the window, and threw a dry napkin at her, striking and startling her. She testified that S.W. threw the napkin back at her. She testified that she thereafter dunked the napkin in water, causing it to become damp and threw the napkin back and forth five to 10 times. She testified that Pfeifer sat at the end of the table laughing. She testified that nurse Anderson was present throughout the exchange.

Grievant S.W. testified as to the incident. It was her testimony that the napkin was tossed back and forth two times. She acknowledges that resident "M" was swearing, but indicated that she was mad at H.P. for pounding on the table. S.W. testified that the napkin was dry, and not wet. She testified that she did not see Sharon Martinez in the room. She testified that Amanda Pfeifer observed the events and was laughing. When called in for an investigation, she did not know what the investigation was about. When told it involved the exchange of napkins, she was incredulous. During the course of the investigation, she asked who turned her in and who was abused, and was not told.

Both grievants testified that napkins were not thrown at, nor did they strike, residents. Both grievants indicated that residents were entertained and amused at their horseplay.

There was a good deal of testimony relative to other exchanges and incidents alleged to be follow-ups to the incident in question. There was also a good deal of testimony relative to the friendships and relationships of the parties who testified and others.

### ISSUE

The parties stipulated the following issue:

Did the County violate the collective bargaining agreement when it terminated the employment of S.B. and S.W.? If so, what is the appropriate remedy?

### RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

#### 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.

...

### **ARTICLE 31**

#### **TERMINATION**

Termination reports shall be in triplicate and signed by the Employer when an employee is separated from the Health Care Center for any reason except sick leave, vacation or other legitimate leave. One (1) copy shall be retained by the Employer, one (1) filed with the Union and one (1) given to the terminated employee. Any employee leaving the Department, except for legitimate reason such as sickness, vacation, or granted personal leave, shall be considered a terminated employee.

...

#### **DISCUSSION**

This Award turns on one key fact; whether or not the grievants threw napkins at residents. All parties agree that if Martinez and Mueller's version of the events is true, patient abuse occurred and discharge is the appropriate remedy. On the other hand, if the testimony of the grievants is accepted and what occurred was harmless horseplay, which served to focus and stimulate residents, the behavior is not disciplinable, much less grounds for discharge.

There was record testimony submitted and argued relative to the timing of events, physical position of people in the dining room, minor disparities and inconsistencies in testimony which are not specifically mentioned in this Award. Similarly, there is evidence submitted with respect to relationships between and among employees at the Facility and motives for testifying that are not specifically mentioned in this Award. These matters have been considered but not determined probative.

I credit the testimony of Sharon Martinez and Amanda Mueller. The two C.N.A.'s gave the same account of events relative to the throwing of the napkins. They did so despite

the fact that they did not know one another prior to the incident. All evidence indicates that they did not talk with one another subsequent to the incident. Each of their testimony at hearing was consistent with the reports they gave at the time.

The Union attacks the credibility of each of these witnesses. With respect to Martinez, the Union claims that Martinez was essentially excluded from the bachelorette party. The Union implies that her testimony was the product of bruised feelings. Attributing her testimony to a social snub would require an extraordinary leap of faith. In this dispute, the grievants testified that Martinez was not present. Clearly, she was present. She gave a detailed account of events. She saw napkins being thrown and testified to the residents cursing in outrage. She saw and was seen by Amanda Mueller. Martinez gave a detailed account of the events, and thereafter was cross-examined. Much of what she described was undisputed. The real dispute in this proceeding is not whether there was a napkin throwing incident nor even whether residents reacted.

The Union goes on to attack Martinez' testimony on the basis that she delayed reporting the event. I accept her testimony that she was averse to getting her co-workers in trouble. It is the rare worker who comes forward eagerly to accuse a co-worker of serious wrongdoing. I find her reluctance to do so understandable. Martinez' story was confirmed in its entirety by Mueller.

The Union attacks Mueller's testimony on the basis that her brother is married to a woman who has a long-standing and serious grudge with S.B. Accepting that on its face, Mueller did not come forward. Mueller did not know or speak with Martinez before she was interviewed by management. Nothing in the record suggests that Mueller was prepped for her meeting with the management investigators. Yet, her story was virtually identical to Martinez'.

S.W. testified to the events as narrated above. Her testimony included her claim that she never saw Sharon in the dining room. Her testimony was inconsistent with that of subsequent investigators and with Mueller's relative to events surrounding and subsequent to the napkin throwing incident.

S.B. testified as noted above. Her testimony was that nurse Anderson was present during the entire period. That testimony is inconsistent with all other testimony in the record.

Ms. Pfeifer's testimony supports the grievants. Her testimony at hearing was that Sharon did not enter the large dining room. Her testimony is wrong in that regard. In her written statement, Ms. Pfeifer indicates that "I did not see everything due to me feeding two residents." She was seated at the table where this raucous, protracted, noisy event transpired. I regard her testimony as evasive, at best. I have attributed no weight to Ms. Pfeifer's testimony.

In conclusion, I believe the napkin-throwing incident occurred as was described by Martinez and Mueller. I believe it constituted patient abuse.

**AWARD**

The grievance is denied.

Dated at Madison, Wisconsin, this 11th day of November, 2003.

William C. Houlihan /s/

---

William C. Houlihan, Arbitrator