BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, COUNCIL 40, LOCAL 342 AFL-CIO

and

LINCOLN COUNTY

Case 219
No. 62490
MA-12309

(Boquist Grievance)

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin, appearing on behalf of Local 342, Pine Crest Nursing Home.

Mr. John Mulder, Administrative Coordinator, Lincoln County, 1104 East First Street, Merrill, Wisconsin, appearing on behalf of Lincoln County.

ARBITRATION AWARD

AFSCME Council 40, hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Lincoln County, hereinafter "County," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on October 13, 2003, in Merrill, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on November 4, 2003, with the option to file reply-briefs by November 21, 2003, at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties agreed at hearing that there were no procedural issues in dispute, but were unable to stipulate to the substantive issue.

The Union proposed:

Did the Employer violate the collective bargaining agreement when it disciplined the Grievant, Sandra Boquist, with a six (6) day suspension on or about January 28, 2003? And if so, what is the appropriate remedy?

The County proposed:

Is an additional three (3) day suspension appropriate discipline for using a transfer belt to tie down a resident to a toilet and leaving her unattended as opposed to a three (3) day suspension for being aware of it and not reporting it? And if not, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I accept the Union's framed issue.

RELEVANT CONTRACT LANGUAGE

Article II – Management Rights

2.1: The management of Lincoln County and the direction of the work force is vested exclusively in the Employer, to be exercised through the department head, including, but not limited to, the right to hire, promote, demote, suspend, discipline and discharge for just cause; the right to decide job qualifications for hiring; the right to transfer or layoff because of lack of work or other legitimate reasons; to subcontract for economic reasons; to determine any type, kind or quality of service to be rendered to patients and citizenry; to determine the location, operation and type of physical structures, facilities, or equipment of the departments, to plan and schedule service and work; to plan and schedule any training programs; to create, promulgate and enforce reasonable work rules; to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogatives of the Employer to operate and manage its affairs in all respects. These rights shall not be exercised in an unreasonable or arbitrary fashion. Nothing herein contained shall divest the Association or its bargaining unit members of any rights existing under Wisconsin's Municipal Employment Relations Act or other State or Federal law.

Article XXIII – Stewards, Grievances and Arbitration

. . .

Step 3: If satisfactory settlement is not reached in Step 2, the Association may, within ten (10) calendar days of receipt of the Trustees' answer, appeal the grievance to arbitration. The Employer and the Association agree that the Wisconsin Employment Relations Commission (WERC) shall be requested to appoint an arbitrator from its staff.

The arbitrator shall meet with the parties at a mutually agreeable time to review evidence and hear testimony relating to the grievance, and shall render a written decision to both the Employer and the Association. Each party shall bear the cost of preparing and submitting its own case. The arbitrator's decision shall be final and binding on both parties and shall be restricted to the interpretation or application of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement. The costs of the arbitration proceedings, including transcript fees, shall be borne equally by the parties.

. . .

BACKGROUND AND FACTS

The Grievant, Sandy Boquist is a nine year employee of the County assigned to Pine Crest Nursing Home in the position of Certified Nursing Assistant (CNA). Boquist had an unblemished employment record at Pine Crest prior to the investigation of the incident of January 21, 2003.

On January 21, 2003, at the beginning of the third shift, the P.M. nursing care employees discovered Resident E.S. tied to the toilet in her room with a restraining belt. Three day shift CNA's were assigned to the wing of the nursing home where Resident E.S.'s room was located; the Grievant, Eva Hutchcraft and Tony Grochowski. The County conducted an investigation to determine who was responsible for tying E.S. to the toilet. CNA's Hutchcraft and Grochowski denied ever having utilized a transfer belt to tie down a resident, but acknowledged that they were aware that the Greivant utilized such a technique in the past. As a result of Hutchcraft and Grochowski having knowledge of use of this technique and failing to report it, they each received a three-day suspension. 1/ The County was ultimately unable to determine who was responsible for the incident of January 21, 2003, but based on the information obtained from Hutchcraft and Grochowski that the Grievant had utilized the same technique in the past, the County confronted the Grievant. The Grievant

initially denied having used the technique in the past, but subsequently admitted to having tied at least one resident to a toilet with a restraining belt within the prior two weeks, but maintained that she was not responsible for the event of January 21, 2003.

1/ Hutchcraft and Grochowski initially grieved their discipline. The grievances were later withdrawn and/or not pursued.

On January 30, 2003, the County issued a Disciplinary Notice to the Grievant for "Negligence" for the following:

> **I. Statement of facts (include date, time, place, acts, names of persons involved):** On 01/21/03, Resident E.S. was found by PM shift tied to toilet with transfer belt. Other employees involved in incident but Sandy Boquist has knowledge and has admitted to doing this (using transfer belt to restrain resident to toilet) as early as 2 weeks prior to this date.
>
> **II. Standards that will be expected from this employee in the future:** It is expected that this practice never be done again and that if any knowledge of such practice, this will be reported immediately to supervisor or DON.
>
> **III. Failure to comply with these standards could have the following impact on the work environment** This becomes a very dangerous environment for the resident. It is also against regulation to restrain residents in any way unless ordered by MD.
>
> **IV. Consequences of the employee failing to follow the above standard**: termination.
>
> **V. These matters will be reviewed ongoing and specifically within ongoing days.**
>
> **VI Disciplinary action taken (if any):** 6 days of suspension will be given on the following days: 2/10/03, 2/12, 2/18, 2/27, 3/12, 3/13/03.

The discipline was grieved consistent with the bargained grievance procedure and is properly before the Arbitrator.

There is no written policy or work rule that forbids an employee from using a restraining belt to tie a resident to a toilet. There are work rules that require permission from a nurse prior to use of restraints at the facility.

Additional facts as relevant, will be addressed in the DISCUSSION.

POSITIONS OF THE PARTIES

The County

The County argues that the discipline imposed was reasonable and consistent with just cause. The Grievant was not disciplined for the incident of January 21, 2003. Rather, she received a six-day suspension for tying down a resident with a transfer belt in the past. The Grievant's discipline was twice as severe as that of the two CNA's who had knowledge that the Grievant utilized this technique in the past and failed to report it. The County considered the Grievant's past employment record and took it into consideration when it decided to not discipline beyond suspension.

The Grievant's conduct failed to preserve the safety and dignity of the nursing home residents, constituted possible resident abuse and potentially violated state and federal regulations. Although the Grievant did not violate a specific work rule, the County has policies that address standards of care and use of restraints. The Grievant received training on how to care for residents. As evidenced by the Grievant's denial and subsequent admission to use of the restraining belt for this purpose, there is no question that the Grievant knew use of transfer belts to tie down residents is inappropriate.

For the foregoing reasons, the grievance should be dismissed.

The Union

The Union asserts that the Grievant was denied due process when she was disciplined by the County. First, there is no specific work rule that the Grievant violated and thus the Grievant was without prior knowledge that her actions would result in discipline.

Second, the County's investigation was flawed. The Grievant was told by the County that equal discipline would be administered to the three on-duty CNA's. The Grievant relied on this and truthfully reported previous instances when residents were left on a toilet. The County cannot discipline the Grievant more harshly for telling the when it has stated all employees will be discipline similarly. Additionally, the County failed to question all employees that may have had knowledge regarding the incident and thus the investigation was both unfair and incomplete.

Third, there is no evidence that the Grievant is guilty of misconduct for events that occurred at some unidentified occasions in the past. The County was unable to identify date, length of time the resident was secured or the identity of the residents involved in the prior incidents.

Finally, the discipline that was imposed is too severe in light of the Grievant's prior work record and the discipline imposed on other employees. This is a case termed by other arbitrators as "lax enforcement" and thus, the penalty is excessive.

In reply, the Union points out that the evidence establishes that the other two CNA's involved had utilized a transfer belt in the past to secure residents and were not disciplined. The County failed to call the two employees at hearing. Knowing that there was disagreement as to the truth and in light of the Grievant's sworn testimony that all three CNA's had restrained residents to toilets in the past, the discipline was inappropriate.

With regard to the EZ stand, although the device is different than a transfer belt, the effect is the same; the patient is immobilized until such time as he/she is released by an attendant. It is disingenuous for the County to argue that use of the restraining belt is inappropriate when the EZ stand is used for the same purpose.

For all of the above reasons, the Union argues that the grievance should be sustained and the Grievant made whole or in the alternative, the discipline should be reduced to a three-day suspension.

DISCUSSION

The issue in this case is whether the County had just cause to discipline the Grievant. There is no question that the Grievant engaged in the conduct for which she was disciplined; she not only admitted it to the County during the investigation, but the parties stipulated that the Grievant had utilized a restraining belt to tie a resident to a toilet within two (2) weeks of the January 21, 2003 incident. Thus, the discipline is valid provided the County has not acted in an unfair, arbitrary, or capricious manner.

The Union first challenges the discipline on the basis that since there was not a work rule forbidding the Grievant's behavior, she did not know it was inappropriate and thus would be subject to disciplinary action. The record does not support this conclusion. The Grievant testified that she knew that her use of the restraining belt "was unacceptable." Although a work rule specifically forbidding the use of restraining belts to tie residents to toilets does not exist at the County's facility, I find that the Grievant knew her behavior would subject her to discipline.

Next, the Union argues that the County is estopped from disciplining the Grievant in a manner different from Hutchcraft and Grochowski because the County assured the Grievant that it would impose equal discipline. Based on the very specific facts of this case, I do not agree. The Grievant testified that she was told by either the Director of Nursing or the supervisor involved in the investigation that all three CNA's would receive the same level of discipline "because no one came forward" and admitted to using the restraining belt. This

assurance was specific, related solely to the January 21, 2003 incident and the evidence establishes that the County disseminated the same level of discipline for the January 21, 2003 incident to the Grievant as it did to Hutchcraft and Grochowski. The County imposed an additional three days of suspension to the Grievant for her admission to past use of the restraining belt in an inappropriate manner. Given that the County's assurance was specific to the January 21, 2003 incident and the additional three day suspension was imposed for a different offense, I do not find that the Grievant was subject to differential treatment.

The Union next argues that the Grievant was treated more harshly, especially since the County had knowledge that other CNA's had utilized the same technique and were not disciplined. To sustain a "lax enforcement of the rules" challenge to discipline, the County must have knowledge of the unacceptable behavior. The Grievant testified that others had used the restraining belt in the same manner as she and were not disciplined. The record suggests that this was the first time she shared this with the County. It seems logical to this Arbitrator that when the Grievant was confronted by the County with the accusations of Hutchcraft and Groskowitski, she would have implicated the individuals who had similarly used the restraining belt. The record is void of such a response by the Grievant. There is no evidence to suggest that the County had knowledge of anyone using restraining belts to tie residents to commodes prior to its investigation of the January 21, 2003 incident. The County cannot be held accountable for information which it did not have at the time it made its decision and thus, I do not find merit to the Union's lax enforcement argument.

As to whether the level of discipline imposed was too severe, I subscribe to the arbitral line of thought that it is inappropriate for an arbitrator to substitute her judgment for that of the employer unless the penalty is clearly out of line with generally accepted standards of discipline. See Elkouri and Elkouri, How Arbitration Works, 6th Edition, p. 960-962 (2003). Although this penalty may be more severe than it need be, given that the evidence supports the offense and the public policy considerations inherent in protecting individuals in a nursing home setting, it is inappropriate for me to modify the penalty.

As to the Union's argument that use of the EZ Stand is the same as use of the restraining belt, I do not find the devices sufficiently similar to justify such a comparison. The EZ stand is an approved device designed to assist staff in moving residents. Although the Grievant chose to utilize a restraining belt for a purpose similar to that of the EZ stand, that does diminish the fact that she knew it was "unacceptable" to use the restraining belt as she did.

The Union challenged the Grievant's discipline for numerous reasons, none of which can be found to have been sufficiently unfair, arbitrary or capricious so as to conclude that the County lacked just cause when it imposed a six-day suspension on the Grievant. I, therefore, dismiss the grievance.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the Undersigned issues the following

AWARD

No. The Employer did not violate the collective bargaining agreement when it disciplined the Grievant with a six (6) day suspension on or about January 28, 2003, and therefore, the grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 15th day of March, 2004.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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