BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY HEALTH CARE FACILITIES EMPLOYEES, LOCAL 2427, AFSCME, AFL-CIO

and

SHEBOYGAN COUNTY

Case 347
No. 62444
MA-12287

Appearances:

Helen Isferding, Staff Representative, Wisconsin Council 40, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Michael Collard, Human Resources Director, Sheboygan County, 508 New York Avenue, Room 336, Sheboygan, Wisconsin 53081, appearing on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County" or "Employer", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Sheboygan, Wisconsin, on October 21, 2003. The hearing was transcribed and the parties completed their briefing schedule on January 16, 2004.

Based upon the entire record, I issue the following decision and Award.

STIPULATED ISSUES

1. Did Sheboygan County have just cause to terminate the employment of Judy Guminey?

2. If not, what is the appropriate remedy?

DISCUSSION

At issue is whether there was just cause to terminate the Grievant.

Standard

Since the record does not indicate that the parties share an express understanding or agreement on the specifics of a just cause standard, the Arbitrator will apply his own test.

There are two fundamental, but separate, questions in any case involving just cause. The first is whether the employee is guilty of the actions complained of which the County herein has the duty of so proving by clear and satisfactory preponderance of the evidence. If the answer to the first question is affirmative, the second question is whether the punishment is contractually appropriate, given the offense.

Basis for Discipline

Applying the above standard to the instant case, the Arbitrator first turns his attention to the question of whether the Grievant is guilty of the actions complained of.

Judy Gumieny, herein "Grievant", was terminated from her employment as a CNA (certified nursing assistant) at Rocky Knoll Health Care Facility on January 24, 2003, based on an incident that occurred on January 15, 2003. The Grievant started work at approximately 7:30 p.m. on January 15. Three members of the nursing staff at Rocky Knoll reported the smell of alcohol on the Grievant's breath that evening. (County Exhibit Nos. 7, 8 & 9). Two supervisors, Jean Kolosso and Roxanne Taylor, then drove the Grievant to the hospital for administration of breath and blood alcohol tests. (County Exhibit Nos. 5 & 6). While talking with the Grievant at Rocky Knoll, Taylor found the smell of alcohol "very evident." (Tr. p. 69). In the car, Kolosso observed a "very, very noticeable, very strong" odor of alcohol on the Grievant's breath. (Tr. p. 59).

The breath tests returned positive results for alcohol at .114 and .115. (County Exhibit No. 12; Tr. pp. 60, 71). Later, the blood test result showed a positive blood alcohol of .12%. (County Exhibit No. 11). Although she initially denied using alcohol that day (County Exhibit Nos. 5 & 6), the Grievant admitted at hearing that she had something to drink before she came to work that day. (Tr. p. 109).

Director of Nursing Charlene Baumgartner and Assistant Director of Nursing Mary Sue Dempski conducted an investigation into the events of January 15. Baumgartner and Dempski interviewed likely witnesses having information favorable or unfavorable to the Grievant, and completed their investigation before reaching any conclusion as to discipline. (Tr. pp. 10-14, 44).

Director of Health Care Centers Dale Pauls made the final decision regarding discipline of the Grievant. He made sure he had all relevant information before making a decision. (Tr. p. 80). In addition to statements obtained through the investigation, he considered the Grievant's employment record with the County, as well as her recent disciplinary history. (Tr. pp. 81-83). He also talked with the Grievant to give her an opportunity to present her side of the story before making a final decision on discipline. (Tr. p. 81).

The County's rules recommend the following: "For consistency by administering discipline Countywide, the following discipline standard should be considered for violation of the above examples." (Union Exhibit No. 4). There is a caution: "**The following recommended sequence of steps may be altered by the Administrator depending upon the severity of the infraction**." Id. (Emphasis in the Original). For "reporting to work under the influence of drugs or alcohol", the recommendation is one (1) day off without pay for the first offense, five (5) days off without pay for the second offense and discharge for the third offense. Id.

The Union argues, however, that the Grievant did not report to work on January 15, 2003, under the influence. In this regard, the Union maintains that the testing merely established a rebuttable presumption that the Grievant was "under the influence." (Emphasis in the Original).

A grievant whose blood-alcohol level exceeds state alcohol intoxication standards can properly be presumed to be under the influence. *Employee Lifestyle and Off-Duty Conduct Regulation*, Marvin F. Hill, Jr. and James A. Wright, Chapter 5, "Arbitral Standards Under 'Just Cause' Provisions", Section VIII., "Off-Duty Considerations and Drug Tests: Discharge and Discipline for Employees Having Drugs 'In Their System'", (BNA, 1993), p. 239. In arbitration, as in the legal forum, the "game is over" for such an employee who argues non-impairment. Id.

The breath and blood alcohol test results showing an alcohol concentration of .114 to .12 have not been challenged. The Grievant herself indicated at hearing that she did not disagree with the results, and that it would be reasonable to rely on those numbers. (Tr. p. 134). Furthermore, she knew before hearing the results that they would be positive. (Tr. p. 109).

Sec. 885.235(1g) Stats., provides that "[I]n any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration," a chemical analysis is admissible, and shall be given the following effect:

. . .

> [T]he fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more. Sec. 885.235(1g)(c) Stats.

Consequently, the Arbitrator finds it reasonable to conclude that the Grievant was under the influence when she reported to work on January 15, 2003. As a result, she violated the County rule that prohibits an employee from "reporting to work under the influence" of alcohol.

The Union argues, contrary to the above, that the more persuasive proof of not being under the influence lies in the Grievant's behavior symptoms (or lack thereof) and the Grievant's response (or lack of) to her three hours of work. The Union adds that the Grievant was never treated as an employee who was "under the influence" until almost three hours after the first "whiff of alcohol" on her breath.

However, the case relied upon by the Union for the proposition that an arbitrator must look at the Grievant's behavioral symptoms to determine if she was under the influence actually supports the above conclusion in this dispute. In GENERAL FELT INDUSTRIES, 74 LA 972, 973 (Carnes, 1979), the arbitrator found that the employer improperly discharged employees on evidence that they were more "boisterous" than usual on reporting for work after they consumed beer and registered .05 and .08 on blood alcohol content on breath tests where (1) boisterousness is not sufficient by itself to establish that grievants were under the influence; and (2) while .05 and .08 readings of test came dangerously close to crossing line of being under the "influence," crucial level would have been .10 under state vehicle code. In fact, an employee who tests under the legal limit may be presumed to be unimpaired. *Employee Lifestyle and Off-Duty Conduct Regulation*, supra, p. 240. Under that circumstance it would be proper, as Arbitrator Carnes did, to consider whether an employee exhibits the "classic" signs associated with intoxication to determine if the employee is under the influence. Alcohol abuse is immediately apparent by a number of symptoms including heightened facial color, slurred speech, faulty coordination, unsteady movements, uncertain steps, and alcohol breath. (Emphasis added). *Management Rights*, Marvin Hill, Jr. and Anthony V. Sinicropi, (BNA, 1986) p. 182. Therefore, since the grievants tested under the legal limit and showed no other symptoms of alcohol abuse except for "boisterousness," the arbitrator in GENERAL FELT *Industries* correctly found that the employer did not have just cause to discharge the grievants. *Supra*, p. *977*. The same line of reasoning in this case would lead to the conclusion that, since the Grievant's test results were well *above* the legal limit for driving, and the Grievant exhibited classic signs of intoxication, she was under the influence. (Emphasis in the Original).

The Union also relies on the following authority:

> A Bac of 0.10 percent or higher is certain evidence that a person has been drinking. But in the absence of behavioral signs of intoxication, (staggering, slurring, and the like) it does not necessarily prove he is under the influence to the extend (sic) that he cannot function normally. (Emphasis in the Original). *Blackacre Series on Discipline and Discharge, Alcohol and Related Misconduct*, Adolph M. Koven and Susan L. Smith, (Coloracre Publications Inc., 1984) p. 78.

In Wisconsin, an analysis that a person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence. In addition, on the evening of January 15th three staff members and two supervisors smelled alcohol on the Grievant's breath. As noted above, alcohol breath is a sign of alcohol abuse. See also Blackacre, supra, p. 52. When questioned about using alcohol that day the Grievant turned her head and said "No." (County Exhibit No. 5). She was evasive, mumbled and would not open her mouth. (Tr. p. 69). Contrary to the Union's assertion, the Grievant did evidence classic symptoms of intoxication including "inability to speak clearly and enunciate words" and "lack of eye contact." (Union brief, p. 6). The Union has not rebutted the evidence that the Grievant was under the influence on the date in question.

The Union claims there is no evidence that the Grievant did not perform her work properly that evening. That is true. Management did not hear from anyone that she was not performing her duties that night. (Tr. p. 77). However, when the Grievant first came to work she was busy settling residents and working on her own with little contact with others. (Tr. p. 32). In the past, when alcohol was involved, the Grievant was found sleeping on the job and was difficult to arouse. No one from management directly observed her working during this period of time. Based on same, the Arbitrator finds that the record does not provide a determinative answer to the question of whether or not the Grievant was doing her job properly on January 15th.

Moreover, the Union makes a misleading argument as to time, contending that the Grievant was allowed to continue working long after the smell of alcohol was detected on January 15, 2003. The Union claims that "Roxane Taylor was first told of smell at 7:20," but it was not until two and one-half hours after the first "whiff of alcohol" that anybody checked on her or her patients. The record does not support such a claim. Instead, Taylor testified that she was first told about the smell of alcohol on the Grievant's breath much later. She stated: "Cindy Walber came down about 2140, which is about ten minutes or twenty minutes to ten – twenty minutes to ten in the evening." (Tr. p. 75). Management was not aware of the situation any time before that. After gathering statements, the supervisors approached the Grievant to take her for testing at about 10:30 p.m. (Tr. p. 76). There is no evidence that the County allowed the Grievant to continue performing her position for an extended period of time while they felt that she was under the influence.

Therefore, based on all of the foregoing, the Arbitrator rejects the Union's position that the Grievant did not act like she was under the influence of alcohol on the date in question.

Based on all of the above, the Arbitrator finds that the County has proven that the Grievant is guilty of the actions complained of on January 15, 2003. A question remains as to whether the punishment was contractually appropriate. The remaining arguments of the parties over whether discharge was for just cause will be addressed in answering this question.

Appropriateness of the Discharge

The Union initially argues that the penalty is too harsh because it does not conform to the County's discipline chart.

The collective bargaining agreement does not require the County to follow a particular set of steps in determining the appropriate level of discipline. Instead, the agreement merely contains a generic just cause requirement for discharge. (Joint Exhibit No. 1, Article 3).

The personnel manual also does not provide an inflexible standard, requiring certain steps to be rigidly followed in disciplinary matters. It simply provides for a general discipline standard to be considered by management, as an aid in encouraging consistency. It cautions: "**The following recommended sequence of steps may be altered by the Administrator depending upon the severity of the infraction**." (Emphasis in the Original). For improper conduct of "Reporting to work under the influence of drugs or alcohol," it suggests a specific level of discipline for a routine case involving no aggravating or mitigating circumstances. The manual recommends a written reprimand for the first offense of reporting to work under the influence of alcohol, a five days suspension without pay for the second offense and discharge for the third offense.

The Union maintains that January 23, 2003 was the first time the Grievant was disciplined for "reporting to work under the influence," and that it was improper to terminate her for a first offense. However, on August 29, 2002, the Grievant was suspended for five days for insubordination for refusing to go for a blood alcohol test. (County Exhibit No. 3). Three staff members smelled alcohol on her breath. Id. Where management has reasonable suspicion that the employee is under the influence, and the employee refuses to submit to fitness-for-work medical evaluation, the employee can be presumed to be under the influence or, alternatively, can be disciplined for insubordination. *Employee Lifestyle and Off-Duty Conduct Regulation*, supra, p. 240. In this respect, Hill and Sinicropi conclude:

> [M]ost arbitrators will uphold discipline or even dismissal when an employee refuses to take an examination so long as management can establish a reasonable basis in fact (probable cause in the public sector) for believing that the employee

> was under the influence. Alternatively, when a tests is refused, an arbitrator may simply conclude that the employee was under the influence and not bother to rule on the question of whether discipline was proper for refusing the examination. Whichever alternative is chosen, the end result is the same. The suspected drug user is disciplined or terminated from employment. Marvin F. Hill, Jr., & Anthony V. Sinicropi, *Remedies in Arbitration*, (BNA Books, 2nd Ed., 1991) p.189.

Here, management had reasonable suspicion to believe that the Grievant was under the influence based on staff observation that she had alcohol on her breath as well as her history of alcohol related incidents. (Tr. pp. 17-23, County Exhibit Nos. 1 & 2). Based on the foregoing, the Arbitrator will treat the August 29, 2002 five-day suspension as a discipline of the Grievant for being under the influence.

The Grievant received two other disciplinary actions during this period related to alcohol. Those actions consisted of a one-day suspension for sleeping on duty in December 2001, (County Exhibit No. 1), and a five-day suspension for sleeping on duty in January 2002. (County Exhibit No. 2). The Grievant denies using alcohol on those occasions. (Tr. p. 124). However, there was suspicion that alcohol was involved in those incidents as well. (Tr. pp. 18, 23, 82-83). There is no reason that the County would make this up and the Grievant's denial that alcohol was not a factor in these suspensions is not credible due to her subsequent treatments for alcohol abuse. (Tr. p. 113, County Exhibit No. 15).

More importantly, these actions can be counted as the same level of offenses under the County's progressive disciplinary system for the following reasons. One, the disciplinary grid treats sleeping on duty and reporting to work under the influence of alcohol in the same manner. (Union Exhibit No. 4). The grid recommends the same levels of discipline – one day suspension first offense, five days suspension for second offense, and termination for third offense – for both of these offenses. Id.

Two, both sleeping and being under the influence involve the same interest of the employer. Both offenses affect the ability of the employee to properly look out for the residents that are in the employee's care. Rocky Knoll's "responsibility to the residents is to give them a safe and secure home, to provide the highest quality of care possible, to assure that we do not have abuse or neglect in the building." (Tr. p. 30). Impaired employees or employees who sleep on duty "are not caring for residents." Id.

Three, the collective bargaining agreement recognizes that minor work rules are one category of offense and safety violations are another. Article 28 of the collective bargaining agreement provides in one paragraph that discipline for violation of a minor work rule will be rescinded after one year without other violations, while the next paragraph provides that a

safety violation will be removed from the personnel file on request after two years provided that no other safety violations have occurred. (Joint Exhibit No. 1). Thus, the agreement treats all safety violations as a group for at least some purposes. Both sleeping on duty and being under the influence of alcohol are clearly safety violations. (Tr. pp. 30, 95, County Exhibit No. 16).

Based on all of the above, the Arbitrator will treat the January 15, 2003 offense as the fourth offense of a similar nature. The one-day suspension for sleeping on the job, the five-day suspension for sleeping on the job, the five-day suspension for insubordination and the termination for being under the influence all relate directly to the care and safety of Rocky Knoll's residents. These incidents all took place within a little over a year. They all involved alcohol. Contrary to the Union's assertion, the County has followed progressive discipline in the instant matter.

The Arbitrator agrees with the Union that in some instances it might not be appropriate to **bundle** unrelated disciplines when they are listed separate on the discipline chart. (Emphasis in the Original). However, for the reasons discussed above, as well as the fact that they are related disciplines and serious offenses, the Arbitrator will consider them together for purposes of evaluating the appropriateness of termination. (Emphasis added). This is particularly appropriate where, as here, the Grievant failed to correct her behavior despite a number of opportunities to do so.

The Union next argues that the County has treated the Grievant more harshly than other employees similarly situated.

Two other employees had alcohol-related disciplinary problems. One employee was an LPN, and the other an RN.

The LPN had one alcohol-related violation, and received a one-day suspension without pay. (Tr. p. 101).

The RN had a one-day suspension without pay for reporting to work under the influence; she received another suspension (five days) without pay at a different date for refusal to test (insubordination) under suspicion of alcohol; and then a third violation, for an alcohol related incident. (Tr. p. 100). For the third violation, the RN was offered and agreed to a last chance agreement that required inpatient treatment for alcohol dependency, in addition to imposing a 30-day unpaid suspension, as an alternative to termination. (Tr. pp. 100, 102).

The above examples are consistent with the discipline imposed on the Grievant. The Grievant has had two violations for reporting to work under the influence and two other alcohol-related violations relating to the care (or the lack thereof because she was sleeping on

duty) of patients. In addition, she unsuccessfully had alcohol counseling on an outpatient basis and inpatient treatment at two different facilities prior to termination. (Tr. pp. 113, 115, 128).

The County did not treat the Grievant differently than other employees with similar problems. There were no other employees with as bad of a record in terms of reporting to work under the influence of alcohol, sleeping on duty and insubordination as the Grievant. (Tr. p. 90).

The Union argues that the Grievant should have been given a last chance agreement like the RN.

The last chance agreement with the RN contained a requirement that she obtain inpatient chemical dependency treatment for a period of time. (Tr. p. 91). The County believed the Grievant "had had several last chance agreements as far as we were concerned. We kept giving her opportunities to remedy the situation." Id.

The County also correctly believes that the actions it took in June of 2002 were the equivalent of a last chance agreement. (Tr. p. 92). In June 2002, the Grievant was found sleeping in a resident's lounge chair under a blanket while on duty. (Tr. p. 45). The Grievant met with management who discussed the possibility of termination with her. (Tr. p. 47). During this meeting, the Grievant offered to resign. (Tr. p. 48). Management talked her out of resigning and instead encouraged her to get help for her alcohol issues as an alternative to being discharged. (Tr. p. 85). She was not terminated or disciplined for this incident. (Tr. p. 49).

The purpose of a last chance agreement is to give the Grievant an opportunity to fight her alcohol problem. The Arbitrator cannot fault the County for failing to offer the Grievant such an agreement in light of its previous efforts to help and to encourage her to deal with her alcohol problem and her unsuccessful prior efforts to address the issue. In the past, it appears that the Grievant was just not ready to successfully tackle her alcoholism. The County was not contractually obligated to offer the Grievant a last chance agreement because she had a worse record of alcohol-related violations than the RN and because she had previously been given more than one opportunity to correct her behavior.

The Union also argues that the Grievant's long history of service with the County should mitigate the penalty imposed. Long service with the employer, particularly if unblemished, is a definite factor in favor of the employee whose discharge is reviewed through arbitration. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 6th Ed., 2003), p. 988. In the instant case, the Grievant does not have an unblemished record. She initially testified that she never had any disciplinary problems "to my recollection." (Tr. p. 112). However, she

later admitted she had five earlier formal disciplinary actions, including two suspensions for unrelated" incidents. (Tr. pp. 129-131).

The Union further argues that the fact the Grievant "came in when she was called for overtime on January 15, 2003 – **even though she had not planned on working early and that is** – part of the mitigating circumstances in this case." (Emphasis in the Original). The Grievant certainly has a commendable record of volunteering to work extra hours herein. (Tr. pp. 112, 122-123). However, when the County called the Grievant to work overtime on January 15th, (Tr. p. 107), she should have informed the County that she had been drinking and stayed home.

In addition, the Union argues that the Grievant was given no notice that she would be discharged if she didn't stop drinking. However, when the Grievant received a one-day suspension without pay for sleeping on duty in December 2001 she was warned: "further infractions will result in additional discipline up to and including discharge as per Sheboygan County Personnel Policy." (County Exhibit No. 1). In January 2002, the Grievant received a five-day suspension without pay for sleeping on duty and again was warned that further infractions would result in discipline including discharge. (County Exhibit No. 2). In August 2002, the Grievant received another five-day suspension without pay for insubordination (being under the influence) and was warned: "further incidents will result in termination of employment." (County Exhibit No. 3). Moreover, when the Grievant was informally counseled about alcohol abuse in June 2002, and encouraged to seek treatment instead of resigning her employment, termination was an issue that was on the table and discussed with the Grievant. (Tr. p. 85). The County gave the Grievant notice that her conduct/performance was unacceptable and could lead to discharge.

Finally, the Union argues that the County's argument about patients' safety is just a ruse. The Union adds that the County never before sent the Grievant home, or gave examples of her misconduct. However, the County sent the Grievant for a blood alcohol test when three licensed staff members smelled alcohol on her breath in August of 2002. (County Exhibit No. 3). If the test came back negative, she "would be able to return to work and would be paid for the time." Id. The Grievant did not go for the test and received a suspension for insubordination. Id.

Furthermore, sleeping on the job is misconduct and she did that three times between December 2001, and June 2002. (County Exhibit Nos. 1 and 2, Tr. p. 84).

As noted previously, the safety and security of patients, the provision of the highest quality of health care possible and prevention of abuse or neglect is the responsibility of the Rocky Knoll management. Sleeping on the job and being under the influence compromises these goals in an unacceptable manner.

The Union makes a number of arguments taking issue with the County's arguments and reliance on certain testimony. However, these arguments are irrelevant to the outcome of this proceeding and so will not be addressed further.

In view of the foregoing, the Arbitrator finds that the punishment was contractually appropriate.

Based on all of the above, the Arbitrator finds that the answer to the issue stipulated to by the parties is YES, Sheboygan County had just cause to terminate the employment of Judy Guminey.

Based on all of the foregoing, it is my

AWARD

The grievance filed in the instant matter is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 22nd day of March, 2004.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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