

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
COLUMBIA COUNTY (HEALTH CARE CENTER)

and

**COLUMBIA COUNTY HOME EMPLOYEES' UNION,
LOCAL 2698, AFSCME, AFL-CIO**

Case 227
No. 62554
MA-12335

Appearances:

Davis & Kuelthau, S.C., by **Attorney Alyson K. Zierdt**, 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54903-1278, on behalf of the County.

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, on behalf of Local 2698.

ARBITRATION AWARD

According to the terms of the 2002-03 collective bargaining agreement between Columbia County Health Care Center (County) and Local 2698, AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the discharge of Stephanie Thomas. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was held at Wyocena, Wisconsin, on October 6, 2003. A stenographic transcript of the proceedings was made and received by the Arbitrator on October 16, 2003. The parties were given full opportunity to present testimonial and documentary evidence at the hearing. The parties agreed at the conclusion of the hearing to send two copies of their initial briefs to the Arbitrator postmarked December 8, 2003, for her exchange. The Arbitrator received the County's brief on November 28, 2003. The Union did not file a brief. Although the parties had reserved the right to file reply briefs, none were filed. The record herein was closed on January 2, 2004.

ISSUES

The parties were unable to stipulate to the issues to be resolved herein. However, they agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument as well as the parties' suggested issues. The Union suggested the following issues for determination:

Did the Employer have just cause to discharge the Grievant? If not, what is the appropriate remedy?

The County suggested the following issues in this case:

Did Columbia County violate the collective bargaining agreement when it terminated the employment of Stephanie Thomas on January 21, 2003, because her permanent work restrictions rendered her unable to perform the essential functions of her job as a CWA? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case and after having considered the parties' suggested issues quoted above, the Arbitrator finds that the following issues reasonably state the controversy between the parties (without the inclusion of argument) and they shall be determined herein, as follows:

Did Columbia County violate the collective bargaining agreement when it terminated the Grievant's employment on January 21, 2003, for the reasons given by the County? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

- A) To direct all operations of the Health Care Center;
- B) To establish reasonable work rules and schedules of work;
- C) To hire, promote, transfer, schedule and assign employees to positions within the Health Care Center;

- D) To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- E) To relieve employees from their duties because of lack of work or any other legitimate reasons;
- F) To maintain efficiency of County government operations;
- G) To take whatever action is necessary to comply with State or Federal law;
- H) To introduce new or terminate existing methods or facilities;
- I) To change existing methods or facilities;
- J) To determine the kinds and amounts of services to be performed as pertains to County government operations; and the number and kinds of classifications to perform such services;
- K) To contract out for goods or services;
- L) To determine the methods, means, and personnel by which County operations are to be conducted;
- M) To take whatever action is necessary to carry out the functions of the Health Care Center in situations of emergency.

ARTICLE 5 – SENIORITY RIGHTS

5.01 Policy: It shall be the policy of the Employer to recognize seniority.

5.02 Definition: Seniority shall be defined as the length of time that an employee has been employed, dating from his or her most recent date of hire, and excluding any unpaid leaves of absence except as hereinafter provided.

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5.04 Application: Seniority shall apply in promotions, transfers, layoffs, recall from layoff, and vacation selection, as hereinafter provided.

5.05 Job Posting: All vacancies or new positions shall be immediately posted on all bulletin boards for a period of five (5) working days, and employees may apply for positions during this period by signing the job posting.

Such posting shall include: Job title, the job location, job shift, and the rate of pay. Any employee who successfully obtains a new job through the job posting mechanisms in another department may not post for another job in another department for twelve (12) months. No one outside the bargaining unit will be hired if applicants from within the bargaining unit meet the qualifications for the posted position. New employees must be employed for at least twelve (12) months to be eligible to sign a job posting unless the posting is within their existing department. Prior to leaving for vacation an employee may submit a notice in writing of their interest in a particular job. This notice shall also contain information as to where the employee can be reached by the Health Care Center during her/his vacation, should such a vacancy so arise. Should said vacancy become available during the employee's absence, consideration for the position will be automatic, if they meet the qualifications for the position.

Health Care Center employees within the bargaining unit shall be given preferential consideration for any vacant County position over non-County employee applicants, providing they meet the qualifications.

5.06 Selection: The senior qualified applicant shall normally receive the vacancy. However, the Employer reserves the right to award a vacant position to another employee, without regard to seniority, if doing so is to provide an accommodation under the Americans with Disabilities Act, for an employee with a work-related illness or injury.

5.07 Qualifications: The Employer retains the right to establish necessary qualifications for all positions, and to determine whether a given employee meets the necessary qualifications. As may be applied to an individual employee, the question of that employee's qualifications shall be subject to the grievance procedure contained in Article IV of this Agreement.

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BACKGROUND

The County's Health Care Center is located in Wyocena, Wisconsin. It is a long-term care facility with 149 beds. The Center provides day-to-day care for residents who cannot care for themselves as well as rehabilitative services for patients who are expected to return home from the Center. As such, the Center is divided into units known as "neighborhoods": one such unit, Willow Court, houses dementia patients only; another unit, Mullberry, houses approximately one-half residents in need of heavy care and one-half dementia residents; two units house residents requiring heavy physical care and one unit is for rehabilitative patients only.

The County's Certified Nursing Assistant (CNA) job description applicable to all County CNAs 1/ no matter what unit or neighborhood they normally work on reads as follows 2/:

1/ On November 16, 1999, the Grievant received a copy of the CNA job description quoted herein.

2/ Each CNA function marked with a dash was one which Director of Nursing Zacho identified herein that in her opinion Thomas could not perform given Dr. Plooster's permanent work restrictions. (Tr. 56-63)

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POSITION OBJECTIVES

The primary purpose of your job position is to provide your assigned residents with routine daily nursing care in accordance with our established nursing care procedures, and as may be directed by your supervisor.

PERSONAL QUALIFICATIONS

EDUCATION:

Must possess, as a minimum, a ninth grade education.

EXPERIENCE:

Must be a licensed Certified Nursing Assistant in accordance with laws of this state.

SPECIFIC REQUIREMENTS:

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- Must not pose a direct threat to the health and safety of other individuals in the workplace.
- Must be able to safely perform * the essential job functions with or without reasonable accommodations.

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MAJOR DUTIES AND RESPONSIBILITIES

ADMINISTRATIVE FUNCTIONS:

*Use the wristband or photo to identify residents before administering treatments, serving meals, etc., as necessary.

*Record all entries on flow sheets, notes, charts, etc., in informative and descriptive manner.

Use only authorized abbreviations established by this facility when recording information.

*Report all changes in the resident's condition to the Wing Nurse/Charge Nurse as soon as practical.

*Report all accidents and incidents you observe on the shift that occur.

ADMISSION, TRANSFER, AND DISCHARGE FUNCTIONS:

*Ensure that the resident's room is ready for receiving the resident. (i.e., bed made, name tags up, admission kit available, etc.).

— Greet residents and escort them to their room.

Introduce resident to his/her roommate, if any, and other residents and personnel as appropriate.

— Make resident comfortable (i.e., put to bed, get water, etc.).

Store resident's clothing.

— Assist residents with packing their personal possessions when they are being transferred to a new room, or when being discharged.

*Transport residents to new rooms or to the receiving area.

— Assist with loading/unloading residents from vehicles as necessary.

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PERSONAL NURSING CARE FUNCTIONS:

Participate in and receive the nursing report upon reporting for duty.

*Follow established policies concerning exposure to blood/body fluids.

*Assist residents with daily dental and mouth care (i.e., brushing teeth/dentures, oral hygiene, special mouth care, etc.).

— *Assist residents with bath functions (i.e., bedbath, tub, or shower bath, etc.) as directed.

— Give backrubs as instructed.

— *Assist residents with dressing/undressing as necessary.

*Assist residents with hair care functions (i.e., combing, brushing, shampooing, etc.),

*Assist residents with nail care (i.e., clipping, trimming, and cleaning the finger/toenails). (Note: Does not include diabetic residents.)

*Shave male residents.

*Keep hair on female residents clean shaven (i.e., facial hair, under arms, on legs, etc.) as instructed.

— *Keep residents dry (i.e., change gown clothing, linen, etc., when it becomes wet or soiled.)

*Change bed linens. Keep linens tight to avoid wrinkles from forming under the resident.

— *Make beds (occupied and unoccupied) when necessary.

Put extra covers on beds as requested.

— *Position bedfast residents in correct and comfortable position.

— *Assist resident with bowel and bladder functions (i.e., take to bathroom, offer bedpan/urinal, portable commode, etc.).

*Maintain intake and output records as instructed.

— *Keep incontinent residents clean and dry.

*Check and report bowel movements and character of stools as instructed.

*Prepare and give enemas. Report results as instructed.

*Collect specimens as instructed (i.e., urine, sputum, stools, etc.).

— *Assist residents in preparing for medical tests (i.e., lab work, x-ray, therapy, dental, etc.).

— *Assist residents in preparing for activity and social programs (i.e., church services, parties, visitor, etc.).

— *Assist in transporting residents to/from appointments, activity, and social programs, etc., as necessary.

— *Assist with lifting, turning, moving, positioning, and transporting residents into and out of beds, chairs, bathtubs, wheelchairs, lifts, etc.

— *Assist residents to walk with or without self-help devices as instructed.

— *Perform restorative and rehabilitative procedures as instructed.

*Provide eye and ear care (i.e., warm/cool compresses, cleaning eyeglasses/hearing aides, etc.) as instructed.

*Assist with the application on nonsterile (moist and dry) warm/cold compresses.

— *Assist in preparing the resident for a physical examination.

— *Weigh and measure residents as instructed.

— *Measure and record temperatures, pulse, and respirations (TPRs), as instructed.

*Answer resident calls promptly.

*Ensure that residents who are unable to call for help are checked frequently.

— *Check each resident routinely to ensure that his/her personal care needs are being met in accordance with his/her wishes.

— *Assist with the care of the dying resident.

— *Provide post-mortem care as instructed.

SPECIAL NURSING CARE FUNCTIONS:

*Observe and report the presence of pressure areas and skin breakdowns to prevent decubitus ulcers (bedsores).

— *Provide daily indwelling catheter care.

— *Provide daily perineal care.

*Assist with the application of slings, elastic bandages, binders, etc.

— *Give tepid sponge baths.

— *Provide daily Range of Motion Exercises. Record data as instructed.

— *Turn bedfast residents at least every two (2) hours.

*Perform diabetic urine testing (i.e., clinitest, acetest, etc.).

— *Provide physical and respiratory therapy as instructed.

— *Perform special treatments as instructed.

*Observe disoriented and comatose residents. Record and report data as instructed.

*Turn all medications found in the residents room/possession over [sic] the wing Nurse/Charge Nurse.

*Provide residents with Reality Orientation as instructed.

*Watch for and report any change in room temperature, ventilation, lighting, etc.

FOOD SERVICE FUNCTIONS:

— *Prepare residents for meals (i.e., take to bathroom, wash hands, comb hair, raise bed, position tables, place bibs, take to/From dining room, etc.).

— *Serve food trays. Assist with feeding as indicated (i.e., cutting foods, feeding, assist in dining room supervision, etc.).

*Assist residents with identifying food arrangements (i.e., informing resident with sight problem of foods that are on his/her tray, where it is located, if it is hot/cold, etc.).

*Record the resident's food/fluid intake. Report changes in the residents eating habits.

*Keep residents' water pitchers clean and filled with fresh water (on each shift) when unit assistants are unavailable and within easy reach of the resident.

*Serve between meal and bedtime snacks.

— *Perform after meal care (i.e., remove trays, clean resident's hands, face clothing, take to bathroom, brush teeth, clean dentures, etc.).

Check rooms for food articles (i.e., food in proper container, unauthorized food items, etc.).

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SAFETY AND SANITATION:

— Restrain residents in chair/bed as instructed.

Check restrained residents at least every thirty (30) minutes.

— Release restraints at least every two (2) hours for range of motion exercises, taking to bathroom, etc.

*Maintain a record of restrained residents, the times restraints were released, and how long the restraints were released.

Participate in an in-service training program prior to tasks that involve potential exposure to blood/body fluids.

*Wash hands before and after performing any service for the resident.

Keep the nurses' call system within easy reach of the resident.

*Immediately notify the Wing Supervisor/Charge Nurse of any resident leaving/missing from the facility.

— *Follow established safety precautions in the performance of all duties.

— *Keep residents' personal possessions off the floor and properly stored.

Keep floors dry. Report spills immediately.

— *Keep excess supplies and equipment off the floor. Store in designated areas.

— Wash wheelchairs, walkers, etc, as instructed.

*Clean, disinfect, and return all resident care equipment to its designated storage area after each use.

Perform routine housekeeping duties (i.e., clean bedrails, overbed table; night stand: etc., that relate to nursing care procedures).

Before leaving work area for breaks, or at the end of the work day, store all tools, equipment, and supplies.

*Report all hazardous conditions and equipment to the Wing Nurse/Charge Nurse immediately.

*Report all safety violations.

Follow established smoking regulations. Report all violations.

*Report any communicable or infectious disease to the Director of Nursing Services and/or to the Infection Control Coordinator.

Follow established isolation precautions and procedures.

*Wash hands before entering and after leaving an isolation room/area.

*Follow established procedures in the use and disposal, of personal protective equipment.

— *Wear and/or use safety equipment and supplies (e.g., back braces, lifter, etc.) when lifting or moving residents.

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WORKING CONDITIONS:

Works throughout the nursing service area (i.e., nurses' stations, resident rooms, etc.).

— Sits, stands, bends, lifts, and moves intermittently during working hours.
Is subject to frequent interruptions.

Is involved with residents; personnel, visitors, government agencies/personnel, etc., under all conditions and circumstances.

— Is subject to hostile and emotionally upset residents, family members, personnel, and visitors.

Communicates with nursing personnel and other department personnel.

— Works beyond normal working hours, on weekends and holidays, and in other positions temporarily, when necessary.

Attends and participates in continuing educational programs.

— Is subject to falls, burns from equipment, odor, etc., throughout the work day.

Is subject to exposure to infectious waste, disease, conditions, etc., including TB and the AIDS and Hepatitis B viruses.

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PHYSICAL AND SENSORY REQUIREMENTS:

— Must be able to move intermittently throughout the work day.

Must be able to speak and write the English language in an understandable manner.

Must be able to cope with the mental and emotional stress of the position.

Must be able to see and hear or use prosthetics that will enable these senses to function adequately to ensure that the requirements of this position can be fully met.

— Must function independently and have flexibility, personal integrity, and the ability to work effectively with residents, personnel, and support agencies.

— Must be in good general health and demonstrate emotional stability.

— Must be able to relate to and work with the ill, disable, elderly, emotionally upset, and, at times, hostile people within the facility.

— Must be able to lift, push, pull, and move a minimum of 50 pounds.

— Must be able to assist in the evacuation of residents during emergency situations.

WORKING HOURS:

AM Shift -- 6:00 am - 2:30 pm OR 6:30 am - 1:30 pm

PM Shift -- 2:00 pm - 10:30 pm OR 2:30 pm - 9:00 pm

NOC Shift. - 10:30 pm - 7:00 am

Positions include every other weekend and holiday along with guaranteed hours except for in-house pool employees.

1. This job description is not intended to be all inclusive. The employee will also perform other reasonably related business duties as assigned by the Director.
2. Management reserves the right to change job responsibilities, duties, and hours as needs prevail. This document is for management communications only and not intended to imply a written contract of employment.

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The Grievant, Stephanie Thomas, was originally hired by the County as a CNA on December 4, 1995. Between December, 1995, and March, 2001, Thomas was hired, voluntarily quit for various personal reasons and was then rehired by the County four times. Thomas was discharged by the County a fifth time on January 21, 2003, for “physical inability to perform essential job functions,” which led to the filing of the instant grievance. During her tenure at the County Health Care Center, Thomas had a disciplinary record, but this record did not influence the County’s decision to terminate her on January 21, 2003.

FACTS

On December 13, 2002, Thomas had volunteered to work an extra shift on her regular off day starting at 6:00 a.m. Thomas made clear to the scheduler that she would only work on her normal unit, Willow Court, for this extra shift. When Thomas arrived at the Center prior to 6:00 a.m., she was informed by the Charge Nurse that she was assigned to work on the Mullberry unit that day, the unit split between dementia residents and those needing heavy

physical care. As Thomas believed her back could not take the heavy work necessary on the Mullberry unit, she left the Center without notifying the Charge Nurse thereof and without punching in. Later on that day, Thomas called the Center and indicated that she had left before punching in that day.

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Director of Nursing Janelle Zacho called Thomas on December 13, 2002, and stated that the County had suspended her without pay pending an investigation for Thomas' having left work on December 13, which the County considered an act of abandonment. In the message, Zacho also asked for a meeting with Thomas at the Center on December 16. 3/

3/ The description of the facts regarding what occurred on and after December 13 are in large part taken from Union Exhibit 2 (Thomas' notes regarding the events surrounding her termination) as well as from the Arbitrator's notes from the testimony at hearing.

On December 16, Thomas met with County representatives as well as her Union Steward, Peggy Morse. At this meeting, Thomas explained her actions of December 13. The County gave Thomas another copy of her job description and requested that Thomas take the job description to her doctor and that the doctor prepare a medical opinion as to whether Thomas was able to perform the duties of her position. 4/ The County confirmed its request for a medical opinion in a letter dated December 23, 2002, which indicated that Thomas should acquire such an opinion and give it to the Center by January 10, 2003.

4/ Under State law, the Center was required to investigate the circumstances of Thomas' abandonment of her position to determine whether Thomas had intended to harm any residents thereby. If the Center had found Thomas guilty of abandonment with intent, the County would have had to file a report thereon with the State of Wisconsin per State law.

On or about January 6, 2003, while Thomas was suspended without pay pending investigation of her leaving work on December 13th and whether she had the physical ability to perform CNA duties, questions arose regarding which doctor Thomas should see to get the medical opinion previously requested by the County (County Exh. 4). On January 6, Thomas' regular doctor, Dr. Pineda, stated that she did not feel comfortable giving Thomas the medical opinion requested by the County and that she wanted to refer Thomas to a physical therapist for this purpose. Thomas called Union Steward Morse to ask what she should do. 5/ Morse spoke to Director of Nursing Zacho who told Morse that going to a physical therapist for the medical opinion would not be sufficient as a physical therapist is not a doctor and cannot diagnose; that Thomas should seek a doctor's opinion, specifically, Zacho stated, an orthopedist or neurologist. Morse then conveyed this information to Thomas (Union Exh. 2 and County Exh. 4).

5/ Thomas' notes (Union Exhibit 2) do not show that she made any request that she be allowed to see her chiropractor, Dr. Felicijan, at this time or at any other time. The only time Thomas requested to

see her chiropractor, according to her notes, was in a December 30th conversation with an Unemployment Compensation representative (Union Exh. 2). No County representatives were present during that conversation.

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Thomas made an appointment to see Dr. Plooster, an orthopedic specialist on January 7, 2003. Thomas was examined by Dr. Plooster on that date at which time she gave Dr. Plooster her job description. Dr. Plooster examined Thomas for only a few minutes after which he diagnosed Thomas with “degenerative lumbar disc disease L4-5 herniated L4” and indicated that Thomas’ work level should be light/medium, 20-35 pounds lifting and carrying maximum, for a maximum of eight hours per shift and 40 hours per week and that only occasionally (11-33% of her work time) could Thomas bend, squat, climb, crawl and twist. Dr. Plooster also stated in his return-to-work form that Thomas could return to work on January 7, 2003, “subject to these permanent restrictions.” 6/

6/ Thomas’ notes (Union Exhibit 2) make no mention of the length of her appointment with Dr. Plooster, what tests or examinations Dr. Plooster performed during the appointment or what Dr. Plooster said or did regarding the CNA job description on January 7, 2003. Nor do Thomas’ notes make any reference to statements or actions regarding Dr. Felicijan’s prior report. Significantly, Thomas’ notes show that Zacho twice asked Thomas to provide a statement of her work capabilities from her primary physician, Dr. Pineda. When Dr. Pineda declined to do so, Thomas selected Dr. Plooster to perform the assessment.

After her appointment with Dr. Plooster on January 7, 2003, Thomas met with County representatives and offered them Dr. Plooster’s return to work form. At this time, because Dr. Plooster had found that Thomas could no longer perform some of the CNA duties listed on the CNA job description, County representatives indicated that they were willing to offer Thomas two options: to resign or to take a leave of absence for one year. County Representatives explained that perhaps during a one-year leave of absence, Thomas’ back would improve sufficiently so that she could again perform all CNA duties. On January 13, 2003, in a letter to the County, Thomas declined to take either of these options.

By letter dated January 21, 2003, the County terminated Thomas’ employment “because you are unable to perform the essential job duties of a Certified Nursing Assistant as outlined in the job description.” At no time on or after January 7, 2003, did Thomas ask whether she could seek a second opinion or to see another doctor; nor did Thomas ask whether she could seek an opinion from her chiropractor. Thomas did not question Dr. Plooster’s conclusions, either with him on January 7th or with the County thereafter. Thomas never filed a discrimination complaint under Section 7.03 or 7.27 of the County’s Personnel Policies and Procedures Manual. 7/ The Union filed the instant grievance on behalf of Thomas, which proceeded to arbitration in this case. 8/

7/ *The evidence showed that Thomas received a copy of this Manual on March 18, 2002.*

8/ *On January 3, 2003, the Union also filed a grievance regarding Thomas' being placed on non-paid suspension pending the investigation of her actions on December 13th and/or her physical capabilities to*

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work as a CNA. This grievance was settled on January 22, 2003, by the County's letter of that date which stated that Thomas would receive payment for all work days she was suspended pending the County's investigation of the abandonment charge against Thomas.

POSITIONS OF THE PARTIES

The Arbitrator received the County's brief in this case on November 28 ,2003; the Union did not file a brief in this case. Therefore, the Union's position has been gleaned from its opening statement at the hearing and positions it took at the hearing and the evidence it proffered.

The County's Brief

The County argued that it did not violate the collective bargaining agreement when it terminated the Grievant on January 21, 2004, because her permanent work restrictions rendered her unable to perform the essential functions of her CNA job. The County asserted that just cause does not apply to Thomas' discharge because her discharge was not disciplinary in nature. Therefore, a different standard should be applied in this case — whether the County's decision to terminate Thomas was unreasonable, arbitrary or capricious.

The County urged that Articles 2 and 5 of the contract support its argument on this point. In this regard, the County noted that Section 2.01 D states that the County must have just cause to "discharge and take other disciplinary action" against employees. Thus, the County argued that only disciplinary discharges are subject to the contractual just cause standard. In addition, the County noted that Article 2 states that it may relieve employees from their duties "because of lack of work or any other legitimate reasons" and that Article 5 states that the County may determine that "a given employee meets the necessary qualifications" of a position. These provisions make clear that the County was within its contractual management rights when it discharged Thomas.

The County observed that it fully considered the medical opinion offered by Thomas, which in the County's opinion, rendered her unable to work anywhere in the Center based upon the demands of the CNA position, the risks to other employees and to patients/residents and the fact that the Center does not have and has never offered light duty to injured employees. The County urged that its decision to terminate Thomas after she rejected the options of taking a leave of absence or resigning was, in the County's view, completely reasonable and it should be upheld by the Arbitrator.

Even if a just cause standard were applied to this case, the County argued that its actions toward Thomas would pass muster. In this regard, the County pointed out that not all of Arbitrator Daugherty “Seven Tests” for just cause sometimes applied in discharge cases fit

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the situation in this case. However, the County noted that Thomas had received the CNA job description and she was or should have been aware of its contents; that the physical requirements of the CNA job reasonably relate to the performance of specific, necessary functions and tasks of CNA’s; that the County’s investigation of Thomas’ December 16th decision to leave her post on Mullberry unit was reasonable, objective and required by state law; that no disparate treatment of Thomas was proven in this case; that Dr. Plooster’s opinion, and the testimony of management witnesses showed that Thomas could not perform the essential functions of a CNA and that to continue to employ Thomas as a CNA would have subjected other employees and residents to potentially serious safety hazards. In all of these circumstances, the County urged that the grievance be denied and dismissed.

DISCUSSION

Grievant Stephanie Thomas worked at the County HCC off and on since 1995. Thomas was discharged on January 21, 2003, for “physical inability to perform essential (CNA) job functions.” The Union argued herein that because this case involves a discharge, the County’s actions should be judged according to a just cause standard. I disagree.

Article 2, Section 2.01 D, makes clear by the use of the phrase “or . . . other disciplinary actions” that the parties intended to apply just cause to actions if taken to discipline employees. In addition, although the general intent of Article 5, Section 5.07, is to allow the County to assess the qualifications of employees in the context of a job opening, the language of this provision is extremely broad and it could reasonably be applied in the instant case. Article 2, Section 2.01 E, also allows the County to relieve employees of their duties for “any other legitimate reasons.” When these contractual provisions are applied to the unique circumstances of this case, it is clear that the use of the just cause standard in this case would be inappropriate. 9/

9/ My ruling on this point is specifically limited to the facts before me and based on the County’s actions before, during and after its investigation of the original abandonment charge against Thomas and the fact that at no time did the County consider Thomas’ prior disciplinary record in deciding to terminate her employment on January 21, 2003.

Thus, Thomas’ discharge was not disciplinary. Rather, it resulted from the fact that on December 16th, Thomas did not believe she was physically able to work her assigned shift on

the Mullberry unit due to her back condition. 10/ In these circumstances, it was reasonable for the County to request that Thomas' back condition be evaluated by a professional who could diagnose and assess her condition in order to determine whether she was capable of performing the functions of her CNA job at the Center. 11/

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10/ The Union argued herein that Thomas' back condition had not caused her to miss work after her return to work in November, 2002. This argument does not detract from or lessen the impact of Thomas' refusal to work on December 16th and the County's reasonable response thereto — to insist that Thomas' back condition be assessed by a medical specialist in such problems.

11/ The Union has not argued herein that the CNA job description was inaccurate or unfairly applied to Thomas.

The Union presented testimonial evidence from Thomas and Union Steward Morse in an attempt to prove that Director of Nursing Zacho refused to allow Thomas to go to her chiropractor, Dr. Felicijan, for the medical assessment of her back condition. Specifically, both Morse and Thomas asserted that Zacho had stated that a chiropractor's opinion would not be sufficient to prove Thomas' physical capabilities. As Thomas' notes (Union Exh. 2) make no mention of this and as Zacho flatly denied ever making any such statement to Morse or anyone, I credit Zacho on this point and find that no one requested that Thomas be allowed to see a chiropractor or Dr. Felicijan during early January, 2003. I also note that Thomas was not present during Zacho and Morse's conversation on this point. But even if Zacho had insisted that Thomas see a medical doctor to evaluate her back condition, such a requirement would not have been unreasonable in the circumstances of this case.

Thomas sought the opinion of an orthopedic specialist, Doctor Plooster, who examined Thomas on January 7, 2003, and diagnosed her with "degenerative lumbar disc disease L4-5 herniated L4." Dr. Plooster placed "permanent restrictions" on Thomas' work. Specifically, Dr. Plooster stated in his evaluation that Thomas lift or carry no more than 20 to 35 pounds; that she work a maximum eight hours per day and 40 hours per week; and that she bend, squat, climb, crawl and twist for only 11 to 33 percent of her work time. An analysis of the County's CNA job description, quoted at length above, shows that Thomas could not fully perform a significant number of the functions of a County CNA with the permanent restrictions placed on her by Dr. Plooster. It is significant that the Union did not contest the County's evidence on this point — Director of Nursing Zacho's testimony that there were 52 work areas on the CNA job description, involving 80-90% of Thomas' work time, which Thomas could not perform given Dr. Plooster's restrictions (County Exh. 7 and Tr. 56-63).

However, the Union argued that Dr. Plooster spent practically no time with Thomas at the January 7th examination, that he asked her no questions and performed few tests on her,

and that Thomas did not see Dr. Plooster refer to the copy of the CNA job description prior to his completion of the examination. In my view, this evidence, on its face, is insufficient to call Dr. Plooster's assessment of Thomas into question in this case. In addition, Thomas could have sought a second opinion at any time. Thomas apparently never sought a second opinion from a physician and she never questioned Dr. Plooster's conclusions at any time relevant

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hereto. The Union also argued that Thomas should have been allowed to go back to her chiropractor, Dr. Felicijan, for diagnosis and/or treatment. However, the record in this case fails to show that Thomas ever requested this of the County (Union Exh. 2).

The Union has argued that the County treated Thomas unfairly in January, 2003, because the County had allowed Thomas to return to work on November 1, 2002, after Dr. Felicijan released her to work "without restrictions" (County Exh. 8) following a non-work injury to her back. The Union noted that Dr. Felicijan's November 4, 2002, return-to-work form, limited Thomas to work only on the Willow Court neighborhood (Union Exh. 1). However, no evidence was proffered by the Union to show that there was in fact, an understanding between Thomas and the Center that she would be assigned to work only on Willow Court.

In addition, no explanation was offered why Dr. Felicijan would release Thomas "without restrictions," yet limit her assignment to Willow Court. As Dr. Felicijan was not called as a witness herein, we have no idea why he stated the Willow Court restriction. Clearly, the County was under no obligation to continue to assign Thomas to Willow Court based on the labor agreement or Dr. Felicijan's release without restrictions. It is also significant that Thomas stated herein she did not give the CNA job description to Dr. Felicijan until December 30, 2002, when Thomas went to him for an assessment requested by the State U.C. offices (Union Exh. 2). Therefore, it appears that Dr. Felicijan did not consider the CNA job description when he wrote Thomas' release to work in November, 2002. In these circumstances and given the fact that there was no evidence that other employees similarly situated were treated better than Thomas, the Union failed to prove that Thomas was treated unfairly by the County.

In any event, in January, 2003, Thomas went to Dr. Plooster to satisfy the County's request that a specific assessment of her back condition be performed to determine whether she could perform her CNA functions. Based upon Dr. Plooster's detailed, permanent restrictions on Thomas' work in January, 2003, the County then came to the conclusion, given the permanent restrictions on Thomas' work, that continued employment of Thomas as a CNA would constitute a hazard to the health and safety of her fellow employees and to the residents of the Center.

Based upon the evidence the County had before it in January, 2003, such a conclusion was neither unreasonable, arbitrary or capricious. Therefore, and in light of the fact that the County has one CNA job description it applies to all CNA's, no matter what neighborhood or area they are assigned to work, that the County has never distinguished the difficulty of work

done among its neighborhoods in the past and that the County has never offered light duty to Center employees, I issue the following

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AWARD

Columbia County did not violate the collective bargaining agreement when it terminated the Grievant's employment on January 21, 2003, for the reasons given by the County. The grievance is, therefore, denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 25th day of March, 2004.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

SAG/anl
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