

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES,
A.F.S.C.M.E., AFL-CIO**

and

ST. CROIX COUNTY, WISCONSIN

Case 199
No. 63341
MA-12553

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of Wisconsin Council of County and Municipal Employees, A.F.S.C.M.E., AFL-CIO, which is referred to below as the Union.

Mr. Stephen L. Weld, Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of St. Croix County, Wisconsin, which is referred to below as the County.

ARBITRATION AWARD

The Union and the County jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Anita Hicks. The Commission appointed Richard B. McLaughlin. Hearing on the matter was conducted on July 9, 2004, in New Richmond, Wisconsin. No transcript was made of the hearing, and the parties submitted briefs by September 10, 2004.

ISSUES

The parties stipulated the following issues for decision:

Did the County have just cause to suspend the Grievant for one day without pay?

If not, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 4 – DISCIPLINARY PROCEDURE

Section 4.01 Disciplinary Action. . . . Disciplinary action may only be imposed on an employee for failing to fulfill his/her responsibilities as an employee. . . .

If the County has sufficient reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public.

Section 4.02. Just Cause Notification. Employees shall not be disciplined or discharged without just cause. . . .

Section 4.03 Procedure. The normal procedure for discipline shall include only the following:

- a. Oral Reprimand
- b. Written Reprimand
- c. Suspension
- d. Discharge

The number of written warnings and the length of suspension shall be determined by the County in accordance with the gravity of the violations, misconduct, or dereliction involved, taking into consideration that such steps are intended as corrective measures.

Section 4.04 Personnel Records. Personnel records including remarks, warnings, and disciplinary measures taken shall be dated. . . . Upon employee's request, notice of disciplinary action shall be removed from the employee's record after a four (4) year period, assuming no further infraction. Expunged records of discipline shall not be used as a basis for progressive discipline and shall not be used as evidence in grievance arbitration proceedings.

BACKGROUND

The grievance challenges a one-day suspension issued to the Grievant on a “Record Of Corrective Warning” form dated November 3, 2003 (references to dates are to 2003, unless otherwise noted). The form states the relevant facts thus:

Unprovoked insolence/disrespect toward public-residents family member (K. Greaton) – Making inappropriate comments to her. Anita confronted K. Greaton, in hallway on 11/3/03, accused her of “tattling on her” in front of resident & other visitors in relationship to situation from the week before. Karen was very upset by this confrontation. . . .

Kristi Tellijohn, the Center’s Director of Nursing, issued the notice of suspension to Hicks.

The suspension is based on an incident reported to Tellijohn by Nancy Schultz, a Registered Nurse, who supervises a number of Certified Nursing Aides (CNA), including Hicks. Schultz provided Tellijohn a “Corrective Observation Record” (COR), dated November 6, which states:

Karen told me she was very upset because she had confided (with) Lisa Leahy that she did not like the tone of voice & attitude Anita had displayed towards her mother. She also said Margaret K said she did not like Anita’s attitude.

Karen said she was in the hallway talking with Norm Swanda & his son Mel & Anita barged right in . . . accusing Karen of tattling on her. Karen was very upset & embarrassed that she would be approached & treated in this fashion (with) other visitors present.

A COR is a written form typically used to document supervisory concerns related to an individual employee. The forms may or may not provoke discipline under the Center’s progressive discipline system. Greaton’s mother and N. Swanda’s wife were both Center residents in November. The conversation Schultz noted in the second paragraph of the November 6 COR took place at the base of a ramp in a hallway that leads from a Nurses’ Station to the dining room and to an exit from the Center.

The first paragraph of the November 6 COR refers to a phone conversation Greaton had with Lisa Leahy, the Center’s Director of Social Services. Greaton phoned Leahy at home late one evening, perhaps 9:00 p.m., very upset about Hicks’ conduct toward her mother. Leahy understood the concern to relate to a conversation between Greaton’s mother and Hicks from perhaps one week earlier. Greaton was concerned about Hicks’ tone of voice while addressing her mother. Greaton did not want Leahy to contact Hicks. Leahy informed Greaton that she

served as an advocate for resident rights, and that she would have to address the matter with Hicks.

Leahy did discuss the matter with Hicks, who asked her if she should apologize to Greaton. Leahy informed her that “it’s totally up to her.” Hicks did approach Greaton to discuss the matter. That discussion is the subject of the second paragraph of the November 6 COR.

The balance of the background is best set forth as an overview of witness testimony.

Kristie Tellijohn

Schultz informed Tellijohn, when she supplied her the November 6 COR, that Greaton was very upset. Tellijohn viewed Greaton as a prominent businesswoman in the community and a credible source of information. She reviewed Hicks’ work record and decided that discipline was necessary. She opted for a one-day suspension over a three day suspension because the matter posed no issue of resident safety. In her view, the location of the conversation was a problem because an issue of resident care is a private matter that should not occur in a public area, such as a heavily used hallway.

She issued the discipline to Hicks during a meeting on November 12. Hicks appeared with a Union Steward, Deanna Person. She could not recall if she gave Hicks the notice of suspension prior to discussing it at the meeting, but acknowledged she did not speak to Hicks before calling the meeting. She did not discuss the matter with Greaton, and may have discussed it with Leahy prior to the meeting. She did discuss the matter with N. Swanda after the November 12 meeting. Her notes of that contact read thus:

He states Karen Greaton did contact him due to being upset with Anita. He states he doesn’t recall the specific conversation in hallway (due to his age). He states that he did discuss (with) Karen that he was sure Anita did not mean to upset her, but at times may say things without thinking first. He reinforced that Anita was very kind & good (with) residents and she (Karen) should not become overly upset. That it wasn’t that big of a deal, and he attempted to calm her down. He also stated his son Mel was not available for contact – had returned to Florida.

She stated that she did not feel much investigation was necessary or that Greaton should file her complaint in writing. She did not attempt to contact M. Swanda. She acknowledged she credited the November 6 COR because she viewed Schultz as “very believable” and Greaton as a respected person. Given Hick’s work record, Tellijohn felt she had all the information she needed to act, particularly since the airing of a resident concern in a public area was itself a problem. N. Swanda, his son and wife were in the area when Hicks approached Greaton. In her

view, Hicks confirmed this during the November 12 meeting, except that Hicks stated that N. Swanda was at the Nurses' Station, and his son was at the top of the hallway, walking toward them.

Tellijohn stated that Hicks' disciplinary record included a series of incidents Tellijohn viewed as relevant to Greaton's complaint. Her record included a COR, dated February 21, 1996, alleging "Anita walked past (a resident wheeling herself to supper) wiggled her rear end, kicked up a leg & smirked . . . as if to say 'I don't have to help you.'" The COR notes that Anita acknowledged the wiggle, but said she was just joking with the resident to "shake your bootie". Hicks received an oral warning on April 26, 1996 for failing to put the necessary restraints on a resident she was monitoring. Hicks received a written warning, dated May 15, 1997, for "provoking a disturbance among fellow employees - affecting morale" by falsely claiming that Schultz had called Hicks at home to harass her about leaving work early. Hicks declined to sign the warning form. Hicks received a COR, dated October 21, 1997, for calling a male CNA a "lady". She declined to sign the COR form, which notes she "does not agree with it." She received a COR and a notice of a one day suspension, both dated June 22, 1998, for stating in the presence of two other persons that a resident liked to "spread her legs". The form notes that Hicks said she made the statement in jest, referring to the action of a Hoyer lift rather than to the resident. She signed the discipline notice. On March 17, 1999, Hicks received a notice of a two day suspension for stating to a newly hired CNA that she was being closely observed and that CNAs were conspiring with her supervisors to get her fired. On December 13, 2001, the Grievant received a notice of a one-day suspension for failing to report a resident sliding onto the floor and for transporting the resident by a method other than that indicated on the resident's plan of care. She signed the form. Hicks received a COR, dated March 20, for neglecting to place a call light within a resident's reach. The form indicates Hicks got upset when counseled, and stated that another CNA was at fault.

Lisa Leahy

Greaton's phone call to Leahy at home to complain of Hicks' conduct toward her mother concerned an incident that occurred perhaps a week prior to the call. Hicks' tone of voice concerned Greaton, and she stated she did not want Leahy to speak to Hicks. Leahy spoke to Hicks and to Schultz, and no discipline followed.

Leahy noted that Greaton was very upset when she complained about Hicks' conversation with her on November 3. Leahy could not recall the conversation in detail, but remembered that Greaton was upset because the conversation occurred where others could hear. The conversation took place in Leahy's office sometime after Hicks had approached Greaton to apologize. Greaton was more upset during this conversation than the first, and was upset at Hicks for speaking with her in a public area and at Leahy for speaking with Hicks. Greaton acknowledged that Hicks attempted to apologize. Leahy spoke with Schultz and with Tellijohn after this conversation.

Leahy also spoke to Hicks, who could not understand why Greateon was upset, but did acknowledge she should have chosen a more private area to speak with her. Leahy later phoned Greateon, who stated the matter should be dropped, and had been blown out of all proportion.

Nancy Schultz

Schultz has worked for the Center since 1995, and currently supervises the first floor, which houses elderly Medicare residents. She is Hicks' direct supervisor, and Tellijohn is her direct supervisor.

Greateon approached her on November 6, very upset that Hicks had approached her. Hicks approached her to complain of "tattling", and did so while she was conversing with the Swanda family. Greateon used the word "tattling", which Schultz included on her COR. She did not specifically date the conversation, or place it other than it was somewhere near the Nurses' Station. Greateon stated that she did not want the matter to go further, fearing Hicks might slash her tires or make a fuss in her store. Schultz discussed the matter with Leahy prior to writing the November 6 COR.

Lucinda Nichols

Nichols is the Union's President, and has worked as a CNA at the Center since 1993. On November 13 or 14, Nichols informed Tellijohn that M. Swanda was aware of the conversation and was willing to discuss it, including repeating the statements he had heard. Tellijohn declined to pursue the matter, and informed Nichols the discipline would stand.

Deanna Person

Person was employed at the Center for ten and one-half years prior to her termination for lack of light duty work. She has an active Worker's Compensation claim involving her tenure at the Center. She was the Union's Secretary at the time of her termination. She accompanied Hicks to the November 12 meeting, which started with Tellijohn issuing Hicks the notice of suspension. Tellijohn identified Greateon as a "highly respected" member of the community, and stated several times that Hicks must recognize that the customer is always right. Hicks denied that the conversation took place as alleged by Greateon. Person asserted that Hicks was not a rude person, and Tellijohn disagreed, pointing to her work record, asserting "this is the way you are" to Hicks.

Anita Hicks

Hicks has worked as a CNA for the Center since February of 1995, and has served in Rehabilitation Therapy since November.

Leahy approached her to discuss Greateon's complaint. Leahy saw her in a hallway, and took her into a lounge area, informing her that Greateon had found her "rude, loud and obnoxious" to her mother. Hicks denied it, and could think of nothing that should have provoked Greateon. She speculated that Greateon had misinterpreted her attempts to encourage Greateon's mother during therapy. Hicks stated that she is "normally loud" in her speech because her mother had bad hearing. Hicks understood Leahy's advice to be that Hicks should apologize to Greateon.

Hicks approached Greateon on November 3, while Greateon was leaving the Center. They spoke at the base of the ramp between the Nurses' Station and the dining area. Hicks attempted to apologize, and denied using the term "tattling". As she spoke to Greateon, M. Swanda was at the top of the ramp walking toward them. There was no one else in the hallway.

The next notice Hicks had of the matter was her summons to the November 12 meeting. Prior to the meeting, Hicks did speak with Leahy about Greateon's concerns. After this conversation, Hicks and Person went to Tellijohn's office. Tellijohn started the meeting by handing the notice of discipline to Hicks. Hicks denied speaking as Greateon alleged, but did not think Tellijohn would believe her. Tellijohn spoke of Greateon's standing in the community, and told Hicks that she is prone to speak without thinking, and that sometimes people say things they may not mean or remember. Hicks asked Tellijohn to speak with the Swandas, and thought that Tellijohn would.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The County's Brief

After a review of the evidence, the County contends that because it "values . . . residents and their families" and because it must compete against "other public and private sector nursing homes", customer satisfaction is a compelling interest. That it has "seriously considered, on several occasions" shutting down the facility highlights that "the actions and attitudes of employees can have a direct impact on resident count." That Hicks "acted in a way that upset and embarrassed a customer" provoked the suspension.

Arbitrators have variously stated the standards establishing just cause, but none of those standards, including the "Daugherty" standards, warrant overturning the suspension, even though the Director of Nursing did not interview the Grievant before imposing the discipline. Hicks' duty to be respectful to a resident "is a matter of simple common sense." That the County is contractually precluded from issuing discipline in a matter that embarrasses an employee highlights how significant Hicks' duty was. To enforce this, the County has

an established interest “in sending the message that employees engaging their mouths before the brain” will not be tolerated. Hicks’ disciplinary record underscores the need to send this signal in this case.

That the family member did not testify affords no basis to overturn the discipline. The family member sought “to avoid potential conflicts with her own business’ customers.” She had, in any event, nothing to gain by reporting her concerns. Against this, the Union can offer no more than Hicks’ “self-serving denials.” Arbitral precedent cautions against giving such denials significant weight. It also cautions against overturning discipline unless the evidence establishes an abuse of discretion. The County concludes by requesting “that the Arbitrator dismiss the grievance in its entirety.”

The Union’s Arguments

The Union notes, in its review of the facts, that there “are a couple of oddities” about Greateon’s complaint. The first is that the call was late at night and to Leahy’s home. The second is that Leahy “did not file a Corrective Action Report . . . or even report the matter up the administrative chain.” The oddities are significant because Greateon chose not to testify, thus making an assessment of her credibility in making the complaint impossible. The complaint became, several days “after the incident at issue occurred” a document signed not by an eye-witness but by a supervisor, and thus the case rests on “Schultz’s unverified version of what she was allegedly told by Greateon.”

If the facts thus alleged could be proven, then a disciplinary event would have occurred. However, the issue posed is whether they happened. No witness testimony supports the County’s accusatory document. The Union’s case rests on Hicks, “who testified truthfully under oath, without guile.”

A review of the testimony establishes that the County testimony will not support the allegation that the Grievant acted aggressively. Rather, it establishes a County concern that what should have been a private conversation occurred in a public area. More significantly, it establishes that the County’s failure to investigate led its managers to give Hicks “the suspension before a single question was asked.” She was simply presumed to be guilty.

The Union contends “it would arguably be enlightening to crawl this case” through the seven “Daugherty” standards. However, the Union contends “such a recitation would be pointless” since the “violations of the basic standards for proving just cause in this case are so egregious and obvious”. The record demonstrates, if anything, that even Greateon thought the matter had become blown out of proportion. Leahy, by following the appropriate procedures, brought a complaint into the open that Greateon had hoped to keep confidential. The result was

bad will that Hicks is being forced to pay for: “. . . why bother with investigation when you have already decided that the accuser is a more important person than the accused and public relations is more important than trying to get at the truth.”

The Union concludes that the “grievance should be upheld . . . and the grievant’s files cleared of all references to this matter and the employee made whole for all losses.”

DISCUSSION

The stipulated issue concerns whether the County had just cause to suspend Hicks for one day. In my view, unless the parties stipulate otherwise, two elements define just cause. The first is that the County must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the County must establish that the discipline imposed reasonably reflects its disciplinary interest. The parties each mention the Daugherty standards, but this falls short of a stipulation to apply those standards to the grievance.

The conclusion not to apply the Daugherty standards impacts the parties’ arguments at hearing. The Union asserted that the absence of Greaton’s testimony and the absence of a proper investigation fatally flawed the discipline. Absent the stipulation of the bargaining parties, I am unwilling to accept the assertion that an employer cannot rely on hearsay to reach or to defend a decision to discipline. Nor, in the absence of a stipulation of the parties, am I willing to accept the assertion that an Employer is obligated to conduct a due process type investigation prior to deciding to discipline. Under the elements stated above, these are factors to be considered as argued by the parties, but are not controlling standing alone.

The parties’ post-hearing arguments make the first element the focus of the dispute. If the incident occurred as alleged, there is no argument that the suspension was appropriate. The dispute is whether the incident occurred as alleged.

The specific allegation has, however, proven somewhat fluid. The November 12 notice of suspension highlights a confrontation provoked by Hicks. Tellijohn’s testimony, however, highlights the location of the discussion as well as its confrontational nature. A December 11 e-mail from Tellijohn to Deb Kathan, the County’s Personnel Director, underscores this:

. . . I believe they are upset because I did not contact the Swanda family, prior to discussing the disciplinary action with Anita. I did not feel an investigation was warranted. We are talking about sensitive family relationships, public relations, and family members having confidence in the care we provide . . . I did speak to both Anita and Lacinda, in regards to the fact that the exact words that Anita spoke were not as important an issue, as the fact that she had discussed a very private matter in a public area. . . .

Thus, what constitutes the alleged incident is part of the parties' dispute.

The fluidity in the County's definition of what it sought to discipline is a troublesome preface to an examination of the first element. Defining the improper behavior is significant to the application of just cause. This is not an academic point, but one crucial to the application of the labor agreement. Section 4.03 demands that the decision to discipline consider "the gravity of the violations, misconduct, or dereliction involved, taking into consideration that such steps are intended as corrective measures."

More to the point, this fluidity in defining the allegation obscures what behavior the County expected the Grievant to modify. If she spoke the right words in the wrong place, then the discipline seeks to have her exercise more care in recognizing and locating private conversations. If she deliberately provoked a confrontation, all of her conduct from the determination of where to have the confrontation to the tone of her voice to the words she used demands modification.

The evidence does not support the assertion that Hicks insolently confronted Greateon. This is a significant allegation, since Hicks must be expected to be respectful toward more vulnerable individuals than Greateon. The insolence related in the November 6 COR is that Hicks barged in on a conversation between Greateon and the Swandas, accusing Greateon of "tattling". There is no reason to doubt Tellijohn's conclusion that Schultz is "very believable" or that Greateon is a respected member of the community. This cannot obscure that the issue is what Hicks actually said and how she said it. The absence of Greateon's testimony hurts this determination, as does the Center's decision not to take a statement from Greateon, for it is difficult to define what she alleges.

Even ignoring this difficulty, there is considerable reason to doubt the severity of the alleged misconduct. Greateon, in her conversations with Leahy and with Schultz, focused her concerns on what she viewed as a breach of her desire to remain anonymous. It is difficult to reconcile this behavior with the severity of the allegations of the November 12 disciplinary notice. That Leahy understood Greateon to believe that the matter had been blown out of proportion underscores this.

That Tellijohn did not seek corroborative evidence before disciplining Hicks complicates the County's assertion of a disciplinary interest. What improper behavior Hicks engaged in remained undefined, and the possibility that she did nothing wrong remained unconsidered. N. Swanda's recollection was limited, but afforded no reason to believe Hicks deliberately provoked a confrontation. More significantly, it afforded reason to doubt that the confrontation Greateon perceived was rooted in anything beyond Greateon's perception. That Greateon contacted him underscores that she felt upset, but also underscores that she was the only party involved in the incident who felt that way. It is, in any event, unclear what upset her. It may have been Hicks'

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behavior or it may have been her perception that she was being identified as a complainer.

Tellijohn's unwillingness to contact M. Swanda is insupportable. Nichols informed her that M. Swanda had the recall his father lacked and was willing to discuss the matter. Inexplicably, Tellijohn felt there was no reason to question him.

Thus, the assertion that Hicks engaged in "unprovoked insolence/disrespect toward the public" rests on no specific, first hand evidence. Nor is there persuasive corroborative evidence for it. It is not evident that the parties consider a COR a part of the progressive discipline system under Section 4.03. Beyond this, part of the Hicks' work record taken into evidence appears to be outside the scope of Section 4.04, which the parties do not argue here. Considering all of the work record submitted into evidence will corroborate the County's view only if the conduct at issue is vaguely defined. The June 22, 1998 written warning concerns the use of terms toward a resident that could be taken to have demeaning, sexual overtones. The October 21, 1997 COR and February 21, 1996 COR are arguably similar. The May 15, 1997 is not, but indicates that Hicks fabricated an incident. None of these incidents indicate behavior from Hicks to provoke a confrontation. Rather, the County sums them as indications that Hicks has a tendency to speak without thinking, is not a good employee and may be willing to lie to protect herself. In sum, the County asserts that whatever it was Hicks did to upset Greaton came from a credible source, while the denial did not. This conclusion affords scant reason to ignore that N. Swanda did not appear upset by the conversation, and no reason to ignore M. Swanda's willingness to discuss the matter. Nor does it make up for the lack of precision in what the County alleges. That Hicks testified she did not believe the Swandas overheard the conversation offers no assistance for the County. If this is taken as an indication that her account is not credible when weighed against the Swandas', what is to be made of her desire to have Tellijohn contact the Swandas?

Section 4.03 demands that discipline turn on "the gravity of the violations, misconduct, or dereliction involved, taking into consideration that such steps are intended as corrective measures." Although the County asserts Hicks acted on November 3 with "unprovoked insolence/disrespect toward public", the evidence will not support that she did anything other than approach Greaton in an attempt to apologize. There is no reliable basis to conclude that she was insolent in the attempt. There is, in sum, no reliable evidence of conduct from Hicks in which the County has the disciplinary interest asserted in the November 12 suspension form. Thus, there is no just cause for the suspension.

Nor will the evidence support the more subtle disciplinary interest Tellijohn advanced in her December 11 e-mail. As a general proposition, the allegation that Hicks should have chosen a more private place to apologize has persuasive force. That force is, however, overcome by the evidence in this case. The November 12 notice of discipline does not mention the subtle point. Rather, it links the suspension to what Hicks said and how she said it. This has significance in the analysis of just cause. The disciplinary signal sent to an employee who is deliberately insolent in dealing with the public is, presumably, either to avoid such contact, or to make such

contact only with oversight. The disciplinary signal asserted in the December 11 e-mail is that

Hicks should have spoken with Greateon in private. The two signals are incompatible. The failure to prove the need for the first dooms the second as a fall-back position.

Section 4.03 demands greater specificity in defining the improper behavior than the County attempted. The Center's unwillingness to investigate the complaint complicates this. Even without demanding her testimony, Greateon's complaint was neither specified nor scrutinized in any meaningful sense. Tellijohn effectively weighed what she viewed as Greateon's character against what she viewed as the Grievant's. This has no basis in Sections 4.01, 4.02, 4.03 or 4.04. That the customer is always right in a competitive environment affords no guidance. N. Swanda thought Greateon over-reacted. M. Swanda apparently agreed. Which customer is right? More to the point, Section 4.03 demands the isolation of specific improper behavior and a considered attempt to modify it through progressive discipline. That did not happen here. The ultimate issue posed by the grievance is whether Hicks engaged in "unprovoked insolence/disrespect", and the evidence does not support the County's assertion that she did.

The parties do not dispute the remedy, and the Award entered below states general make-whole relief.

AWARD

The County did not have just cause to suspend the Grievant for one day without pay.

As the remedy appropriate to the County's violation of Section 4.02, the County shall make Anita Hicks whole by expunging from her personnel file(s) any reference to the November 12 "Record Of Corrective Warning", and by paying her the difference between the wages and benefits she has already been paid by the County and those she would have received but for the suspension from work noted on the November 12 "Record Of Corrective Warning."

Dated at Madison, Wisconsin, this 12th day of October, 2004.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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