BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 115

and

COUNTY OF LAFAYETTE – MANOR NURSING HOME

Case 98
No. 67035
MA-13720

Appearances:

Daniel D. Barker, Murphy Desmond, S.C., P.O. Box 2038, Madison, WI 53701-2038, appearing on behalf of Lafayette County.

Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, WI 53511-3808, appearing on behalf of Local 115, AFSCME, AFL-CIO.

ARBITRATION AWARD

Lafayette County – Manor Nursing Home, hereinafter County or Employer, and Local 115, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or staff member to serve as the sole arbitrator of the instant dispute. Commissioner Susan J.M. Bauman was so appointed. A hearing was held on July 27, 2007 in Darlington, Wisconsin. The hearing was transcribed and the transcript was filed on September 6, 2007. The record was closed on October 23, 2007, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties stipulated that the issue to be decided is:

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

BACKGROUND

Grievant, TO, had been employed by Lafayette Manor Nursing Home as a CNA for about 15 years, assigned to the night shift, 10:30 p.m. to 7:00 a.m. Concurrently, she has been employed by Darlington Community Schools for approximately 12 years.

During the course of her employment, TO was counseled or disciplined on numerous occasions:

In April 1997, the Grievant was given a verbal warning because of the manner in which she interacted with other CNAs and told them what to do. The following November, she was given a verbal warning for the manner in which she complained of other employees and the tone of her voice.

In January 1999, TO was given a verbal warning for her failure to be aware of potential safety hazards for residents. That April, she received a written warning for an inappropriate interaction with a resident who complained about her behavior.

In March 2001, the Grievant received a written warning for calling a resident an unacceptable name, even though it was used in jest. The following January, TO was suspended for two days for allegedly yelling at a resident and using inappropriate language when talking to another employee in front of the same resident.

In March 2003, a resident complained that TO was very antagonistic to her. At the request of the resident, TO was directed not to provide cares to that resident in the future. In that same month, the Grievant made an inappropriate remark to a resident and was verbally warned about it.

In July 2004, the Grievant was suspended for two shifts for failing to properly report a medication situation to a nurse.

On June 9, 2006, the Grievant was issued disciplinary guidelines due to many issues concerning her performance. These guidelines included doing all routine bed checks with another staff member; not answering call lights without another CNA for eight specifically named residents who had reported or requested that she not perform bed checks for them alone; not being scheduled to work in the Sunset West unit; not retrieving information from medical administration forms or residents' charts; not doing charting for residents not on her list; not being in the second floor report room unless getting reports for the night. Additionally, she was directed to report all resident incidents to the supervising nurse in a timely manner; to use proper names when speaking to residents; to adhere to the Residents Rights and Abuse Policy; and to stay on her assigned floor unless called upon to assist somewhere else. These guidelines were issued by Mary Sue Mack, Acting Director of Nursing, and Sherry Kudronowicz, Administrator of Lafayette Manor, based upon specific incidents that occurred between May 25, 2006 and June 2, 2006.

Despite this, in July 2006, TO was suspended for three days for her failure to utilize a second CNA when transferring a resident. The actions were considered to be a safety issue for both the resident and the Grievant. TO's actions were also considered to be insubordinate in that she was specifically directed to obtain the assistance of another CNA in such situations.

On January 10, 2007, the Grievant was again suspended for three (3) days for being insubordinate to her charge nurse and being rude and abrupt with co-workers. There was also a complaint about TO being inappropriate and rude to a resident more than once, including TO telling the resident that she (TO) had gotten into trouble because of the resident. In addition to the suspension, the Grievant was verbally advised that additional complaints about her would result in her termination.

The Employer never received any grievances from TO or the Union regarding any of these disciplinary actions or the issuance of the disciplinary guidelines.

FACTS

On or about March 15, 2007, Lafayette Manor Administrator Kudronowicz, Director of Nursing (DON) Tricia Beck and, perhaps, Assistant DON Arlene Meyer, received telephone calls from Matt Roloff, the regional ombudsman, in which he indicated that he had received a phone call concerning TO and her treatment of residents. Roloff, who maintained the confidentiality of his informant, stated that the caller was concerned about the potential for verbal or physical abuse of residents by TO, but he did not describe a particular incident or name a particular resident as having been affected by TO's actions. As a direct result of this contact, Kudronowicz met with Beck and the social worker and formulated a plan to investigate the allegation. At the same time, the Grievant was suspended.

The three managers determined that a random survey of residents should be performed by the social worker, asking residents if they felt safe, and if they had been talked to in a rude, demeaning or threatening manner. The social worker interviewed residents with whom TO regularly worked as well as residents with whom she had little or no contact. The social worker did not mention TO by name. The random survey determined that the approximately eight residents interviewed felt safe and did not have issues or concerns.

During the same time period, a CNA who had been caring for resident MC[1] came to DON Beck and told her that she should interview Millie, and specifically ask her about the night that she fell. MC is an elderly and rather frail resident of Lafayette Manor Nursing Home. Beck sat at a picnic table with Millie and asked about the night that MC fell and the "diploma" Millie had received.

[1] To protect her privacy, the affected resident will be referred to as either MC or Millie.

Millie told Beck that the night she fell, two people came into her room to assist her, Mark [Severson] and a female CNA. At some point, the female CNA who was TO, although MC could not identify TO at the hearing, discussed the "diploma" Millie had received for completing physical therapy and having become ambulatory, no longer having need for a bed alarm. Millie said that TO told her the diploma wasn't any good anymore, that she could tear it up. According to Millie, this comment made her feel bad, hurt, and made her want to cry.

After this conversation with MC, Beck spoke with Severson who confirmed that he had heard something about a diploma on the night that MC fell. Based upon this, Beck and Kudronowicz met with the Grievant to hear her side of the story. Although TO denied making such a statement, based on a review of TO's personnel file, past history and work performance, the two managers determined that Millie was more credible than TO. They decided to terminate TO.

At hearing, MC's recollection of the incident was very clear and consistent with the report Beck had initially received from her. Millie is declining in health and she was not able to identify TO. However, the record is clear that the female CNA involved in this issue is the Grievant.

Also at hearing, Mark Severson, who is no longer employed by the County, testified that he heard MC comment that she had graduated from physical therapy that day. That is, he heard a conversation about a diploma, initiated by Millie, but he did not hear TO say anything about the diploma.

Both Severson and TO testified that they responded to a call for help around 1:30 a.m. and found MC on the floor, half undressed and confused as to time of day, insisting that she had to get dressed as her son was coming to take her to a medical appointment. TO was alone in the room with Millie while Severson went to get Annie Swensen, the nurse on duty who had to evaluate MC's condition before she could be put back into her bed. TO testified adamantly that she did not tell MC that her diploma would be no good or words to that effect, including that she could tear it up. In fact, TO did not recall ever seeing the diploma. The Grievant agreed that making such a remark to Millie would have been degrading.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE 7 – EMPLOYEE DISCIPLINE

Section 1. Just Cause. Non-probationary employees shall not be disciplined, suspended, disciplinarily demoted or discharged without just cause. Written notice of the suspension, discipline, disciplinary demotion or discharge, and the reason or reasons for the action, shall be given to the employee, with a copy to the local Union within three (3) working days after such disciplinary action is taken.

ARTICLE 8 – GRIEVANCE AND ARBITRATION

Section 1. Definition. A grievance is defined as any matter involving the interpretation, application, or enforcement of the terms of this Agreement. An employee shall have the right to be accompanied by a steward, attorney or district representative of the Union at any or all steps of the grievance and arbitration procedure.

Section 2. Procedure. Grievances shall be processed in the following manner: (Time limits set forth shall be exclusive of Saturdays, Sundays and holidays.) Time shall be deemed to be of the essence, and failure to comply with the time period set forth herein shall render the grievance void, unless the time period is specifically waived in writing by all parties.

Step 1. An employee who has a grievance shall deliver the grievance, in writing form, to the Nursing Home Administrator (or designee) within twenty (20) days of the employee's knowledge of the occurrence of the event causing the grievance, which, in all events shall not be more than forty (40) days after the event. The Administrator, or designee, shall attempt to make a mutually satisfactory adjustment, and, in any event, shall be required to give a written answer to the employee and his or her representative within five (5) days.

Step 2. The grievance shall be considered settled in Step 1 unless, within ten (10) days after the Step 1 is due, the grievance is reduced to writing to the Chairperson of the County Grievance Committee. The Committee shall respond in writing to the employee and his or her representative, if any, within ten (10) days. The Committee may hold a hearing on the grievance. In the event the Committee holds a hearing on the grievance, the date for the hearing shall be set per mutual agreement between the parties. The Committee's decision shall then be due within ten (10) days of the last day of the hearing.

Step 3. In the event the grievance is not settled in Step 2, above, then either party may request the Wisconsin Employment Relations Commission to appoint a commission member or member of its staff to serve as the sole arbitrator. The party seeking arbitration of the matter must give notice of intent to arbitrate within 21 calendar days, and must file its request with the Wisconsin Employment Relations Commission within 60 days after the grievance is denied in Step 2, above, or within 60 calendar days after the date the County Grievance Committee's written answer was due, whichever is earlier.

Section 3. The arbitrator's award shall be final and binding upon the Employer, the Union, and the employee or employees involved. The arbitrator shall have no authority, however, to add to, detract from, alter, amend, or modify and [sic] provisions of this Agreement or impose on any party hereto a limitation or obligation not explicitly provided for in this Agreement.

POSITIONS OF THE PARTIES

The Employer contends that it had just cause to terminate TO. It analyzes its case using Daugherty's seven standards of just cause:

1. TO knew the Employer would not tolerate rude treatment of residents. Her disciplinary record establishes that she had fair warning that rude treatment of residents would not be tolerated. Indeed, in January 2007, she was put on notice that one more such incident would result in her termination.

2. The Employer had a reasonable and legitimate expectation that TO would treat residents with dignity and respect. In her testimony, TO denied making the comments in question, but acknowledged that making such comments regarding the diploma would be degrading to Millie.

3. TO violated the rule in question. The Employer contends that the weight of the evidence establishes that TO made the statement to MC, as alleged. This is supported by Millie's first hand testimony. Although MC made a number of differing reports as to the words TO used, all establish that the Grievant said something regarding the physical therapy diploma such that over four months after the incident, Millie reported the same conduct as she had during her initial interview with Beck.

   Additionally, Millie identified the offending employee as the woman that entered her room with Mark the night she fell. There is no question that woman was TO, not Annie the nurse who came into the room later, after Mark went to get her. The testimony of Mark and the Grievant also supports this order of events in that they testified that they entered the room together, and that Mark left to get Annie.

   Millie's testimony has intrinsic credibility, while that of TO does not. Her testimony is self-serving, as she has an obvious motive to testify untruthfully. This is consistent with the Grievant's disciplinary history in which she conspired to cover-up a resident's injury. Further, TO's history of treating residents rudely add further support to the conclusion that she did make the remarks in question.

4. The investigation conducted by the Employer was appropriate. While it is true that DON Beck could have asked more artful questions of Mark Severson, and could have done a more thorough job of asking questions, and management should not have equated Mark's statement as a confirmation of the allegation, the investigation was not flawed to the point that the discharge cannot stand. The errors made by management had no prejudicial effect on the Grievant, as they did not rely on hearsay and assumption alone. MC's first hand statement, made under circumstances when she was alert and oriented, was sufficient. Additionally, management gave TO an opportunity to tell her side of the story before they made any decision.

5. There is no question that Lafayette Manor takes improper treatment of residents seriously, and consistently applies its rule against such behaviors. There is no claim that TO has been singled out.

6. The penalty of discharge matches the offense in this manner, especially given the fact that TO has received an extensive list of warnings and suspensions for improper interpersonal conduct.[2]

The Employer asks that the discipline be upheld and the grievance be dismissed.

The Union argues that the only witness to the alleged incident is an elderly resident of Lafayette Manor Nursing Home. It points out that, at hearing, Millie was unable to recall how to spell her own name. She first testified that she was attacked and "ended up on the floor." She was unable to identify the Grievant, and she was unable to recall that there were two female employees in the room the night that she fell. MC was highly confused on the night in question, having gotten out of bed around 1:00 a.m. to get dressed for a nonexistent appointment.

The evidence at hearing is that Mark Severson and TO were down the hall from Millie when she fell and called for help. They found her on the floor, semi-nude, with a head injury. LPN Anne Swenson was summoned to conduct an evaluation, and she spent considerable time with MC during the remainder of the shift.

After being placed back into bed by all three employees, there is no evidence that TO was alone with the resident. LPN Swenson would have been the one to advise MC that she would again require a bed alarm.

[2] Inasmuch as the Employer combined tests 3 and 4, "Did the employee violate the rule" and "Is there proof that the employee is guilty", the undersigned has done the same, resulting in only six factors listed.

The Union contends that Beck was predisposed to a finding that TO was a potential for abuse to the residents when she began her investigation. This led to Beck's jumping to the conclusion that the Grievant had committed the offense. Beck's questioning of potential witnesses was cursory: she asked Severson if he remembered anything about a diploma being mentioned. When he said he did, Beck concluded that this confirmed the allegation when in fact Severson was relating the resident's comment regarding her having completed physical therapy that day. Further, Beck never questioned Swenson with regard to the incident even though Swenson spent a great deal of time with the resident that night and was the person who told MC that she wouldn't be able to get up on her own anymore.

The Union asks that the grievance be sustained, the Grievant's record purged of any record(s) of disciplinary action, and that she be made whole for all lost wages and benefits.

DISCUSSION

The collective bargaining agreement provides that "[n]on-probationary employees shall not be disciplined, suspended, disciplinarily demoted or discharged without just cause." The agreement does not define the phrase "just cause." Although the Employer has presented its argument using the seven Daugherty standards of just cause, the Union had not agreed to those standards and the collective bargaining agreement does not mandate their use. Absent an agreed-upon definition of "just cause" and absent an agreement as to the legal standard to be utilized in this matter, the undersigned adopts a two prong analysis. This standard requires the Employer to establish the existence of conduct by the grievant in which it has a disciplinary interest, and it must then establish that the discipline imposed for the conduct reasonably reflects its disciplinary interest.

It is really only the first prong of this analysis that is at issue herein, inasmuch as the Grievant was on notice that an additional complaint from residents regarding rudeness and inappropriate remarks would result in her termination. Furthermore, the Union does not argue that the discipline imposed is inappropriate but, rather, argues that the Employer did not establish that the Grievant had engaged in the behavior alleged.

The investigation that led to TO's termination was triggered by a telephone call from Matt Roloff, nursing home ombudsman. In his contact with management representatives, Roloff specifically named TO as the person alleged to have mistreated an unnamed resident. Although Roloff maintained the confidentiality of the person who contacted him, as well as the name of the resident involved, DON Beck testified without hesitation that Roloff stated that TO was the CNA of concern.

In response to the call, the Employer developed a means of surveying residents, without naming TO, to see if there were any concerns. Neither residents who had regular contact with TO nor residents who did not have such contact indicated any problems with any of the

employees of Lafayette Manor. In the same time period during which these interviews were taking place, Millie confided in another CNA that she was upset about an incident that had occurred. This CNA advised Beck to talk with Millie, and to question her about the night she fell and her diploma. Beck did so. Millie told her that the female CNA who came to her room with Mark when she fell told her that the diploma she had just gotten was no good, that she might as well tear it up.

There was no question that the female CNA was the Grievant, and she does not contest that she was the female that accompanied Mark Severson and assisted MC off the floor after she fell. TO, however, denies that she made the comments in question.

After her conversation with MC, Beck asked Severson if he recalled a discussion of the diploma that night. Upon his indication that he did, Beck concluded that he had verified Millie's comments. Beck and Kudronowicz then interviewed TO who denied the comments. After discussion, they determined that Millie was more credible than TO and terminated her employment. This grievance ensued.

At hearing, Millie had a clear recollection that Mark and TO (who she was unable to identify) came into her room to assist her, but she had no recollection that LPN Anne Swenson was also in her room, assisting and evaluating her. The Union contends that the failure to identify TO and the failure to recall Anne was also there, demonstrate that Millie's recollection of the incident is faulty and cannot be determinative of whether TO made the remarks that she denies making. The Union further argues that Anne was alone in the room with MC part of the time, and seems to imply that if such remarks were made, Anne made them. At a minimum, the Union ascribes to Anne the fact that she told Millie that she would have to have a bed alarm and would not be able to leave her bed without assistance, something that she had just "earned" by completing physical therapy and obtaining her "diploma." The Union would, perhaps, have the undersigned believe that MC confused this discussion with the remarks that TO is alleged to have made, and that Millie's feeling sad and hurt that resulted from the alleged discussion with TO was really the result of being told that she, once again, required a bed alarm.

Anne Swensen did not testify at hearing. She was not called as a witness by either the Employer or the Union. The Employer did not call her because she was not a witness to the alleged remarks by TO. The remarks were alleged to have been made when TO was alone in the room with Millie. The Union did not call Anne Swensen. Perhaps her testimony as to Millie's response to being told she needed a bed alarm would support the Union's supposition that it was Anne's comments that negatively affected Millie. Because Anne did not testify to that effect, the record contains nothing about that conversation but the Union's speculation. That is not evidence and will not be considered.

Resident MC was quite clear that she was alone in her room with the female CNA, TO. The testimony of TO and Mark Severson is also clear that TO was in the room alone with Millie. The record is not as clear as to who brought up the subject of the diploma, nor when. The actual words spoken on this subject have been described in a number of different ways, but regardless of who initiated the discussion, or which set of words were used, "not good anymore" or "might as well tear it up", there is no question that it was inappropriate and degrading to Millie.

There were only two people present during the conversation, Millie and the Grievant. Although elderly and perhaps somewhat confused on the night in question regarding her medical appointment, Millie has been consistent in reporting that the female CNA with Mark was the person who said something upsetting about the physical therapy diploma. Millie apparently reported the incident to another CNA, and told Beck about it without prompting as to the nature of the comments made, having only being asked about the night she fell and her diploma. At hearing, Millie was very clear about the comment, even if she was not as clear about other events that took place. Despite her age and frailty, the undersigned found Millie to be a very credible witness. She had nothing at stake, no reason to relate an incident that did not take place.

On the other hand, the Grievant had a lot at stake, both when interviewed by Beck and Kudronowicz and at the arbitration hearing. If she admitted making a rude or inappropriate remark to a resident, TO would be terminated from employment. It is very clear from the record in this case that TO has a history of making inappropriate remarks to residents and co-workers, usually inadvertently. It is more likely that TO made the remark to Millie and did not recall it, than it is that Millie made up the incident. For TO, it may have been an inadvertently degrading remark when all she meant was something to the effect that despite all your hard work in physical therapy, you still fell and may not be permitted to self-ambulate. Regardless of her intent, TO clearly said something to MC that was inappropriate and upsetting to her.

To be sure, as the Employer acknowledges, the investigation conducted in this matter could have been better. Beck concluded, based on Mark's recollection of a discussion of the diploma, that TO said what Millie alleged her to have said. However, the County did not make the decision to terminate the Grievant at that point. The County afforded TO the opportunity to respond to the allegations and, after a discussion between Beck and Kudronowicz in which they decided that MC was more credible than TO, they decided to terminate TO. It is true that Beck should have been more specific in her questioning of Mark, and perhaps Annie Swensen should have been interviewed as well. However, the determination of whether to terminate or not turned, for management and for the undersigned, on the question of whether TO or MC was more credible and had more at stake. MC had no reason to make up the incident, and she consistently told the same story to the CNA who reported it to Beck, to Beck, and before the arbitrator. While the details may have become

sketchier, the central point remained the same. Millie, without any history of animosity towards TO and without anything to be gained by doing so, reported that TO had made remarks to her that were hurtful, that were rude, that in TO's words were degrading. TO, on the other hand, had every reason to deny making the comment. However, such a comment is consistent with TO's prior behavior and a reliable report.

TO engaged in behaviors complained of by Millie and the Employer. Based on this incident and her entire disciplinary record, I find that the County had just cause to terminate TO.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 27th day of, November 2007.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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