

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

HEALTHCARE SERVICES GROUP, INC.

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 150, CTW, CLC

Case 2

No. 68141

A-6333

Appearances:

Timothy J. McCartney, Healthcare Services Group, Inc, 3220 Tillman Drive, Suite 300, Bensalem, Pennsylvania, 19020, appearing on behalf of Healthcare Services Group, Inc.

Yingtao Ho, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, 53212, appearing on behalf of Service Employees International Union Local 150, CTW, CLC.

ARBITRATION AWARD

Healthcare Services Group and Service Employees International Union Local 150, CTW, CLC are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. They requested that the Wisconsin Employment Relations Commission designate a commissioner or staff member to serve as arbitrator of a dispute concerning the discharge of the Grievant, a Healthcare Services Group employee. The undersigned was so designated. A hearing was held on December 10, 2008, in Beloit, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. No stenographic transcript of the proceeding was made. Thereafter, each party submitted an initial brief and a reply brief, the last of which was received on January 30, 2009, whereupon the record was closed.

Now, having considered the record as a whole, the Arbitrator makes and issues the following award.

ISSUE

The parties stipulated to the following statement of the issue to be considered by the arbitrator:

Was there just cause for the discharge of the Grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE XVI – SUSPENSION, DISCHARGE, RESIGNATION

Section 16.1 – The Employer will have the right to discharge, suspend or discipline any employee for just cause. The Union acknowledges the disciplinary procedure(s) set forth in the Employee Handbook (dated 9/07).

. . .

**[EXCERPTS FROM THE EXTENDICARE EMPLOYEE HANDBOOK
REFERENCED IN SECTION 16.1 OF THE AGREEMENT:]**

CLASS III OFFENSES: An employee will be discharged if an investigation reveals they have committed a Class III infraction. Other offenses may also merit discharge. Class II examples include, **but are not limited to:**

1. Verbal, mental, physical, or sexual abuse of any resident/patient of the facility, family member, visitor, or fellow employee, or neglect or mistreatment of any resident/patient of the facility.

. . .

10. Refusal to follow a direct order from a supervisor. (Insubordination)

11. Serious disrespect to any supervisor in the presence of others that disrupts the work place.

. . .

[Emphasis in original.]

BACKGROUND

The original parties to the collective bargaining agreement (“Agreement”) governing this dispute are Service Employees International Union Local 150, CTW, CLC (“Local 150”) and Extendicare Health Facilities, Inc., d/b/a Beloit Health & Rehabilitation Center (“Extendicare”). Extendicare is a national owner and operator of nursing-home and long-term-care institutions, and the Beloit Health and Rehabilitation Center (“Center”) is a nursing home facility located in Beloit, Wisconsin. In 2005, the housekeeping and laundry services for the Center were subcontracted to Healthcare Services Group (“HSG”). Pursuant to a memorandum

of agreement entered into by HSG and Local 150, HSG became bound by all of the terms and conditions of the Agreement between Extendicare and Local 150 that are relevant to this dispute.

The Grievant became employed as a laundry aid at the Center in October of 2004, and in 2005 she became employed by HSG in that same position. For the duration of the Grievant's tenure at the Center, she worked six days each week, from 2:00 p.m. until 9:30 p.m., alone, in a closed laundry room, washing, drying, and folding soiled linens.

Maude Coleman, also originally an Extendicare employee, was employed at all relevant times by HSG as the housekeeping director at the Center. As such, she was responsible for overseeing the day-to-day housekeeping and laundry operations, and she was the Grievant's immediate supervisor. It was most often the case, however, that Coleman was not present to directly supervise the Grievant while she was working, because Coleman's first-shift schedule overlapped the Grievant's second-shift schedule by only one or two hours each day. When there was no HSG supervisor present at the Center, the Grievant was to report to the Extendicare management team.

The Grievant has had epilepsy since she was a young child. On April 17, 2008, approximately two hours into her shift, the Grievant experienced what was for her the familiar physical sensation of an "aura" – a numb feeling in her tongue that signaled to her that she was about to have a seizure. The Grievant left her laundry work and went to the unoccupied break-room at the Center, where she laid down on a futon and had two seizures. After the seizures ended, the Grievant telephoned her mother, as well as her aunt and cousin (both of whom were employed as CNAs at the Center) and told them what had just occurred. They told the Grievant it was okay for her to finish her shift as long as she was seated while she was doing her work.¹ After making these calls, the Grievant went to the nurse's station at the Center, where she found a chair that she began to drag toward the laundry room. The unit clerk, Patrice Huron, was working in the nurse's station area and asked the Grievant what she was doing. When the Grievant told her that she had just had two seizures and needed to sit down to do her work, Huron told the Grievant to "hold on" so she could "get someone". Huron got the attention of Barbara Hayden, a member of the Extendicare management team, and told Hayden that the Grievant had just had two seizures and was taking a chair into the laundry room to finish her work. Hayden stopped the Grievant and questioned her about the seizures. The Grievant told Hayden that she had had two seizures but that her mother, aunt, and cousin had told her she could stay at work as long as she was sitting down. Hayden instructed the Grievant to take a seat, told her that she could not work around the laundry machines, and told her that she would need to go home. Hayden then enlisted the assistance of Connie Sandow, a nurse unit manager present at the Center. Hayden told Sandow, in the presence of the Grievant, that the Grievant had just had two seizures and would need to go home, and she instructed Sandow

¹ One would not expect most adults to seek permission from a parent or other relative to stay at work, but such behavior makes sense coming from the Grievant, who apparently suffers from developmental disabilities in addition to her seizure disorder.

to sit with the Grievant while Hayden called the Grievant's mother. Hayden also instructed Sandow that she would need to escort the Grievant to the laundry room to get her things and then escort her to the front door, where the Grievant would need to wait for her ride.

At this point, the Grievant became agitated. She stated to Hayden that she was not her boss, that Sandow was not her "damn" boss, and that they could not tell her what to do or "fucking" make her do anything. In response to Hayden's statement to the Grievant that she intended to call Coleman about the seizures, the Grievant stated "Maude is not the boss of me". The Grievant stated that her mother was her boss and that her aunt and cousin had told her she could stay at work as long as she was sitting. Thereafter, while the Grievant was being escorted by Sandow to retrieve her things and wait for her ride, the Grievant stated, "you fucking people make me sick". There were approximately ten people in the area of the nurse's station, including staff and residents, when this exchange occurred. The Grievant was yelling when she made some of the comments. As the Grievant was being escorted by Sandow to the front door of the Center to wait for her ride, the Grievant stated that she could not believe she was being suspended for having had seizures.

Brad Schenkel is a district manager for HSG who oversees the housekeeping and laundry activities for sixteen or so nursing home facilities, including the Center in Beloit. Schenkel was notified by telephone about the incident involving the Grievant, on the day it occurred. Schenkel then contacted Coleman and instructed her to gather written statements regarding the incident and to prepare a termination notice for the Grievant. As instructed, Coleman drafted the termination notice on April 18. Schenkel also arranged a meeting with the Grievant about the incident for April 21, 2008.

At the beginning of the meeting of April 21, the Grievant gave Schenkel a hand-written note that stated, "I had a seizure I don't rember [*sic*] anything after that", and she told him that she did not recall what occurred after her seizures. At this point, Schenkel determined that he needed to investigate whether the incident of April 17 could have been caused by the seizure, and he decided not to give the Grievant the termination notice that had been prepared by Coleman. Instead, Schenkel gave the Grievant two "employee warning notices", both of which placed the Grievant on indefinite suspension. The first notice, which Schenkel characterized at hearing as a "safety warning", provided as follows:

It is this employees [*sic*] position with Health Care Services Group to wash alone in the laundry room at night. This presents a possible medical and safety risk. We need documentation (medical) stating that is [*sic*] safe to work in this position from your doctor.

The second notice, which Schenkel characterized as an "insubordination notice", provided as follows:

We will investigate further to see if the outburst could be a result of the seizure. If we cannot find verification that this outburst is related to the seizure, action

will be taken up to termination in accordance with the Union and Extendicare Handbooks.

In response to Schenkel's written request for medical documentation verifying that the Grievant could safely perform her job, the Grievant's neurologist provided correspondence dated April 22, 2008, which stated the following:

This letter is to inform you that [the Grievant] may return to work 4/28/08 and is safe to perform her job duties.

After receiving this correspondence, Schenkel sent a letter to the Grievant's neurologist, which stated, in part, the following:

I just want to ensure that you have a total understanding of [the Grievant's] work environment. In her position she works alone in a laundry room with industrial equipment on second shift. This laundry room is locked and off limits to most all personnel. My concern is that with [the Grievant's] potential for seizures, it is possible that she could have a seizure, render herself unconscious, bang her head and be on the floor of the laundry room for 8 hrs before someone discovered her.

Schenkel went on in this correspondence to request the opportunity to discuss the situation at greater length with the Grievant's neurologist. Although Schenkel had not made an effort to obtain a medical release from the Grievant, he tried to contact the Grievant's neurologist by telephone, but the doctor was unwilling to discuss the Grievant's medical condition with Schenkel without a release. In response to Schenkel's inquiries, however, the Grievant's neurologist provided additional correspondence dated May 2, 2008, stating the following:

Pt is able to return to work in the laundry. She may work by herself around laundry equipment. This was determined at [the Grievant's] visit on 4/22/08.

Also, during this period of time, Schenkel was in communication with the American Epilepsy Foundation, and in particular with AEF's director, Jeanne Lee. On April 29, 2008, Lee had sent Schenkel correspondence indicating that the Grievant had met with her and had expressed concern that she may lose her job because she had had seizures at work. Lee's letter emphasized that the Grievant was safe to return to her job, citing the first letter from the Grievant's neurologist, as well as the Grievant's four years of experience working independently as a laundry aid at the Center. In an effort to facilitate the Grievant's return to work, Lee also offered seizure response training to the Center's staff.

After receiving this correspondence, Schenkel contacted Lee by telephone on May 5, 2008, to discuss the Grievant's case and, specifically, to inquire whether a seizure could have caused an extended blackout or explained the incident of April 17. During that telephone call, Schenkel described the Grievant's outburst to Lee, who had not been told about the incident

during the earlier meeting with the Grievant. There is a dispute between Schenkel and Lee as to what Lee said during this conversation. Schenkel testified at hearing that Lee stated that the Grievant's claim that she had an extended blackout after her seizure was "illogical" and that the Grievant was "playing" him. In November of 2008, in preparation for hearing in this matter, HSG's attorney forwarded draft correspondence to Lee, which HSG asked Lee to transfer to AEF letterhead, sign, and return it to HSG. The proposed letter recounted that Lee had told Schenkel that the Grievant was "playing" Schenkel with her claimed loss of memory; it further stated that "[e]pilepsy does not cause blackouts, either during or after a seizure" and that "[e]pilepsy does not cause uncontrolled outbursts, cursing or other inappropriate conduct, either during or after a seizure". Lee refused to sign such a letter. Instead, she sent correspondence to Schenkel stating "at no time did I say or imply that [the Grievant] was 'playing' anyone". She further contradicted HSG's proposed letter by stating that "[p]eople with epilepsy often describe their episodes as 'blackouts'" and "the definition of a seizure is 'uncontrolled' behavior or activity". At hearing in this matter, Lee also denied that she made the comments attributed to her by Schenkel. She stated that she generally would not be willing to exclude the possibility that a blackout could be associated with a seizure and that she would not have been able to determine in the course of her telephone call with Schenkel whether the described behaviors were seizure-related. Further, Lee recounted that Schenkel seemed very nervous during this telephone call and expressed a concern that he might get sued in relation to the situation involving the Grievant.

On May 7, 2008, Schenkel presented to the Grievant written notice of the termination of her employment with HSG. The notice described the incident leading to her termination as follows:

On 4/17-08, [the Grievant] used profanity when speaking to Barb Hayden at the nurse's station and was very insubordinate. When HCSG attempted to counsel [the Grievant] for this incident on 4/21, she claimed to have no memory of it due to her medical condition. On 4/25 SDM Schenkel was provided with [the Grievant's] doctor's contact information, but was unable to verify the severity of her condition due to doctor-patient confidentiality. On 5/1 SDM Schenkel was given a release to discuss [the Grievant's] condition with a representative from the American Epilepsy Foundation. On 5/5, SDM Schenkel was informed by this representative from AEF that [the Grievant's] claim of no memory is not only illogical, since she was requesting a chair for future seizures, but also not plausible for a person with her condition.

The termination notice concludes as follows:

The act of insubordination is a class III violation as described in the Extendicare Employee Handbook. This action warrants immediate termination. It is [HSG's] position to terminate [the Grievant] effective 5-7-08.

Prior to April 17, 2008, the Grievant had never been reported to have used profanity at the workplace. Her 2007 evaluation had rated her work as satisfactory and good. The evaluation indicated that the Grievant needed to improve her volume of work, but it also described the Grievant as “very cooperative” and someone who “tries to please everyone”.

DISCUSSION

As is typical in cases involving employee discipline, the burden here is on the employer to show that the Grievant was discharged for just cause. HSG and Local 150 have briefly argued whether the required quantum of proof should be “clear and convincing evidence” or “preponderance of the evidence”. I need not resolve this question, as I have concluded that HSG has failed, even under the lower standard, to prove that it had just cause to terminate the Grievant’s employment.

I also need not resolve the parties’ dispute relating to the basis for the Grievant’s discharge. The notice of termination provided to the Grievant on May 7, 2008, indicates that her employment was terminated for insubordination, a class III violation in the Extendicare handbook that warrants immediate termination of employment. In its post-hearing argument, HSG seemingly expands its basis for having discharged the Grievant to include two additional class III offenses – verbal abuse of a fellow employee/visitor, as well as serious disrespect to a supervisor in the presence of others. Local 150 contends that these *ex post facto* justifications should be excluded from consideration. This contention need not be addressed, as I have concluded that HSG has failed to meet its burden to show that the Grievant’s actions – whether characterized as insubordinate, verbally abusive, seriously disrespectful, or something else – justified her discharge.

There is no question that the incident that led to the Grievant’s discharge occurred. After the Grievant had her seizures, she said that Hayden was not her boss, said that Sandow was not her “damn” boss, said that Coleman was not her boss, asserted that none of them could “fucking” make her do anything, stated “you fucking people make me sick”, and perhaps had to be told twice, rather than once, that she would have to stop working and go home. The question here is whether the Grievant’s actions warranted her discharge under a just cause standard. Though there has been much argument as to whether the Grievant was in a non-volitional, “postictal” or blackout state when the outburst occurred, no one involved in this proceeding was qualified to make such a medical assessment, and the question is not one that I view as dispositive. Having a seizure on the job would be a traumatic event for anyone. After the Grievant had her seizures on April 17, she gained permission from her mother, aunt, and cousin to finish her shift and was intent on doing so. The Grievant simply wanted to return to her work. What she encountered, however, was a flurry of directives by Hayden indicating that she was no longer fit to do her job – she was told she had to sit, told she could not be around the laundry equipment, told that her mother would be called and she would be sent home, and told that, under supervision, she would need to gather her things and wait at the front door. Further, it is evident based on the Grievant’s comment as she was being escorted to the front door – wherein she stated that she could not believe she was being suspended for

having a seizure – that, during this brief exchange, Hayden gave the Grievant what must have been an infuriating impression that she was being disciplined because of her seizure.² Hayden may have been acting out of genuine concern for the situation, but her input seemingly increased the intensity of an already upsetting event. I have concluded that these factors provide a reasonable explanation for the Grievant's behavior and undermine HSG's claim that it had just cause for her discharge.

HSG argues that the Grievant's actions should not be excused in this situation, because her previous seizures at work were not followed by outbursts. Indeed, the record indicates that just weeks before the incident for which the Grievant was fired, the Grievant had a seizure at the Center, was told by a nurse at the facility to go to the emergency room, and left the Center and walked herself to the hospital, remembering to call her supervisor to report that she would not be able to finish her shift. The fact that the Grievant discretely handled previous seizures, however, does not undermine my opinion that the circumstances at play here excuse the Grievant's behavior.

Indeed, it is the special circumstances involved in this case that should alleviate any concerns HSG purports to have regarding showing tolerance toward insubordinate behavior. HSG asserts that a failure to properly discipline the Grievant could have caused HSG to lose its service contract with the Center or could have undermined management's ability to effectively supervise its employees. A willingness to "tolerate" the Grievant's behavior under these unusual circumstances, however, could not reasonably be mistaken for any indication that insubordinate behavior in a normal circumstance would be acceptable among HSG employees.

HSG also asserts that the Grievant's discharge should be upheld as the product of a fair, thorough investigation. I have a contrary view of the quality of the investigation. Schenkel had the Grievant's termination notice drawn up on April 18, the day after the incident occurred and several days before he ever spoke with the Grievant about it. Schenkel has asserted that, after receiving the Grievant's note at the April 21 meeting, he decided to give her the "benefit of the doubt" and investigate further rather than discharge the Grievant immediately. However, Schenkel's subsequent activities appear to have represented little more than a search for a reason to fire her. Schenkel had requested, for example, that the Grievant obtain documentation from her doctor verifying that she was fit to return to work, but when the Grievant's neurologist provided correspondence to that effect, Schenkel simply refused to accept that conclusion. Schenkel responded to the doctor by asserting that he perhaps had not been fully aware of the Grievant's work environment. Schenkel's opinion of the Grievant's suitability also was not influenced by Lee's correspondence affirming that the Grievant's condition would not affect her ability to perform her job. Ostensibly because he was not able to

² While the written account drafted by Hayden suggests that it was toward the end of the exchange, after the Grievant yelled and used profanity, when Hayden told the Grievant that she was being suspended, the statement drafted by Huron suggests that it was much earlier in the exchange, before the Grievant's outburst occurred, that Hayden told the Grievant that "she was suspendid [sic] until further notice and that she could not work with her condition".

speak to the Grievant's neurologist over the phone – and despite having received two letters from the Grievant's neurologist and one letter from AEF all indicating that the Grievant was qualified to return to work – Schenkel stated in the termination notice ultimately provided to the Grievant that he had been “unable to verify the severity of her condition”.

Further, Schenkel dubiously claims that he decided to discharge the Grievant because Lee told him the Grievant had been "playing" him and that her blackout excuse was "illogical". Based on these statements, Schenkel concluded, as he put it, that the Grievant was of “sound mind” when the outburst occurred and must have been lying to him when she suggested at the meeting of April 21 that she could not remember anything after the seizures. This conclusion is fraught with problems. Lee has repeatedly and persuasively denied that she ever would have made such a statement. Moreover, given my conclusion that a blackout is not a prerequisite to finding that there is a reasonable basis for excusing the Grievant's behavior, any conclusion Lee and Schenkel drew as to whether one occurred are simply irrelevant. Finally, the evidence before me does not support Schenkel's conclusion that the Grievant was lying when she indicated to him that she had an extended period of memory loss after the seizures. The Grievant explained at hearing that she remembers only some of the incident of April 17 and that, after it occurred, she went home and slept for twenty-four hours. Though the Grievant's April 21 note and her statement, indicating that she did not remember anything, were perhaps an over-simplified explanation of what she had experienced, it was unfair for Schenkel to have jumped to the conclusion that she was lying, and his willingness to do so weakens HSG's claim that his investigation was fair and thorough.

HSG contends that the Grievant's discharge should be found to have been supported by just cause based on the fact that the Grievant testified at hearing that the termination of her employment was appropriate under the applicable work rules. The Grievant's willingness to provide an affirmative answer, under cross-examination, to the question that is the ultimate one before me, carries no weight in this case.

I find that the Grievant has made reasonable efforts to mitigate her wage losses. When she could not find employment, she enrolled in school as a part-time student in September of 2008. I reject HSG's contention that any back-pay should be limited to the period of time prior to when she enrolled in school.

CONCLUSION

The Grievant's employment was not terminated for just cause. The Grievant shall be reinstated in her position immediately. Further, she shall be made whole for any loss of earnings incurred by reason of HSG's violation of the Agreement, which back-pay shall be reduced by her actual interim earnings. I remand to the parties the task of computing the back-pay award, and I retain jurisdiction for the purpose of resolving any dispute that arises regarding that amount.

Dated at Madison, Wisconsin, this 20th day of April, 2009.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator

DLC/gjc

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