

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1760-A, AFSCME, AFL-CIO

and

ST. FRANCIS IN THE PARK HEALTH AND REHABILITATION CENTER, INC.

Case 26
No. 68405
A-6343

(Markon Grievance)

Appearances:

Mr. James Mattson, Staff Representative, 8480 East Bayfield Road, Poplar, Wisconsin, appearing on behalf of Local 1760-A, AFSCME, AFL-CIO.

Mr. Joseph J. Roby, Jr., Attorney, Johnson, Killen & Seiler, P.A. 800 Wells Fargo Center, 230 West Superior Street, Duluth, Minnesota, appearing on behalf of St. Francis in the Park Health and Rehabilitation Center.

ARBITRATION AWARD

Local 1760-A, AFSCME, AFL-CIO hereinafter "Union" and St. Francis in the Park Health and Rehabilitation Center, hereinafter "Employer," mutually requested that the Wisconsin Employment Relations Commission assign Lauri A. Millot to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the undersigned on February 10, 2009 in Superior, Wisconsin. The hearing was not transcribed. The parties submitted letters in support of their positions by March 14, 2009, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute framed the substantive issues as:

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

RELEVANT CONTRACT LANGUAGE

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ARTICLE 4 – MANAGEMENT RIGHTS

Section 1. The Employer shall have the sole and exclusive right to manage and operate its facility subject to terms of this Contract and applicable law, governmental rules and regulations, and the rights, which include but shall not be limited to:

- a. To manage all operations, activities and to direct its employees;
- b. To hire, suspend, discipline, or discharge for just cause;
- c. To promote, assign, transfer, lay-off and recall employees consistent with the terms of this Agreement;
- d. To relieve employees from duty for legitimate reasons;
- e. To maintain discipline and efficiency among employees;
- f. To determine the existence and description of vacancies;
- g. To decide the number and type of employees and utilize volunteers provided none of these bargaining unit employees are laid off or suffer a reduction of hours as a result of the use of volunteers;
- h. To contract for goods and services provided none of this bargaining unit's employees are laid off or suffer a reduction of hours as a result of these contracts;
- i. To establish reasonable policies and procedures;
- j. To determine the type, amount and scope of services to be provided to residents and the nature of facilities to be operated;
- k. To establish schedules of operation and determine the methods, procedures and means of providing services to residents.

Section 2. Nothing in the above provision is intended to limit any other rights of the Employer not specifically and expressly covered, provided that the exercise of any of the above rights, the Employer shall not violate any provisions of this Agreement.

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ARTICLE 19 – DISCIPLINE

Section 1. The parties recognize the authority of the Employer to discipline, discharge or take other appropriate disciplinary action against employees for just cause.

Section 2. The following shall be the sequence of disciplinary action:

- a). Oral reprimand
- b). Written reprimand
- c). Written reprimand with a one (1) day unpaid suspension as scheduled by the Employer
- d). Written reprimand with two (2) days unpaid suspension as scheduled by the Employer
- e). Discharge

The above sequence of disciplinary action shall not apply in cases where the infraction is considered just cause for immediate suspension or discharge.

The following lists some of the common infractions and their disciplinary actions. In general, any conduct, which exhibits disregard for the goals of St. Francis in the Park Health and Rehabilitation Center or the health and well being of its residents, may be grounds for immediate dismissal. **This list does not contain all actions that may call for disciplinary measures, but it is intended to be a guide, to help you avoid activities that are opposed to the goals of St. Francis Home. (bold in original)**

Infractions for which you may be dismissed immediately, but are not limited to:

1. Failure to obey legitimate directions from a person in authority.
2. Failure to fulfill the requirements and responsibilities of your job as required by your job description.
3. Unauthorized possession, use, sale or distribution of alcohol, drugs, narcotics and other mood altering substances on St. Francis in the Park Health and Rehabilitation Center premises or Facility sponsored events.
4. The illegal manufacture, distribution, dispensing, possession, or use of controlled substances or drug paraphernalia [as defined by state and federal law] on home-owned premises or while engaged in agency-sponsored events.
5. Possession of weapons or firearms on facility premises.
6. Reporting for work under the influence of intoxicants, drugs or taking them while at work or being under the influence of prescription drugs per the facilities Alcohol, drugs & Controlled

Substances policy. Any employee reporting for work, or at work, under the influence shall immediately be relieved from duty and sent home.

7. Falsification of own or another's time card.
8. Falsification of records or information.
9. Theft or misappropriation of home, employee or resident property or any form of dishonesty. Unauthorized possession or use of St. Francis in the Park Health and Rehabilitation Center's, resident's or another employee's property.
10. The employee, prior to accepting a gift, gratuity or tip, must consult and get approval of the Department Head. The Department Head will provide a written opinion with a copy provided to the employee and employees personnel file for future reference in case the donor was to challenge the staff member's action.
11. Consuming food or drink designated for resident use.
12. Physical, emotional, sexual or verbal abuse to residents, staff or family members or any other individual on the facility premises.
13. Engage in or be a party to Sexual Harassment.
14. Failure to report on the job incident, injury or illness.
15. Failure to report having a contagious disease.
16. Excessive absence or tardiness.
17. Absent two workdays without notice in one consecutive 365 day period.
18. Disclosing of confidential resident or company information.
19. Failure to view all mandatory facility training in-services within established time lines and/or failure to meet the states (sic) minimal training requirements for the employees (sic) certification/licensure. Time spent viewing in-service tapes in the Facility shall be compensated, provided the employee is on duty.
20. Failure to pass the caregiver backgrounds checks.
21. Threatening other staff, residents, or visitors in the facility.
22. Job Abandonment.

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BACKGROUND AND FACTS

The Grievant, Marlene Markon, was a 32 year full time employee of the Employer at the time of her termination. From 1976 through 2003, she held the position of LPN I. In 2003, her title changed to LPN II. For five months in 2008, she served as the Acting Nurse Manager. At the time of her termination, the Grievant worked the day shift (6:45 a.m. – 3:15 p.m.) earned \$18.83 per hour and her supervisor was Jessica Stoltman, Registered Nurse.

The Grievant was disciplined on April 3, 2008 for refusing mandatory overtime and on June 2, 2008 for failure to complete a training program.

The Employer operates a five floor nursing facility in Superior, Wisconsin.

On May 28 while the Grievant was distributing medication, certified nursing assistant Michelle Nelson sought out and located the Grievant to tell her that SC was complaining about chest pain. The Grievant went to SC's room and observed SC sitting calmly in her bed. SC informed the Grievant that she had chest pain and the Grievant asked SC where the pain was located. The Grievant took SC's vital signs and noted that they were normal, nothing significant or out of the ordinary.

At approximately 2 p.m. Stoltman arrived in the office area where the Grievant was making entries to resident charts. The Grievant informed Stoltman that SC was complaining of chest pain. Stoltman told the Grievant that SC had complained of chest pain the prior week and that SC had called the hospital directly.¹ Stoltman did not direct the Grievant to call the physician or the family.

The notation the Grievant made in SC's medical chart read as follows:

Res (resident) c/o (complained) L (left) arm pain. States, "I'm having a heart attack." Appears to be in no distress. Skin warm and dry. T (temperature) 98.3, P-76 R-18, o2 sat 96% on rm (room) air, BP 110/64. Res incont. (incontinent) but refused to get up to be changed. Will monitor thru out the day.

Resident SC was admitted to the local hospital emergency room on June 1, 2008. Hospital records indicate that she had possibly had a Transient Ischemic Attack (TIA) which is also referred to as a "mini stroke." SC was admitted to another nursing home on June 2, 2008.

The Employer's facility was being surveyed by the Department of Health and Human Services, Centers for Medicare and Medicaid Services during May and June of 2008 as a result of complaints. In the course of that investigation, the Surveyor Team uncovered the above entry in SC's chart. A member of the Survey Team informed the facility Administrator Jill Hess of the incident. Based on this discovery, Hess initiated an investigation.

¹ Resident SC telephoned the local hospital on May 21, 2008 and informed the nurse that she was having a heart attack. The Nurse called the Employer's facility to inform them of SC's telephone call. The Director of Nursing assessed SC and concluded that SC was not showing signs of having a heart attack. The Director of Nursing informed SC and the local hospital of her findings. When told, SC responded, "I don't want to wait until I do have one." The facility physician was not called regarding this incident.

The Employer completed an Employee Warning Notice on June 11. The notice indicates that the action being taken was “Dismissal” and the Employer’s statement is as follows:

Resident had chest pain – told RN – When RN did not respond – LPN should then have gotten DON or ADON involved –

The form provides an area for the Grievant to respond. The Grievant indicated on the form that she disagreed with the Employer’s description of the violation and provided the following:

Numerous times things were told to Nurse Manager and with staffing & only 1 license person on floor – Not always time to follow up. Not only that, when told Jessica about the chest pain she proceeded to tell me about the incident of 1 week earlier when the same thing had happened. Also if LPN’s can’t assess what do staff on 1st floor do when something like this is reported when she also is an LPN.

The Employer completed a Personnel Action Form on June 16, 2008. The form indicates the Grievant’s last day of work was June 8, 2008 and her termination code was “D8” which is described as “Abuse of a Resident.” The commentary included, “put resident at risk” and “survey reported to Board – did not report chest pain – notify RN or MD.”

Additional facts as relevant, are contained in the DISCUSSION, section below.

ARGUMENTS OF THE PARTIES

Employer

The Employer argues that the Grievant was terminated for just cause consistent with the specific terms of the collective bargaining agreement.

This case is about the Grievant’s assessment of resident SC. Wisconsin administrative code section N 6.03(1)(a) defines assessment as “the systematic and continual collection and analysis of data about the health status of a patient culminating in the formulation of a nursing diagnosis.” The Grievant assessed SC and in doing so, placed SC’s medical safety in jeopardy. The Grievant is an LPN and does not have the authority to assess residents. Rather, the Grievant is required to report changes in a patient’s condition to a registered nurse, the resident’s physician and to the resident’s responsible family member.

The Grievant’s assessment of resident SC on May 28 was contrary to state law, her job description, and her training with the Employer and resulted in the Employer receiving “immediate jeopardy” citations for providing substandard care. Three of four citations issued were based, in part, on the SC situation. As a result of the citations, both federal and state

regulators levied large daily fines against the Employer. In addition, Medicare and Medicaid assistance reimbursement was denied for approximately five months.

The cost of the SC incident was high, not only from a monetary perspective, but also from a medical care perspective. The Grievant could have prevented the situation had she followed her training, her job description and state law. The parties' labor agreement allows for immediate termination when an employee fails to fulfill the requirements of their job description. Clearly the Employer had just cause to terminate the Grievant.

The Employer maintains that under the plain language of the parties agreement, the Grievant's action and inaction constituted just cause for immediate discharge and therefore the grievance should be dismissed.

Union

The Union asserts that the Employer did not have just cause to terminate the Grievant, a seventeen year employee of the Employer.

The Grievant followed normal care procedures and provided appropriate care to resident SC. When the Grievant learned at 9 a.m. that SC was complaining of chest pains, she gave her her prescribed medicine and checked her vital signs. SC's vitals were within the normal range. Had the Grievant's supervisor been on the floor, she would have informed Stoltman of SC's complaints, but since she was off the floor (as she often was), Stoltman was not available to address SC's issues.

May 28 was a day no different than any other day at the Employer's facility. Various residents had needs and demands. In order to address all residents, the Grievant directed the CNA to check on SC. SC showed no signs of distress during the remainder of the day. She was no longer complaining of chest pain. As was the Grievant's normal practice, she charted for her shift at the end of the day during which time she informed Stoltman of SC's complaints. Stoltman was not concerned, in fact, Stoltman told the Grievant that SC had similarly complained the week before and identified SC as a "chronic complainer."

The Grievant could not go over her supervisor's head and report SC's complaints to the Director of Nursing or SC's physician. As evidenced by Stoltman's tone and approach, not addressing complaints by residents that regularly complain was the norm. Stoltman's comments about SC and the prior week underscore the practice on the floor. Management sets the direction for employees and Stoltman was the Grievant's immediate supervisor. The Employer is unfairly attempting to make the Grievant the scapegoat for the citations issued.

The Grievant's punishment – termination – is excessive. While it is true that the Grievant failed to chart SC's complaints, she informed her supervisor who did nothing. The Grievant's error is no more than a charting omission which amounts to nothing more than a clerical error.

The Union requests that the Arbitrator sustain the grievance, reinstate the Grievant and make her whole for any and all lost wages and benefits she has lost due to the Employer's unjust termination.

DISCUSSION

This is a discharge case. The Union asserts that the Grievant's termination lacked just cause. The Employer disagrees.

Articles 4 and 19 of the parties' collective bargaining agreement provide the Employer with the express right to discipline the Grievant, provided there was just cause to impose the discipline. Article 19 further provides that the Employer may immediately terminate an employee if the employee engages in specifically identified misconduct violations. The methodology of a just cause analysis looks first to whether the employee engaged in the behavior for which she was disciplined and second, whether the discipline imposed reasonably reflects the employer's proven disciplinary interest.

The Grievant was disciplined for failing to notify the RN, DON or ADON when presented with a resident who complained of chest pain. The Grievant admitted she became aware of SC's complaints at approximately 10 a.m. and admitted that she did not notify anyone nor document the complaints in SC's chart until much later in the day. The Union presents multiple arguments which justify the Grievant's behavior.

The Union first argues that the Grievant did not make an assessment. I disagree. After the Grievant was informed by the CNA that SC was complaining of chest pains, the Grievant assessed SC's condition. She asked SC how she felt. She took SC's vital signs. She reached the conclusion that SC's vital signs were consistent and "normal" and, as a result of that information, did not seek out any further medical attention for SC. That decision was an informed decision, albeit incorrect and inconsistent with policy, procedure, and law, but she made a decision. Based on this decision, the Grievant did not seek out her supervisor or another RN. She did not contact the Director of Nursing, SC's physician or SC's family representative.

To take appropriate action when a resident complains of chest pain is not only common sense, but also an expectation of an LPN's job description. Inherent in the Employer's job description are expectations that are applicable in this instance. Many of these are overall expectations, but there are some extremely specific to this instance including:

Other Nursing Care Functions:

3. Consult with the Resident's physician in providing the resident's care, treatment, rehabilitation, etc, as necessary.

...

6. Notify the resident attending physician and responsible party when there is a change in the resident's condition.

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This obligation is further enforced by DHFS's conclusion, "The failure to notify the RN of resident #18's and #24's chest pain so that appropriate assessments and follow-up care could be implemented created a situation of immediate jeopardy." Er. Ex. 9 p. 85. Moreover, these are not obligations that the Grievant was unaware of or had not completed in the past.

The Grievant admitted that she knew she was expected to promptly inform the RN of SC's complaints. She also explained that she did not call a physician because licensed practical nurses do not make contact with the physician unless directed to by the registered nurse. When asked whether she had the authority to call a physician, the Grievant admitted to having that authority stating that she usually did so after being instructed by the registered nurse to make the call. I find the Grievant credible, but elusive.

The Grievant's 1999-2000 Performance Review includes comments that establish that Grievant has contacted the physician, that she notified the physician according to procedure, and further, one notation states that the Grievant, "does it on own in absence of manager." The 2002 Performance Review includes the comment, "Marlene addresses problems /chg of res status to MD promptly..." These comments are instructive in not only establishing that the Grievant knew she was expected to take immediate action when there was a change in a resident status and that she was expected to contact a physician, but more importantly, that she had performed these responsibilities admirably in the past.

The Union maintains that the Grievant's decision to not immediately notify anyone of SC's complaints was the norm as evidenced by her supervisor's disrespectful characterization of SC as a complainer, her failure to take immediate action when informed of SC's change in condition and her uncaring and irresponsible description of SC's telephone call the week prior to a local hospital informing them that she was suffering from a heart attack. The Grievant is a 32 year employee who knows full well to seek medical intervention when there is a change in condition. Stoltman's substandard approach to managing employees and protecting the health and welfare of the residents in her care does not excuse the Grievant's behavior.

The Union next argues that SC was a difficult resident to provide care for and that she often complained. While I accept that SC was a resident that regularly sought attention from staff, that fact does not diminish or negate staff's obligation to provide her quality care. SC's health and welfare were placed in jeopardy as a direct result of the Grievant's failure to pursue medical intervention after SC complained of chest pain. At a minimum, SC was entitled to the Grievant's adherence to procedure so that SC could be properly evaluated.

I now move to the level of discipline imposed. The Grievant's willingness to ignore a resident's complaints of chest pain is a serious offense. Not only was the patient's health and well-being placed in jeopardy, the Employer's facility was penalized for the Grievant's inaction. The Union and Employer have negotiated immediate discharge language for incidents wherein an employee exhibits "disregard" for the "health and well being of its residents." The Grievant's failure to notify a registered nurse, the Director of Nursing, the Assistant Director of Nursing, SC's physician or SC's responsible person when SC communicated chest pain, a serious medical change in condition, rises to this standard. I therefore find the termination justified.

AWARD

Yes, the Employer had just cause to discharge the Grievant. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 15th day of June, 2009.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator