

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SEIU HEALTHCARE WISCONSIN

and

WILLOWS NURSING AND REHABILITATION CENTER

Case 13

No. 73222

A-6576

(Mary Kay Coy Termination Grievances)

AWARD NO. 7907

Appearances:

Nicholas E. Fairweather, Hawks Quindel, S.C., 222 W. Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of SEIU Healthcare Wisconsin.

David B. Kern, Quarles & Brady LLP, 411 E. Wisconsin Avenue, Suite 2350, Milwaukee, Wisconsin, appearing on behalf of the Willows Nursing and Rehabilitation Center.

ARBITRATION AWARD

This is a labor arbitration proceeding arising out of the discharge of the Grievant, Mary Kay Coy, from her employment at the Willows Nursing and Rehabilitation Center located in Sun Prairie, Wisconsin. The Willows is party to a collective bargaining agreement between itself and SEIU Healthcare Wisconsin, the labor organization representing Coy. That agreement provides at Section 10.1 that the Willows has the “right to discharge, suspend or discipline any employee for just cause.” It further provides that the “Union acknowledges the disciplinary procedure(s) set forth in the Employee Handbook (dated 5/19).” The Union and the Willows have agreed that the issue before the undersigned is as follows:

Did the Willows Nursing and Rehabilitation Center have just cause for the termination of Mary Kay Coy? And if not, what is the remedy? Tr.6.

Consistent with customary practice, the burden of proof lies with the employer to demonstrate just cause for the termination.

BACKGROUND

Coy worked as a cook at the Willows for 19 years prior to her discharge. She was responsible for preparing breakfast and lunch for the residents. The facility was authorized to care for 50 plus patients but there were 40 plus in March of 2014. Coy worked from 5:30 a.m. until 1:30 to 2:00 p.m. She had a one-half hour unpaid break which was taken between 9:00 and 10:00 a.m. depending on workload. She was required to punch out and punch back in when taking her break. Her duties did not involve meal planning or dietary responsibility; others performed those tasks. Coy's responsibility was to prepare the items on the menu for the residents. The lunch menu consisted of a main menu and an alternative menu was available for those who preferred that option. There were also some residents who required food that was pureed prior to consumption.

WORK RULES

The Willows maintains a fairly elaborate handbook which includes specific work rules together with a procedure for enforcing the rules. The handbook is obviously used at multiple facilities as it makes repeated reference to employees' employment-at-will status which of course is not true with respect to Coy and her fellow bargaining unit members. Nevertheless the enforcement procedures are acknowledged in the labor agreement and neither side disputes their applicability here.

The system divides the rules into three categories designated as Class I, Class II and Class III. Class I violations are described as "lesser breaches of policy" which can be "simply corrected." Class I violations are remedied through a series of notices and warnings with the fifth violation resulting in termination. Class II violations are "violations which require immediate disciplinary action." These violations result in two final warnings followed by discharge. Class III violations are serious violations warranting immediate discharge. The focus in this case is on Class I and Class II violations. The handbook also includes an elaborate attendance policy which is not involved here. The disciplinary procedure does not involve any suspensions and does include a provision that discipline more than 18 months old "will not be considered for purposes of progressive discipline."

DISCIPLINE OF GRIEVANT

Coy was discharged per the progressive disciplinary system summarized above. During the period from August of 2013 through her discharge in March of 2014, Coy accumulated a variety of notices and warnings which the Willows identified as Class I or Class II violations. Some were grieved and withdrawn by the Willows. They are set forth below in chronological order.

EXHIBIT NO.	DATE	TYPE	RULE	RESOLUTION
19	08/19/13	First Notice	Class I, Rule 3 - same day practices	Removed per Union grievance. Un. Ex. 1
22	09/17/13	Final Notice	Class II, Rule 4 - verbal discourtesy	
20	11/22/13	First Notice	Class I, Rule 6 – disrespectful language in reference to supervisor	Removed per Union grievance. Un. Ex. 2
23	01/31/14	Final Notice	Class II, Rule 6 – called supervisor liar and Pinocchio; serious disrespect	Removed per Union grievance. Un. Ex. 4 (2/20/14)
21	02/18/14	First Notice	Class I, Rule 6 – minor disrespect for supervisor	Removed from file. Un. Ex. 3 (03/20/14)
24	02/19/14	Discharge Warning	Class II – serious disrespect involving a comment about “going postal”	
Jt. 3	03/12/2014	Termination	Class II, Rules 18, 23 – substitution of mashed potatoes Class II, Rules 3, 7 – timecard falsification and working off clock	

The foregoing demonstrates a pattern of disrespectful behavior and an apparent belief that Coy's 19 years of service allowed her to utilize the "easy" way to circumvent rules. This is not the employment record of a model employee. Most troubling is the repeated disrespectful attitude displayed by Coy toward her supervisor.

TRIGGERING INCIDENTS

Willows argues correctly that when the parties have an agreed upon disciplinary procedure in place the arbitrator may not deviate from it. That however is a two-edge sword, requiring an employer to adhere to that same policy and upon failure to do so for an arbitrator to conclude that just cause has not been established. With that framework in mind, I review the two incidents that resulted in the discharge.

On two occasions, March 10 and 12, 2014, Coy left the premises at approximately 9:00 a.m. to take her one-half hour unpaid break at her residence which was four blocks from the Willows. She failed to punch out properly and when she returned at 9:30 a.m. the time clock recorded her "punch in" as a "punch out." Coy then returned to work and one-half hour later "punched in" at 10:00 a.m. The time clock was set up so that if an employee punched out the employee could not punch in for at least one-half hour after the punch out. Tr.180.

The correct procedure for employees who err when punching in or out is to fill out an "Oops" slip which is formally identified as a "Missed Punch Form." In the two instances at issue here, Coy engaged in self-help to remedy her failure to punch out when she left at 9:00 a.m. The Union argues that it was a simple "workaround" suggested by the payroll clerk. Willows counters that the action constituted falsification of the timecard and working off the clock.

I conclude the violation falls somewhere in between. Clearly, Coy understood she should have completed the "Oops" form rather than engaging in self-help. There is no evidence that Coy was trying to cheat the Willows or that she was extending her breaks. At the end of the day her timecard reflected the total hours of actual work. The error was that it reflected an unpaid break from 9:30 to 10:00 a.m. The handbook work rules identify punching someone else's timecard or having someone else punch yours, working off the clock, and repeated failure to properly use time/swipe card and/or excessive "Oops" slips as Class I violations. In my judgment, Coy's misdeeds fall into these categories rather than deliberate falsification. While the Willows argues that the failure to punch out denies them an accurate record of the length of Coy's breaks, had Coy completed the "Oops" form several hours later the Willows still would not have an accurate record of the duration of the breaks. There was no suggestion that Coy had ever abused the duration of her breaks. She was given the option of taking breaks when she believed her workload would permit. The Willows asserts that Coy's behavior violated Class II, Rule 7 – Being away from duty station without authorization. That is simply incorrect. As noted, Coy elected when to take her break. Her mistake was the failure to clock out, not the fact that she left. Likewise her failure to punch out is not equivalent to a Class III, Rule 3 – Falsification of a document. As discussed above, the failure on two occasions to punch out and followed by a self-help workaround fits squarely in the Class I category.

The second half of the triggering event is the potato substitution issue. The daily menu which is prepared by the dietician provided that the main items on the Wednesday lunch were: chicken and dumplings, buttered green beans, whole wheat bread, and chilled fruit cup. The alternate lunch option was: slow roasted turkey, cooked potatoes, and tossed salad and dressing. According to Coy, she had never seen the term “cooked potatoes” prior to the day in question. Coy checked the recipe book which she utilized and learned that the item to be cooked was baby red potatoes. Coy could not locate any baby red potatoes and in light of the fact that only three people had requested the alternative she substituted mashed potatoes without first obtaining approval. Coincidentally, a state inspector was on the premises at the time. She apparently questioned the substitution but did not issue any citation. Coy indicated that she did not advise her supervisor because there was a past practice of substitution without approval and because she had to prepare mashed potatoes anyway for residents on a pureed dietary restriction.

The Willows treated the unauthorized substitution as violations of Class II, Rule 18, which penalizes “Willful failure to perform job duties” and Class II, Rule 23, which penalizes “Violation of any rule or requirement set forth in this handbook that is not otherwise classified.” Notably at the hearing in this matter no attempt was made by the Willows to attach either rule to this behavior. On the other hand, there is no question that Coy failed to follow the mandated procedure. Clearly, there is nothing in the handbook about food substitution so a claimed violation of Class II, Rule 23, is simply unsupported. In my judgment the potato substitution did not constitute a willful failure to perform job duties. It does not fall neatly into other rule violations but is closest to Class I, Rule 4 – Improper or wasteful use of equipment and/or supplies. Certainly it was an improper use of supplies in the sense that Coy should have obtained prior approval for the substitution. It was the type of misdeed that could be corrected by counseling and warning. As noted in the handbook, the purpose of the disciplinary procedure is “to correct employee behavior by the use of the least severe penalty possible consistent with the employee’s offense.”

Having concluded that the two final rule violations warranted Class I rather than Class II level treatment, the question remains as to how those changes should be treated under the policy. In other words, would the reduction from Class II to Class I status have saved Coy from termination?

The disciplinary policy does not directly address that circumstance. If (as we have here) an employee receives two Class II violations placing him or her at the “Discharge Warning” stage, does a subsequent Class I occurrence then move the person to discharge? The procedure as noted is silent but suggests that in order to move to discharge you need another Class II violation. Clearly, if the Class I violation occurred before the two Class II violations, the employee would not be terminated following the second of the two Class II violations.

It is understandable that the policy does not address our situation. The procedure was clearly drafted for non-union employment and notes frequently that employment is “at-will” and that the Willows can terminate “for any lawful reason under circumstances the company deems appropriate.” All of this leads me to conclude that the Willows incorrectly treated the final two

incidents as Class II rule violations when they should have been treated as Class I violations. Therefore, the Willows did not have just cause for the termination. Accordingly, Coy shall be reinstated without loss of seniority to her formerly held position. She should receive back pay less any interim earnings and any unemployment compensation she may have received. The period of time from her discharge until her reinstatement shall not count towards the 18 month forgiveness policy. Coy will be reinstated and placed back on the progressive discipline track. The next Class I discipline, if any, will be step 4. For the Class II track she will receive a discharge warning if a further violation occurs.

Signed at the City of Madison, Wisconsin, this 17th day of February 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Arbitrator