

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of an Impartial Hearing Between

LISA SZOPINSKI

and

DODGE COUNTY

Case 236
No. 72866
M-4149

DECISION NO. 35492

Appearances:

David Dorn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 336 Doty Street, Fond du Lac, Wisconsin, appearing on behalf of Lisa Szopinski.

Nancy L. Pirkey, Buelow Vetter Buikema Olson & Vliet LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of Dodge County.

IMPARTIAL DECISION

On February 3, 2014, Dodge County filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, as the Impartial Hearing Officer to preside over a grievance relating to the termination of Lisa Szopinski. A hearing was conducted on June 10, 2014, in Juneau, Wisconsin. The proceedings were not transcribed. At the conclusion of the evidentiary hearing, the parties made closing arguments and the record was closed.

BACKGROUND AND FACTS

Lisa Szopinski was employed by Dodge County in the Clearview Nursing Home (hereinafter "Clearview") as a certified nursing assistant (CNA) for approximately 17 years prior to her discharge. Over the course of her employment, Szopinski had a work history which included a number of disciplinary incidents. Most were related to absenteeism and are unrelated to the matter underlying this dispute. On January 9, 2004, Szopinski received discipline for unsatisfactory performance relative to feeding a resident. On July 29, 2008, Szopinski was suspended for unsatisfactory performance, arising out of a resident transfer. On July 31, 2012,

Szopinski was counseled for failing to promptly notify a supervisor that a resident had slid out of his wheelchair.

As a CNA, Szopinski was assigned to provide care to three Clearview residents who had suffered brain injuries. The incident leading to the termination occurred on September 29, 2013. During the course her shift, a resident assigned to Szopinski was incontinent.

Coworkers reported that Szopinski reacted by putting a pad on the floor to soak up the urine. It was reported that she then asked the wheelchair bound resident to mop the floor. CK, a licensed practical nurse (LPN), reported that she indicated "No" to Szopinski, and that Szopinski replied by holding up a finger, as if to indicate that CK should wait, and indicated to CK, "I'll let you know." The reaction allowed the resident to continue to mop. Two other coworkers indicated that Szopinski's behavior was scolding toward the resident. Scolding was described as an accusatory tone of voice and critical comments, such as "this isn't funny, why are you laughing." Szopinski was described as talking quietly. There were other residents in the dining area where this occurred.

Szopinski finished cleaning the floor and took the resident to be cleaned and changed. This process took about ten to fifteen minutes.

The coworkers provided statements which were reduced to writing. Those statements were made a part of the record. The individuals who provided the statements did not testify.

Szopinski did testify. Her testimony mirrored the statement she wrote in the submission of her grievance. That grievance consisted of the following:

The name and position of the employee filing:

Lisa Szopinski

Certified Nursing Assistant

Statement of the issue involved:

I feel that I was unfairly terminated.

Relief sought:

I am asking Clearview to be "reinstated" for the discipline noted.

Date of the event giving rise to the grievance:

An incident that occurred on September 29, 2013, but not reported until September 30, 2013.

Facts supporting the grievance:

I feel that I was unfairly terminated, because I did the best that I could to handle a complicated situation. I observed a situation that needed attention immediately and made staff members L and CK aware of the fact that the participant urinated on the floor and told them to "be careful" and then proceeded by pointing down to the urine on the floor behind them underneath the participant. L responded by saying, "I can't take care of him right now I have to take the smoker out." Once she told me that I got on the walkie talkie and asked to see if anyone else could help and I received no response. Right before L took the smoker out I asked her to stay for a minute and watch so I could go grab floor cleaner and a mop. In the last meeting between LK, JK, JR, and AZ, JK asked if I had "enough time to change him and clean the area up later?" First of all, I would need at least one other staff member[']s help to change the participant in need and that would take at a minimum of 10 minutes for thorough care of the participant. Second of all, there were 2 participants within arm's length of me at the time and there were no staff available to stand by them since L took the smoker out and CK was passing medicine so leaving them all alone and changing the participant was not even an option. So since I was left alone with 3 total participants I went over and grabbed the other 2 participants and brought them over to the participant that needed help. At that time I talked with the participant and asked, "What's going on?" because this happened at lunch also. The participant was chuckling as he said, "I had to piss." I then told him, "All you have to do is ask" because CK (LPN) and I were both there. I then said, "Well we will have to get that cleaned up so no one will slip and fall." So I proceeded (sic) by backing the participant up next to me and the 2 other participants and sprayed the floor with floor cleaner. While I was doing that I had asked him to hold the mop, and I also asked him if he wanted to give the mop a couple swipes. He said, "Sure" and chuckled. Now my question at this time is, if A was able to hear and observe the difficult situation that I was in why was she unable to lend a hand and assist me? Why was I the only one trying to help or trying to get help for the participant? It was pretty obvious that this situation needed to get taken care of immediately and I was the only one who was willing to help the participant at that time.

Identity of the policy, procedure, or rule that is being challenged:

"Residents Rights and Clearview Standard of Care". Dodge County Policy and Procedure #105 "Discipline" "and any other policy that may apply".

Steps taken so far:

I have talked to JK to inform her that I was starting the grievance process on the phone on October 9, 2013, and then sent her an e-mail on October 9, 2013 to try and get my job back. I was also called by JK on October 10, 2013 to come in for a meeting on October 11, 2013 with JK, JR, LK and AZ as this same group was present on my termination day which was October 2, 2013. So now proceeding with step 2 in the grievance process [this] letter is being e-mailed to Jane Hooper, Administrator and JK, Unit Coordinator for CBIC on October 16, 2013.

Reason why the actions of the supervisor should be overturned:

I do not feel like it is fair to place all the blame on me for what happened during this incident. I feel I was put in a complicated situation and I tried my best to seek help and there was just not enough staff available at the time. I already volunteered to stay 6 hours extra to help assist the P.M. shift and they pulled 1 staff from where I was working to another unit. I also believe that staff need to know that if a problem comes up as serious as this incident we should have worked together to figure out how to get him changed. Instead of taking the smoker out immediately we could have explained to the smoker that it would be a little bit before he can go smoke, but reassure him that we will get him out for his smoke break. I personally feel that after 18 years of experience at Cleaview, (sic) and 16 of those years working with participants suffering from traumatic brain injuries that it is necessary for our staff to work as a team to provide participants with the best care possible. "My termination was arbitrary and capricious".

Lisa M. Szopinski CNA

October 16, 2013

The grievance was denied by the following letter:

October 21, 2013

Lisa Szopinski
303 Carroll Street
Beaver Dam, WI 53916

Dear Ms. Szopinski,

I am in receipt of your grievance and have reviewed it. I find that you did not follow the required procedures and format detailed in Policy #109 – Grievance Procedure. It is my understanding that you were given a copy of this policy when you met with JK, LK, JR and AZ on October 11, 2013. In that policy it states that you must submit a signed grievance. Additionally, you were advised in the letter given to you by JR at that meeting that if you submitted a grievance it must be signed. Despite all of this, you chose to submit a grievance by e-mail rather than submitting a signed document.

As stated in the policy, failure to submit a grievance in a timely fashion or to follow the procedures outlined in the policy is cause for dismissing the grievance.

Thank you for your understanding in this matter.

Sincerely,

Jane E. Hooper
Administrator

Cc: JK
JR
file

ISSUES

The County believes the issues for decision are as follows:

1. Must the grievance be dismissed because Lisa Szopinski did not comply with the policy requiring that the employee must actually sign the grievance?
2. Was the County's action in discharging the grievant done in an arbitrary and capricious manner?

Szopinski disagrees that the first issue is presented in this proceeding. She stipulates that the second issue is appropriate for decision.

RELEVANT PROVISIONS OF THE GRIEVANCE PROCEDURE

Policy # 109	Approval Date: 11/15/11
Policy Title GRIEVANCE PROCEDURE	Effective Date: 01/01/12
	Revision Date(s): None

This policy is intended to comply with Section 66.0509(1m), Wis. Stats., and provides a grievance procedure addressing issues concerning workplace safety, discipline and termination. This policy applies to all employees covered under Section 66.0509(1m), Wis. Stats., other than law enforcement employees subject to Section 59.26(8) or Chapter 63, Wis. Stats. An employee may appeal any level of discipline under this grievance procedure. For purposes of this policy, the following definitions apply:

* * *

2. Employee Discipline. "Employee discipline" includes all levels of progressive discipline, but shall not include the following items:

* * *

3. Employee Termination. "Employee termination" shall include action taken by the employer to terminate an individual's employment for disciplinary or quality of performance reasons, but shall not include the following personnel actions:

* * *

5. Grievant. The individual filing the grievance or appeal personally affected by the discipline, termination or workplace safety matters. A grievant is the only person who may file a grievance. The issues related to any grievance must relate to issues personal to the grievant filing the grievance and may not relate to matters affecting other parties.

* * *

Grievance Format

Any written grievance filed under this policy must contain the following information:

- The name and position of the employee filing it,
- A statement of the issue involved,
- A statement of the relief sought,
- A detailed explanation of the facts supporting the grievance,
- Documentation related to the grievance in possession of the grievant,
- The date(s) the event(s) giving rise to the grievance took place,
- The identities of the persons involved,
- The identity of the policy, procedure or rule that is being challenged,
- The steps the employee has taken to review the matter, either orally or in writing, with the employee's supervisor,
- All reasons why the actions of the supervisor should be overturned, if applicable, and
- The employee's signature and the date.

A grievance alleging a workplace safety issue shall also identify the workplace rules allegedly violated, if applicable.

By signing the grievance, the employee is declaring under penalty of law that the statements contained in a grievance are true and correct to the employee's belief. Any employee who files a frivolous grievance is subject to disciplinary action.

If a timely filed grievance is missing information or is incomplete it shall be (sic) not be considered and the grievant shall be notified of this determination within two (2) working days of receipt by the County.

Steps of the Grievance Procedure

Employees should first discuss complaints or questions with their immediate supervisor. Every reasonable effort should be made by supervisors and employees to resolve any questions, problems or misunderstandings that have arisen before filing a grievance.

Before Filing A Grievance – Verbal Grievance and Dispute Resolution. Within five (5) business days of the termination, employee discipline or actual or reasonable knowledge of the workplace safety issue, and prior to filing a written grievance, the grievant must discuss the dispute with the supervisor who made the decision. The supervisor and employee must informally attempt to resolve the dispute. The supervisor shall notify the department head of this meeting and the results of the meeting. If the dispute resolution involved the department head, the department head shall

notify the County Administrator of this meeting and the results of the meeting.

Step 1 – Written Grievance Filed with the Department Head The employee must prepare and file a written grievance with the department head within ten (10) business days of when the employee knows, or should have known, of the events giving rise to the grievance. The department head or his/her designee will investigate the facts giving rise to the grievance and inform the employee of his/her decision, if possible within ten (10) business days of receipt of the grievance. In the event the grievance involves the department head, the employee may initially file the grievance with the County Administrator or his/her designee, who shall conduct the Step 1 investigation.

Step 2 – Review by County Administrator If the grievance is not settled at Step 1, the employee may appeal the grievance to the County Administrator, or his/her designee, within five (5) business days of the receipt of the decision of the department head at Step 1. The appeal shall indicate all reasons why the decision of the department head should be overturned. The County Administrator or his/her designee will review the matter and inform the employee of his/her decision, if possible within ten (10) business days of receipt of the grievance.

Step 3 – Impartial Hearing Officer If the grievance is not settled at Step 2, the employee may request in writing, within five (5) business days following receipt of the County Administrator's decision, a request for written review by an impartial hearing officer. The County shall select the impartial hearing officer. The hearing officer shall not be a County employee.

The impartial hearing officer shall have the sole authority to determine whether the impartial hearing officer has jurisdiction, which may be subject to review by the governmental body.

In all cases, the grievant shall have the burden of proof to support the grievance.

This process does not involve a hearing before a court of law; thus, the rules of evidence will not be followed. Depending on the issue involved, the impartial hearing officer will determine whether a hearing is necessary, or whether the case may be decided based on a submission of written documents. The impartial hearing examiner may admit all evidence that the impartial hearing officer determines is relevant and may exclude immaterial, irrelevant or unduly repetitious testimony or evidence. After the employee and the County have finished introducing evidence, the impartial

hearing officer shall close the hearing. Prior to the close of the hearing, the County may request the impartial hearing officer for a determination that the grievance was frivolous. The parties shall have no right to file briefs or position statements following the hearing.

The impartial hearing officer shall have the power to issue a response to the Grievance. The impartial hearing officer shall prepare a written decision. The impartial hearing officer must answer the following question: Based on the preponderance of the evidence presented, has the Grievant proven the decision of the Administration was arbitrary or capricious? The impartial hearing officer shall have no power to issue any remedy, but the impartial hearing officer may recommend a remedy. Remedial authority shall be subject to the determination and approval of the County Board, and shall be addressed by the County Board in the event the grievance is sustained.

Step 4 – Review by the Governing Body If the grievance is not resolved after Step 3, the employee or the County Administrator shall request within five (5) business days of receipt of the written decision from the hearing officer a written review by the County Board. ...

Timeliness

An employee may not advance or file a grievance outside of the time limits set forth above. If the employee fails to meet the deadlines set forth above, the grievance will be considered resolved. If it is impossible to comply with the deadlines due to meeting notice requirements or meeting preparation, the grievance will be reviewed at the next possible meeting date. The failure of the grievant to follow the timelines and other requirements of this policy shall result in the impartial hearing officer not having jurisdiction over this matter and shall terminate the grievance procedure for that grievance.

Representation

The grievant shall have the right to representation at Step 3 of the grievance procedure at the grievant's expense. The representative shall not be a material witness to the dispute. If the grievant intends to have representation, the grievant will notify the County at the time the grievant appeals the Step 2 decision, and shall identify the representative.

Processing of the Grievance

An employee must process his/her grievance outside of normal work hours, unless the employee elects to use accrued paid time (vacation, comp time etc.) in order to be paid for time spent

processing his/her grievance through the various steps of the grievance procedure.

Exclusive Remedy

This procedure constitutes the exclusive process for the redress of any employee grievances as defined herein. However, nothing in this grievance procedure shall prevent any employee from addressing concerns regarding matters not subject to the grievance procedure with the administration, and employees are encouraged to do so. Matters not subject to the grievance procedure that are raised by employees shall be considered by County representatives who have final authority, subject to any applicable County policy or directive, to resolve the matter.

DISCUSSION

The core facts surrounding this matter are not in dispute. Certain facts, or nuances of facts, are disputed. Two coworkers reported that Szopinski asked or directed the resident to mop up the urine. Szopinski indicated that she asked the resident to hold the mop, and, if inclined, to take a couple of swipes.

Coworkers indicated that Szopinski scolded the resident. The accusation was to her tone of voice and accusatory demeanor. There was no indication that Szopinski was loud or made a deliberate effort to raise her voice. Szopinski denies that she was scolding the resident or that she engaged in demeaning behavior. There is no indication that Szopinski's comments were broadcast to all in the room. However, two individuals did indicate that they heard the remarks.

The resident sat for ten to fifteen minutes before he was taken to be cleaned up. It is a fair inference from the termination letter that the delay was deemed inappropriate. Szopinski indicated that she was left to handle the matter, care for two other residents, and had no help.

The initial question presented, raised in the grievance answer, is whether the grievance must be dismissed because it is not signed. The grievance was filed on October 16, 2013. The answer denying the grievance because it was not signed was dated October 21, 2013. The grievance procedure paragraph, "Grievance Format," which requires the employee's signature, also provides:

If a timely filed grievance is missing information or is incomplete it shall be (sic) not be considered and the grievant shall be notified of this determination within two (2) working days of receipt by the County.

October 16, 2013 was a Wednesday. October 21, 2013 was a Monday. The grievance was filed timely under the grievance procedure. It does not appear that Szopinski was notified of the missing signature within two working days. Notwithstanding, the County would have the grievance dismissed for non-compliance with the grievance procedure.

The grievance procedure is promulgated per § 66.0509, Wis. Stats. The statute requires that “employee termination” be covered. The statute further requires:

1. A written document specifying the process that a grievant and an employer must follow.
2. A hearing before an impartial hearing officer.

* * *

§ 66.0509(1)(1m)(d), Wis. Stats.

It is my reading of the statutory grievance procedure that the legislature intended that terminations go through a grievance procedure that includes a hearing before an impartial hearing officer. The County has established a detailed grievance procedure, and takes the position that any violation/non-compliance with any substantive or ministerial element of the grievance procedure amounts to a waiver of the employee’s right to have the termination heard by the impartial hearing officer.

I think this is an extreme and unwarranted view. The grievance procedure was created per the statute. Under the statute, the grievance procedure creates a process “that a grievant and an employer must follow.” Here, Szopinski set forth a claim in great detail, which followed the elements of the grievance procedure. Szopinski laid out the entirety of her claim and its history and basis before the County. She supplied an electronic and not a manual signature. The grievance was filed on time. The County has suffered no prejudice. This is a gotcha defense. The statute contemplates a hearing before an impartial hearing officer. The statute also directs the creation of a grievance procedure. The grievance procedure should form an orderly process to permit a matter to be considered locally, and if the matter cannot be resolved, heard by an impartial hearing officer. The grievance procedure should not be a procedural minefield that frustrates access to the hearing.

I believe Szopinski filed a timely grievance. I believe she submitted it with an electronic signature and that the signature satisfies the requirements of the grievance procedure. I do not believe the County satisfied its grievance procedure obligation to notify Szopinski of the perceived defect within two working days, and, thus, I believe the County is estopped from raising the defense.

The parties stipulated the substantive issue as described. Additionally, the grievance procedure directs that I answer the following question:

Based on the preponderance of the evidence presented, has the Grievant proven the decision of the Administration was arbitrary or capricious?

All evidence in the record indicates that Szopinski handed the resident a mop. Thereafter, she either invited him to take a couple of swipes or she asked or directed him to mop. The resident is a brain injured, wheelchair bound individual. Szopinski is a caregiver. I think she influenced him to mop. The cleanup activity is not within the care plan of the resident.

The coworker reports indicate that someone said “no” to her as she directed the resident to mop. Her reaction was to hold up a cautionary finger to acknowledge the message and to convey that the LPN should wait. Szopinski acknowledged the exchange in her testimony. The essence of this exchange was to highlight that having the resident mop was a bad idea and notwithstanding this caution Szopinski intended for the mopping to continue.

I do not believe the evidence supports a conclusion that Szopinski scolded the resident. Szopinski testified that she did not do so. The County offered statements taken from others who were present to the effect that she did. Those individuals were not subject to examination or cross-examination. The only first person witness to the event who testified was Szopinski. The preponderance of the evidence was that Szopinski did not scold the resident.

The record indicates that the resident sat for ten to fifteen minutes before he was taken to be cleaned and changed. Szopinski testified that she sought help to no avail. She further testified that she had three residents to care for and a mess to clean. There was evidence in the record that there were other employees present. Szopinski’s testimony that she sought help and no one would assist is not contradicted in the record. I believe that a preponderance of the evidence indicates that there was no one willing to assist Szopinski. I do not believe the delay in getting the resident cleaned and changed can be attributed to her.

Szopinski gave a mop to the resident and caused him to mop up his urine. She persisted even after a coworker signaled “no.” I believe Szopinski’s behavior in this regard was inappropriate.

The question in this proceeding is not whether or not there was just cause for discharge.

DECISION

The decision to terminate Lisa Szopinski was based, at least in part, on her having caused the resident to mop up after himself. That action was inappropriate. The decision to terminate was therefore neither arbitrary nor capricious.

Dated at Madison, Wisconsin, this 10th day of February 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan, Impartial Hearing Officer