

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 GENERAL TEAMSTERS UNION LOCAL 662 : Case 2
 : No. 46519
 and : A-4856
 :
 CLAIREMONT NURSING FACILITY :
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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, by Mr. Scott D. Soldon, appearing on behalf of the Union.
 Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin, by Mr. Stevens L. Riley, appearing on behalf of the Employer.

ARBITRATION AWARD

General Teamsters Local 662, hereafter the Union, and the Clairemont Nursing Facility, hereafter the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereafter Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On December 4, 1991, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held in Eau Claire, Wisconsin on January 14, 1992. The hearing was not transcribed. The record was closed on February 11, 1992, upon receipt of posthearing written argument.

ISSUE:

The parties stipulated to the following statement of the issue:

Did the Employer violate the collective bargaining agreement by suspending the grievant for three days on September 10, 12 and 13, 1991?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE 11

DISCIPLINE AND DISCHARGE

Section 1. Basis. No employee shall be disciplined or discharged except for just cause. Employees shall have the right to be represented by a Union representative in connection with any investigatory meeting with an Employer representative regarding disciplinary action.

Section 2. Records. Personnel records, including warnings and disciplinary measures taken, shall be dated. Employees may request to see their own personnel record and reasonable access to the same

shall be made available. When authorized by the employee, the Union shall be afforded the same opportunity.

Section 3. Disciplinary Procedure. The progression of disciplinary action normally is 1) oral, 2) written, 3) suspension, 4) dismissal. However, this should not be interpreted that this sequence is necessary in all cases, as the degree of discipline will depend on the severity of the offense. Disciplinary actions shall be maintained in effect for eighteen (18) months during which time a repetition of the same or a similarly serious offense can result in more serious disciplinary action. In all such cases the employee shall have the right to recourse to the grievance procedure.

Section 4. Notice. A suspension or discharge shall be effected in writing by the Employer, with copies delivered to the employee and the Union steward. Grievances protesting a suspension or discharge must be filed within seven (7) days from delivery of the written notice or the right to grieve the same shall be forfeited. Grievances filed as a result of a suspension shall commence at Step 3 of the grievance procedure and grievances filed as a result of a discharge shall commence at Step 4. By mutual agreement of the parties, Step 3 can be waived and the parties can proceed directly to arbitration.

BACKGROUND

Nancy Henke, hereafter the Grievant, is employed full-time as a Nursing Assistant at the Clairemont Nursing Facility and has been so employed for 12 years. On September 9, 1991, the Grievant was suspended for three days, i.e., September 10, 12, and 13, 1991, for neglecting residents' needs. The Employee Warning which notified the Grievant of the three day suspension stated, inter alia, as follows:

On 9-7-91 at 12:05 p.m. a witness overheard Nancy telling Resident in 302 "you don't need to go to the bathroom - you can wait until after dinner." This remark was made after resident asked to be helped to the bathroom.

The Employee Warning form contained a section entitled "Employee Comments". In this section, the Grievant stated as follows:

Muriel Torrey was in bed all week - and confused & ill -didn't work that hall.

At hearing, the Grievant stated that she did not refuse to assist Muriel Torrey, hereafter M.T., with any bathroom needs on September 7, 1991.

On September 10, 1991, a grievance was filed alleging that the Employer suspended the Grievant without just cause in violation of Article 11. The grievance was denied at all steps and, thereafter, submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Employer

Deb Sykora, Food Services Supervisor, is sufficiently acquainted with the Grievant to recognize her. According to Ms. Sykora, she overheard the Grievant's refusal to help patient M.T. to the bathroom. Ms. Sykora, who was not responsible for the supervision of the Grievant, promptly reported the incident to the Assistant Administrator, leaving him to make the call as to what, if anything, should be done. While Ms. Sykora had no motive for being untruthful, the Grievant is obviously motivated by desire to escape the disciplinary consequences of her action. Ms. Sykora's testimony is entitled to be credited herein.

When the Grievant was confronted with the facts as witnessed by Ms. Sykora, her initial response to the supervisor was that she had no comment regarding the charge "because it wouldn't do any good." When her supervisors declined to let the matter rest and pressed her for a response, she wrote the following comment: "M.T. was in bed all week and confused and ill - didn't work that hall."

If the facts were as the Grievant testified at hearing, the natural response would have been to deny that she was in M.T.'s room at the time alleged and to deny that the incident described by Ms. Sykora ever took place. The Grievant, who was given two separate opportunities to deny the charge, did not do so. Her statement at the hearing, denying the act, deserves no credence whatsoever.

The Grievant's statement that M.T. was in bed all weekend and her testimony that M.T. was confined to bed all day on Saturday, September 7, is contradicted by the nurses notes which contain the statement that on September 7, 1991, M.T. was "anxious and wanting to get out of the W/C."

There is no testimony that any witness consulted a clock, so all times must be considered approximate. Acceptance of the fact that the Grievant assisted Mr. Sires with the oxygen tank about Noon on September 7, does not effectively controvert or rebut the unequivocal testimony of Ms. Sykora, nor does it provide the Grievant with an alibi.

The Grievant did not dispute the facts involved in any of the pre-September 7 disciplinary actions. They were, in effect, conceded. The Employer had just cause for suspending the Grievant and a suspension did not violate the collective bargaining agreement. The grievance should be dismissed.

Union

Supervisor Sykora would have the Arbitrator believe that the Grievant committed what the supervisor believed to be an offense in the presence of the supervisor; that she did it openly and flagrantly; and that the supervisor did nothing about it, but instead retreated to find another supervisor. The Grievant denies the allegation. The Grievant's version of events in question is more compelling than that offered by Supervisor Sykora.

The credible facts in this case do not indicate that the Grievant committed any act of "resident abuse." M.T., and the Grievant were very friendly. As confirmed by the Grievant and fellow employe Ruth Garr, M.T. was one of the Grievant's very favorite patients. According to Ms. Garr and the Grievant, M.T. could not be taken to the bathroom at the time of this incident

but rather, used a bedpan. M.T., who expired prior to the arbitration hearing in this case and therefore could not be called as a witness, was seriously ill, confused, disoriented and primarily confined to bed rest.

The Grievant flatly denies being in M.T.'s room at or near 12:05 p.m.. The sequence of events does not put the Grievant in M.T.'s room at the time in question. Following her lunch break, the Grievant punched back in at approximately 11:58 a.m.. It took her approximately three minutes to return to her work area, where she picked up a cart and began performing work. Thereafter, the Grievant left the dietary cart, went to the area where the liquid oxygen was kept and assisted a fellow employe who was filling an oxygen tank. It took a considerable amount of time to fill the tank. The Grievant returned to the work where the meals were being served substantially after 12:05 p.m..

Assuming arguendo that the Grievant did what is alleged, it does not amount to "resident abuse." Telling a confused, disoriented and severely ill woman that she "does not need to go to the bathroom" is not an offense. The Employer has not shown that any direct consequences resulted such as M.T. having an accident or other aides being compelled to take her to the bathroom, etc.. Since there was no intent to harm the patient and no consequences resulted, the suspension is a severe overreaction.

Where employers fail to conduct proper investigations prior to imposing severe punishment, arbitrators have not hesitated to overturn the penalty imposed. The Employer gave the Grievant no opportunity to rebut the statements made against her and failed to conduct a reasonable, fair and impartial investigation prior to deciding to suspend her.

The Employer's failure to produce the accusing witness at the investigatory interview, during the grievance process or at any time prior to rebuttal in the arbitration hearing is a violation of the Grievant's fundamental right to due process. Given the Employer's complete failure to afford any due process to the Grievant, the suspension should be overturned and the Grievant should be made whole for all losses sustained.

The imposition of a three day suspension in the circumstances of this case would eviscerate the just cause provision of this contract. Assuming arguendo that the Grievant committed some offense, she did not deserve a three day suspension.

DISCUSSION

At hearing, Deb Sykora, a dietary supervisor, stated that at "about 12:05 p.m." on September 7, 1991, she was in Hall 300, standing at the entrance to M.T.'s room. Sykora further stated that, at that time, she observed the Grievant in M.T.'s room, pushing M.T. in a wheel chair. Sykora recalled that, as the chair passed by the bathroom, M.T. stated that she had to go to the bathroom and that the Grievant responded that M.T. did not need to go to the bathroom at that time and that M.T. could wait until after dinner.

According to Sykora, she was shocked by the Grievant's response because all employes had been told to take residents to the bathroom immediately upon request. Sykora stated that she did not say anything to the Grievant because she was not the Grievant's supervisor, but rather, went looking for one of the nurses. Sykora recalled that when she could not find a nurse, she went to the office of the Assistant Administrator, Jim Beck, who told Sykora to write-up the incident. On September 8, 1991, Sykora prepared the following written statement:

On 9-7-91 at approximately 12:05 PM as I was in the hall helping pass dinner trays I overheard Nancy Henke telling Murriel Torrey "she didn't need to go to the bathroom she could wait until after dinner."

At hearing, the Grievant stated that she did not recall having any contact with M.T. around noon of September 7, 1991 or refusing M.T. help at any time on that day. The Grievant recalled that on September 7, 1991, she punched in from lunch at 11:58, went to her assigned unit and began to pass trays. The Grievant further recalled that, thereafter, Stacy Douglas requested the Grievant to assist another Nursing Assistant, Jim Sires, in filling an oxygen tank. The Grievant recalls that it took five to six minutes to fill the oxygen tank and that after assisting Sires in the oxygen room, she went to the dining room.

The record does not establish that the Employer obtained any statement from M.T. concerning the events in dispute. 1/ Since M.T. passed away prior to hearing, she was not available to corroborate either version of the events of September 7, 1991. The initial question to be determined is whether the Union is correct when it argues that the Grievant's version of the events is the more credible.

According to the Grievant, she first learned of the September 7, 1991 allegation on September 9, 1991 when she was called to a meeting with Jane Zien, a nursing supervisor, and Rebecca Martin, the Personnel Director. The Grievant recalls that when she entered Martin's office, she received a copy of the employe warning which alleged a violation of "Neglecting Resident's Needs" and which stated, inter alia:

On 9-7-91 @ 12.05 p.m., a witness overheard Nancy telling Resident in 302 "you don't need to go to the bathroom - your can wait until after dinner." This remark was made after resident asked to be helped to bathroom.

The Grievant recalls that, during the meeting with Zien and Martin, she was asked if she wanted to make any comments and that she replied that it probably would not do any good. When she was told to make a comment, the Grievant wrote the following:

Muriel Torrey was in bed all week - and confused & ill - didn't work that hall.

At hearing, the Grievant stated that, during the meeting with Martin and Zien, she did deny the allegation of the "witness". 2/ The Grievant further stated that she did not know why she did not write down the denial.

It is understandable, as the Grievant stated at hearing, that she was upset at the time of the meeting with Martin and Zien. However, the Grievant, who is a Union Steward and a member of the Union committee that bargained the collective bargaining agreement with the Employer, was not too upset to provide

1/ The record is silent as to whether or not the Employer attempted to obtain a statement from M.T. The record does indicate that on September 6, 1991, M.T. complained of feeling weak and that on September 7, 1991, M.T., who was in her nineties, was experiencing increasing confusion.

2/ Neither Zien, nor Martin, testified at hearing.

a written comment to the allegation. The written comment does not contain a denial of the allegation. The failure of the Grievant to specifically deny the allegation when asked to provide a written comment at the time that the Grievant was first confronted with the allegation calls into question the veracity of the Grievant's subsequent denial at hearing.

At hearing, Beck, who was no longer employed at Clairmont, stated that Sykora came to his office shortly after 12:05 p.m. on September 7, 1991. Beck confirmed that he had requested Sykora to write-up the incident. According to Beck, Sykora's written statement of September 8, 1991, was consistent with her verbal statements on September 7, 1991, except that on September 7, 1991, Beck did not know the name of the employe who had been observed by Sykora. Unlike the Grievant, Sykora's testimony at hearing concerning the events of September 7, 1991 is consistent with a prior written statement.

On September 7, 1991, the Grievant was assigned to work in the 100 hall and not the 300 hall. Given the testimony of Union Witness Ruth Garr that the Grievant and M.T. idolized one another, as well as the Grievant's testimony that she visited M.T. every day, it is not implausible that the Grievant would be in M.T.'s room even though she was not assigned to work the 300 hall which contained M.T.'s room.

At hearing, Stacy Douglas, a Unit Service Aide and Union Steward, recalled that the Grievant was at the dining room door at "about noon" on September 7, 1991. Since the dining room is located in the 300 Hall, near M.T.'s room, Douglas's testimony places the Grievant in the vicinity of M.T.'s room at the approximate time that Sykora claims to have seen the Grievant in M.T.'s room. At hearing, the Grievant acknowledged that she would have been in the 300 hall to pass noon trays.

Douglas confirmed that, after lunch on September 7, 1991, she requested the Grievant to assist Sires in the oxygen room. Douglas, who was on her way to the laundry room when she called out to the Grievant, stated that she next saw the Grievant at 12:15 or 12:20, as the Grievant and Sires were coming out of the oxygen room. Crediting the Grievant's testimony that it took five or six minutes to fill the oxygen tanks, Douglas' testimony indicates that the Grievant entered the oxygen room after 12:05 p.m.

As the Employer argues, there is no evidence that any of the witnesses had consulted a clock at the time of the alleged incident and, therefore, all times must be considered to be approximate. Neither the Grievant's testimony, nor any other record evidence, conclusively establishes that the Grievant could not have been in MT's room at approximately 12:05 p.m.

It is not evident that Sykora had any animosity towards the Grievant, nor is it evident that Sykora had any other reason to fabricate her testimony concerning the events of September 7, 1991. The record does not provide any basis to conclude that Sykora incorrectly identified the Grievant as the Nursing Assistant who was in M.T.'s room.

Upon consideration of the record evidence, the undersigned credits the testimony of Deb Sykora and finds that at approximately 12:05 p.m. on September 7, 1991, the Grievant was in M.T.'s room; that M.T. told the Grievant that M.T. had to go to the bathroom; and that the Grievant told M.T. that M.T. did not need to go to the bathroom and that M.T. could wait until after dinner. Having credited Sykora's version of events, the undersigned turns to the question of whether the Employer's decision to suspend the Grievant for three days for "Neglecting Resident's Needs" conforms to the requirements of the parties' collective bargaining agreement.

The provisions which expressly govern the discipline and discharge of employes are contained in Article 11 of the parties' collective bargaining agreement. Article 11, Section 1, provides, inter alia, that "No employee shall be disciplined or discharged except for just cause." Article 11, Section 3, provides a normal progression of disciplinary action involving 1) oral, 2) written, 3) suspension, 4) dismissal, but recognizes that this sequence is not necessary in all cases because "the degree of discipline will depend on the severity of the offense".

According to Sykora, she was shocked by the Grievant's response because all employes had been told to take residents to the bathroom immediately upon request. Sykora, however, was a dietary supervisor and not a nursing supervisor. As Sykora stated at hearing, she did not know much about the nursing department.

According to Beck, he and Personnel Director Martin made the decision to suspend the Grievant. When questioned concerning the reasons for the discipline, Beck did not state that the Grievant was disciplined for failing to follow a work rule which required all employes to take residents to the bathroom immediately upon the request of the patient. According to Beck, his concern in imposing the discipline was twofold. First, that the failure to respond to a resident's request to use the bathroom could have an adverse impact on the patient. Secondly, other residents who learn of an employe's failure to respond to a resident's request to use the bathroom may become concerned that their own needs may not be met.

Following his conversation with Sykora on September 7, 1991, Beck contacted the nursing supervisor to check on M.T. Beck did not follow-up this contact to ascertain whether M.T. actually had to go to the bathroom. Neither Beck's testimony, nor any other record evidence, demonstrates that the Grievant was wrong in her conclusion that M.T. did not need to go to the bathroom.

As the Union argues, on the date in question, M.T. was ill and experiencing confusion. Statements of confused patients are not necessarily reliable indicators of the patient's condition. Assuming arguendo, that other residents were aware of the Grievant's refusal of M.T.'s request to go to the bathroom, the undersigned is not persuaded that M.T.'s refusal would provide any resident with a reasonable basis to conclude that their own needs would not be met.

Neither Sykora's testimony, nor any other record evidence, establishes that, on September 7, 1991, the Grievant was subject to a well-established and uniformly applied work rule that, regardless of the circumstances, all residents are to be taken to the bathroom upon request. Absent evidence of such a work rule, the reasonableness of the Grievant's conduct must be evaluated on its particular facts. The record evidence does not establish that the Grievant acted unreasonably in concluding that M.T. did not need to go to the bathroom. Accordingly, the undersigned finds that the Employer did not have just cause to

discipline the Grievant. Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer violated the collective bargaining agreement by suspending the grievant for three days on September 10, 12 and 13, 1991.
2. The Employer is to immediately remove the three day suspension from the Grievant's personnel file and make the Grievant whole for all wages and benefits which were lost as a result of the suspension.

Dated at Madison, Wisconsin this 7th day of April, 1992.

By _____
Coleen A. Burns, Arbitrator