

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEBOYGAN COUNTY INSTITUTIONS
EMPLOYEES, LOCAL 2427, AFSCME, AFL-CIO

and

SHEBOYGAN COUNTY

Case 250
No. 51606
MA-8669

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
appearing on behalf of the Union.

Ms. Louella Conway, Sheboygan County Personnel Director, appearing on behalf of the
County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer, respectively, were signatories to a 1992-1994 collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. The undersigned conducted grievance mediation on December 1, 1994, but the dispute was not resolved. A hearing was held on January 19, 1995, in Sheboygan, Wisconsin. The hearing was not transcribed. Afterwards, the parties filed briefs by March 20, 1995, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the labor agreement when it laid off Lynn Kono on November 17, 1993? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1992-1994 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. . . .

. . .

ARTICLE 27

SENIORITY

It shall be the policy of the institutions to recognize seniority. (As used herein the term "seniority" shall mean the period of continuous employment from the last date of hiring.)

1. Lay-Offs: If a reduction of employee personnel is necessary, the last person hired shall be the first person laid off and the last person laid off shall be the first person recalled. The employee(s) exercising a bump must be capable of performing the job without retraining and only with familiarization.

FACTS

The County operates a nursing home known as Sunny Ridge in Sheboygan, Wisconsin. Sunny Ridge is a large skilled care nursing facility with about 400 beds. It is licensed by the State and is subject to State regulations.

The County employs Certified Nursing Assistants, hereinafter CNAs, to assist the residents with their daily living tasks such as eating, dressing, toileting and bathing. In performing these

tasks, the CNAs do a lot of lifting. Specifically, they lift and turn residents from beds, toilets, etc. They perform these lifts daily. Some of these lifts are performed unassisted, meaning that the CNA does it by him or herself. Other lifts are performed assisted, meaning that several aides work together to lift a resident. If a CNA is unable to do the requisite lifting, the other CNAs have to do more than their share of the lifting.

Attached to the CNA job description is another document entitled "Working Conditions and Physical Standards." As the title indicates, this document specifies what physical abilities are required of CNAs. That document provides in pertinent part:

PHYSICAL ABILITIES REQUIREMENTS:

The following physical abilities may be required for this job at any given time:

...

- lifting 25-50 lbs. from floor to waist level, 2 to 3 feet vertically, 34-66% of the time
- pushing/pulling up to and over 90 lbs. on wheels of various sizes, on a variety of terrains 34-66% of the time
- carrying 25-50 lbs. less than 25 feet, 34-66% of the time

...

Although required only occasionally (i.e., less than 33% of work time), the following physical abilities are VERY IMPORTANT to be able to perform the essential functions of the job: (emphasis in original)

...

- lifting 50-75 lbs. from floor to waist level, 2-3 feet vertically

The lifting requirements specified above have been in place since at least 1990. The Employer has determined that these lifting requirements are necessary to protect employes and residents from injury.

Grievant Lynn Kono was hired as a CNA at Sunny Ridge in October, 1986. She worked in that capacity until November, 1993. By all accounts, she was a very good CNA. She enjoyed the residents and was well liked by them. She was not the least senior CNA.

On August 30, 1992, Kono suffered a work-related injury when she strained her back while turning a resident in bed. She was off work due to this back injury about six months. During that time she received worker's compensation, specifically temporary/total disability. On March 2, 1993, Kono's doctor released her to return to work in a light duty capacity. Kono's doctor also imposed a weight restriction on her of 20 pounds, meaning that she was not to lift more than 20 pounds. Kono then returned to work and worked on light duty until March 31, 1993, at which time she reinjured her back. This reinjury to her back was not caused by a specific incident. Instead, Kono's back just started to hurt again even though she was working within the 20 pound weight restriction imposed by her doctor. Kono was off work due to this reinjury for about two and one-half months. During that time she again received worker's compensation. On June 14, 1993, Kono's doctor released her to return to work again. This time Kono's physician imposed a weight restriction of 50 pounds, meaning that she was not to lift more than 50 pounds. When Kono returned to work on June 15, 1993, her supervisor drafted a new job description for her which contained modified duties. This document, which Kono signed, indicated that her modified duties were as follows:

DESCRIPTION OF MODIFIED DUTIES TO BE PERFORMED:

Update 6-15-93 of Modified duties

- Lift 50 lbs. maximum with frequent lifting and/or carrying objects weighing up to 25 lbs.
- Stand/walk 6-8 hrs.
- Sit 6-8 hrs.
- May use hands for repetitive single grasping, fine manipulation, pushing & pulling
- May use foot/feet for repetitive movement as in operating foot controls
- May partially sustained bend
- May twist, squat occasionally
- May climb, reach frequently

EXCLUSIONS: May not lift over 50 lbs.

Employee will be responsible to work within these RESTRICTIONS, AND TO REQUEST ASSISTANCE FROM THE APPROPRIATE SUPERVISOR, AND / OR AVAILABLE STAFF FOR DUTIES BEYOND CAPABILITIES.

EMPLOYEE SIGNATURE: Lynn Kono /s/ **DATE:** 6/15/93

SUPERVISOR SIGNATURE: K. Kuhfuss RN /s/ DATE: 6/15/93

Insofar as the record shows, Kono performed the modified duties referenced above from June 15 until November 15, 1993. It is disputed though whether her work during that time frame constituted light duty or regular duty. The Employer contends Kono performed light duty while the Union contends she performed regular duty. The work schedules contained in the record for the time period between June and November, 1993, do not have the letters "LD" (which is used as shorthand for light duty) behind Kono's name.

Sometime in the fall of 1993, Kono's doctor determined that Kono had reached a "plateau" (i.e. end) of healing from her August 30, 1992 back injury and that her back injury was permanent. The doctor then issued a final release and a final medical report. In this report the doctor assigned Kono a permanency rating of 5 percent and imposed a permanent 50 pound weight restriction. The doctor also indicated that Kono was "never to lift over 50 pounds alone and to be careful with body mechanics."

Following this determination by Kono's doctor that Kono's back injury was permanent, Kono received a cash settlement from the County's worker's compensation insurance carrier for her 5 percent permanent partial back disability.

In mid-November, 1993, the Employer determined that the permanent restriction placed on Kono by her doctor (namely the restriction that she never lift more than 50 pounds) was below the required lifting standards for the CNA position and that Kono was unable to perform the essential functions of her job as a CNA. It therefore laid her off. The Employer's November 15, 1993 letter to Kono informing her of same stated in pertinent part:

I am writing to inform you that based on the permanent restrictions given to you by Dr. Holtrop you will be placed on lay-off status from your position of Certified Nursing Assistant at Sunny Ridge Nursing Home. The lay-off action is effective 11-17-93.

You will receive periodic notification from Sheboygan County regarding current job vacancies. I encourage you to apply for those positions that you are qualified for, within your physical restrictions.

In February, 1994, Kono grieved her layoff and sought to be placed back in a CNA position. As the grievance was being processed, the Employer raised a timeliness objection to the grievance. However, at the arbitration hearing, the Employer waived its timeliness objection so

that the arbitrator would decide the matter on the merits.

Kono has not worked at Sunny Ridge since November 15, 1993. Sometime in 1994, Kono resumed working for the County in a clerical position. Since then she has worked in a

variety of County clerical positions. She has not had any back problems since working in these clerical positions. Kono was working for the County in a clerical position as of the date of the hearing herein.

POSITIONS OF THE PARTIES

The Union contends the Employer violated the contract when it laid off Kono on November 17, 1993. According to the Union, Kono's layoff was improper. To support this premise, the Union notes at the outset that Kono was not laid off because her job ceased to exist or because she was the least senior employe and a general staff reduction was implemented. Instead, she was laid off because of the permanent 50 pound weight restriction she received from her doctor. In the Union's view, the weight restriction which was imposed on Kono does not constitute a sufficient reason for her layoff. It makes the following arguments in support thereof. First, the Union asserts that Kono's restriction against lifting over 50 pounds is within the CNA job description. That argument is premised on the Union's contention that the physical abilities specified on the attachment to the CNA job description are not mandatory. It notes in this regard that the language says that "the following physical abilities may be required" (emphasis added). The Union argues that since the word "may" is used, it is not a mandatory requirement that CNAs be able to lift more than 50 pounds. Next, the Union asserts that when Kono returned to work in June, 1993, she worked in a regular CNA position, not a light duty position. To support this premise, it notes that the work schedules contained in the record do not contain the letters "LD" (shorthand for light duty) behind Kono's name. The Union submits that if Kono had indeed been on light duty, she would have been designated as such on the schedules. Since she was not so designated on the schedules, the Union argues this proves Kono was not on light duty from June to November, 1993. Third, the Union calls the arbitrator's attention to the fact that the Employer has a light duty policy. The Union implies that Kono could have stayed on light duty rather than be laid off. Finally, the Union argues that Kono has proven she can do the work of a CNA. According to the Union Kono proved this by working from June to November, 1993, with no problems. In the Union's view, Kono should not be kept from being a CNA simply because of possible "what ifs." In order to remedy this alleged contractual breach, the Union asks the arbitrator to rule in Kono's favor, put her back in a CNA job, and make her whole.

The County contends it did not violate the contract when it laid off Kono from her CNA position. In the Employer's view, it acted reasonably in placing Kono on layoff status when her (temporary) restriction against lifting more than 50 pounds became permanent. The Employer argues that once that happened (i.e. that the 50 pound weight restriction became permanent), Kono could no longer perform an essential function of the CNA job as specified in the CNA job description, namely the function that CNAs occasionally lift 50 to 75 pounds. According to the Employer, this permanent 50 pound weight restriction constitutes a justifiable reason for her layoff from a CNA position. It makes the following arguments in support thereof. First, as previously noted, the Employer contends that the CNA job description requires that employes have the ability

to lift between 50 and 75 pounds. It asserts that Kono no longer has that ability because of her permanent 50 pound weight restriction. To support this contention, it cites Kono's own testimony at the hearing that she is "never to lift more than 50 pounds again." Next, the County submits that if Kono were to try to lift more than 50 pounds, she risks injury to both herself and any resident she is trying to lift or move. In this regard, the Employer calls the arbitrator's attention to the fact that it has a legal obligation to ensure the safety of both its residents and its employes, and that if injuries do occur, it faces financial liability for same. Next, the County submits that if it were to allow Kono to return to work as a CNA, this would result in the other CNAs doing more heavy lifting because Kono could not lift more than 50 pounds. In the Employer's view, this is unfair to the other CNAs. Finally, the County argues that arbitral precedent supports its decision to lay off the grievant because she could no longer physically perform an essential function of the CNA job. It therefore requests that the grievance be denied and that Kono not be returned to a CNA position. With regard to the latter point, it notes that since Kono has been working in clerical positions for the County, she has not had any back problems.

DISCUSSION

I begin my analysis with the general premise that in order for an employe to continue holding a particular job, the employe has to be physically able to perform the duties of the job in question without risk to themselves or others. If the employe cannot do so, the Employer can remove the employe from the position in question. At issue here is whether the grievant can still perform all the duties of a CNA. The grievant asserts that she can while the Employer disputes that assertion. According to the Employer, the grievant can no longer perform the heavy lifting involved in the job because of a permanent 50 pound weight restriction resulting from a back injury.

For the purpose of context, my discussion begins with the following overview of Kono's employment history. For the first six years of her employment, Kono was physically able to perform all the duties required of a CNA including the heavy lifting. She performed over and above the bare minimum for the job because she was considered by management to be a superb CNA. Additionally, Kono liked working with the residents and she, in turn, was liked by them. In 1992 though, Kono strained her back while turning a patient. Her back injury was such that she was off work for about six months while her back healed. She received workers' compensation during that period. When she returned to work, she was not physically able to do much lifting because her doctor imposed a temporary 20 pound weight restriction on her. Given this weight restriction, the Employer put her on a light duty assignment whereby she did not have to do the lifting that is normally done by CNAs. Kono worked on light duty for about a month when she reinjured her back again. This time her back injury was such that she was off work for two and one-half months while her back healed. She again received worker's compensation during that period. She then returned to work in June, 1993, and worked until November, 1993.

The parties dispute whether the work that Kono performed between June and November, 1993, was regular duty or light duty. The Union asserts it was the former while the Employer the latter. To support its contention that Kono did regular duty during all this time, the Union calls the arbitrator's attention to the fact that Kono was not listed on the CNA work schedules for that time period as being on light duty. In my view the fact that Kono was not listed on the work schedules as being on light duty is not particularly significant. Instead, I believe what is of great significance here is the document the Employer drafted, and Kono signed, when she returned to work on June 15, 1993. That document contained a listing of modified duties that Kono was to perform. By its very nature, any list of job duties that is modified from the original job description means that the employe is not doing all of the regular duties of the job. Such was the case with Kono from June to November, 1993, because she was directed to not lift more than 50 pounds. Those employes performing regular CNA duties occasionally have to lift more than 50 pounds. Insofar as the record shows, Kono complied with this directive and did not lift more than 50 pounds. Since Kono did not lift more than 50 pounds during the time period between June and November, 1993, it follows that she was not performing all the duties that are regularly performed by CNAs. Specifically, she was not lifting more than 50 pounds. That being so, it is held that she was not performing regular duties during that time frame.

In the fall of 1993, several events occurred which brought the instant matter to a head. First, Kono's doctor determined that her back injury was permanent because her healing had reached a plateau level. The doctor therefore gave Kono a final release and assigned her a permanency rating for her back injury. As part of this final release, the doctor made the 50 pound weight restriction permanent. Second, the Employer's worker's compensation carrier reached a financial settlement with Kono for her permanent partial back disability. After the foregoing events occurred, the Employer removed Kono from her CNA position. It did so by placing her on "layoff status."

Layoffs usually occur when the overall work force is reduced by the employer because of business conditions. That was obviously not the case here. Additionally, some layoffs are disciplinary in nature. That was not the case here either. Instead, Kono's layoff can easily be characterized as a disability layoff.

Based on the following rationale, the undersigned finds that the Employer's decision to remove Kono from a CNA position and lay her off was not a contract violation. First and foremost, the physical abilities specified on the attachment to the CNA job description provide that those who perform that job have to lift between 50 and 75 pounds. Kono can no longer do that because she is permanently barred from lifting more than 50 pounds. Thus, the CNA lifting requirement is beyond the permanent restriction placed on Kono. Moreover, lifting more than 50 pounds is not an insignificant CNA job duty. The attachment to the CNA job description says that it (i.e. lifting between 50 and 75 pounds) happens "occasionally" and there is nothing in the record that indicates otherwise. Additionally, notwithstanding the Union's contention to the contrary, this lifting requirement is mandatory. Second, the County is responsible for the safety of

its employes and its residents. Consequently, the County has an obligation to ensure that injuries do not occur to either. Since the CNAs occasionally lift more than 50 pounds while assisting residents with their daily living needs, Kono could endanger her own safety and that of the residents by continuing to perform such heavy lifting. The fact that Kono is willing to accept the risk of continuing to perform such heavy lifting does not mean that the County has to share in that risk. Third, if Kono were to stay on light duty indefinitely, the other CNAs would have to do the lifting that Kono could not perform. This would be unfair to the other CNAs who would be carrying, both literally and figuratively, more than their share of the weight. Finally, the Management Rights clause (Article 3) specifically gives the Employer "the right to relieve employees from duty because of a . . . legitimate reason." I find that Kono's permanent restriction against lifting more than 50 pounds constitutes a "legitimate reason" for her to be "relieved from duty" because the CNA job requires incumbents to lift 50 to 75 pounds. Given the foregoing, it is held that the Employer's decision to remove Kono from a CNA position and lay her off was neither arbitrary nor capricious. The simple fact of the matter is that because of her back injury, Kono can no longer perform what the physical standards attached to the CNA job description specify as an "essential function of the (CNA) job," namely lifting 50 to 75 pounds. Since Kono cannot do so, the Employer does not have to keep her in a CNA position. Accordingly, Kono's removal from a CNA position and subsequent layoff did not violate the labor agreement.

In light of the above, it is my

AWARD

That the Employer did not violate the labor agreement when it laid off Lynn Kono on November 17, 1993. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 23rd day of June, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator