

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 253
No. 51837
MA-8754

Appearances:

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

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

ARBITRATION AWARD

Sheboygan County Institutions Employees, Local 2427, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Sheboygan County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union, with the concurrence of the County, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide the instant dispute. The undersigned was so designated. Hearing was held before the undersigned on April 7, 1995 in Sheboygan, Wisconsin. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on May 19, 1995.

Background:

The County operates a health care facility where the grievant, Michael Mayer, has been employed as a Certified Nursing Assistant since July 15, 1991. At the time in question the grievant was working the second shift, 2:30 - 11:00 p.m., and was usually assigned to 3 South. On Tuesday, March 22, 1994, a resident reported to Jan Hurm, a Nursing Supervisor, that on the previous Friday, March 18, 1994, the grievant had transferred him from the bed to the chair without using the hooyer lift and in doing so twisted the resident's knee. The resident stated he reported it to the CNA the next morning, but wasn't sure who that CNA was. The resident's care plan requires the use of a hooyer lift when he is transferred from bed to chair and vice versa. The grievant worked that shift on 3 South along with Scott Doro, Pat Gaffney, Kathy Breitbach, Sandy Fischer, Tammy Verhelst and Maureen Riese. Scott Doro and the grievant were working in the

"infirmarium" area on March 18, 1994, but would assist in other sections of the floor and answer lights if no one else was available.

On March 23, 1994, Nursing Supervisor Jean Saunders spoke with each of the employees about the incident. Gaffney, Breitbach and Fischer had no knowledge of the incident. Verhelst thought that she and Riese had put the resident in bed. Riese did not remember anything unusual, but thought she and Verhelst had put the resident in bed. Doro thought that the grievant could have been helping him put another resident in bed at the time in question. Saunders spoke with the resident who stated that he had been transferred just before supper and "It was one of the boys. I thought it was Mike Mayer but he came and talked to me today and said it wasn't him. I told him maybe I was wrong. I know it was one of the boys and it was not Scott Doro."

The grievant was interviewed by Susan McCabe, the Director of Nurses, on March 23, 1994. The grievant denied transferring the resident without a hooyer and stated he was in the infirmarium and thought he was working with Tammy Verhelst. The grievant told McCabe that the resident told him (grievant) someone had transferred the resident alone, but the grievant said it was not him and that he was not on that section that day. He further stated that he worked with Scott Doro on Monday and Doro had mentioned it to him. After the meeting the grievant called McCabe's office and said that he worked with Shirley Brewer, not Tammy Verhelst, on March 18, 1994. A check of the schedule revealed that Brewer had not worked that shift. On March 29, 1994, the County suspended the grievant for one day for transferring the resident on March 18, 1994 without the hooyer lift per the statement of the resident. The grievant filed a grievance on April 7, 1994 which was denied on April 11, 1994. The grievance was processed to the instant arbitration.

At the arbitration hearing held on April 7, 1995, Dan Holbach testified that he had worked for the County for about two years. He was working on March 18, 1994 on the p.m. shift and although he was assigned to 2 South, he had worked on 3 South as well where the resident was located, to help put residents to bed. Holbach testified that he transferred the resident from the chair to bed alone without a hooyer lift because he was pressed for time. Holbach testified that he probably transferred the resident on March 18, 1994. He recalled that he transferred the resident from the chair to the bed around 7:30 - 8:00 p.m. Holbach was no longer employed by the County at the time of hearing.

Issue:

The parties stipulated to the following:

Did the County violate the contract when it gave Michael Mayer a one day suspension on March 29, 1994?

If so, what is the appropriate remedy?

Contractual 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. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due to him/her for such period of time involved in the matter.

...

County's Position:

The County takes the position that it had proper cause to suspend the grievant. The County points out that it has an obligation to care for its residents as required by Federal guidelines and State statutory and code provisions. It notes that the dispute lies in who transferred the resident. It is not disputed that the resident was transferred without a hooyer lift contrary to his care plan or that a one day suspension was appropriate.

The resident, who was alert and oriented, specifically identified the grievant as the person who transferred him without the hooyer lift and that it occurred after his nap just before supper. Three aides remember putting the resident to bed, yet Holbach claimed to have put the resident in bed without using the hooyer lift. The grievant's credibility is questionable, as he stated he worked with Brewer on the 18th, but Brewer did not work that day.

The County notes Holbach's name was never mentioned during the investigation and questions whether Holbach had anything to do with the case. Holbach testified that he put the resident to bed at 7:30 p.m., while the transfer in question occurred before supper and was from the bed to a chair. Testimony showed that the 2 South was a "heavy floor", making it unlikely staff from that area would be transferred to 3 South where several rooms were vacant due to remodeling. Holbach also was not seen on 3 South by anyone that evening.

The grievant was assigned to the infirmary and he answered the light when employes on that section went on break. The only two males working in the resident's area were the grievant and Scott Doro, and the resident stated it was not Scott Doro. As to Holbach, he could not have done it. Further, he left his employment with the County before the hearing and now, when it cannot affect his employment, he comes forward to save a friend from discipline. The person who

transferred the resident from the bed to the wheel chair was the grievant.

The County argues that it meted out the appropriate discipline for a safety violation and a one day suspension is proper. The County has a progressive discipline policy which covers safety violations. The grievant is aware of that policy and had been disciplined under it in 1992 for a safety violation.

The County maintains that it investigated the situation thoroughly and on two different days the resident was interviewed and reported that the grievant transferred him without a hooyer lift. The County contends that the discipline was warranted and proper and that, therefore, the grievance must be denied.

Union's Position:

The Union contends that the County failed to carry its burden of proof. It observes that while the County described the resident as oriented, the resident did not testify. The information as to the time of occurrence and whether it was a transfer from bed to chair or chair to bed is all second hand.

The Union also contends that there was not just cause for the suspension. The County did not adequately investigate the matter. The investigation began four days after the incident and was directed to putting the resident in bed, rather than in a chair. Further, there was no follow up to correct that error. The County should have talked to Dan Holbach, the only other male on duty that shift besides the grievant and Doro, but did not. The Union asserts that the County did not care who did it if it was not the grievant. The County jumped to the conclusion it wanted and reached an erroneous result.

The Union also contends that the grievant accounted for his whereabouts and Doro's testimony supports the grievant. Further, the resident was not sure it was the grievant, only that it was not Doro, as reported to Saunders on March 23, 1994. The Union suggests that the resident identified the wrong person and the wrong time of day. If it had happened at supper time, he would have reported it when he was put to bed. The guilty person has since come forward, yet the County continues to insist the grievant is responsible. While conceding Holbach is no longer an employe, the Union asserts he told Doro and Sandy Beers that he was the person responsible before he left his employment.

The Union also notes the County's lack of surprise over Holbach's admission. The County not only jumped to conclusions, but was biased toward the grievant and denied reality. The Union requests that the grievance be sustained, that the grievant's record be cleared and that he be made whole.

County's Reply:

The County defends its failure to call the resident on the basis that residents are vulnerable to their care givers and fear mistreatment after making a complaint, especially here where the grievant went back to the resident and told him that he was not the one. The two

statements reporting the same information to two different persons at two different times and days establishes the credibility of the report. The Union relied upon hearsay testimony that Sandy Beers heard Holbach admit he did it, and it would be a double standard not to allow the County to use its reports, yet allow the Union to reference hearsay statements.

The County denies that its investigation was not done correctly or completely. It investigated the incident when it first learned of it and two separate people investigated the matter. At no time during the investigation did the grievant bring up Dan Holbach's name although he named others that worked that night. No one had said the grievant did not do it. The Union's questioning of when the event occurred or how it occurred overlooks the fact that the County provided the Union the information it had from the beginning and the transfer was from the bed to the wheel chair which occurred before dinner. Holbach was not on the floor until 7:30 p.m. and even this is questionable. It is doubtful Holbach did any transferring. Holbach is simply trying to save a friend from discipline and his statement has little merit. The grievant's credibility is also questionable, since he did not recall who he worked with the evening of March 18, 1994. The County insists the only and proper conclusion is that the grievant did it and the grievance must be denied.

Union's Reply:

The Union contends that the County referred to things not in the record and distorted the facts. It points to the Saunders interview with the resident cited by the County. The County ignored a sentence, thus giving an improper picture of what was said. That report was an admission by the resident that he may be wrong. That admission, along with Holbach's testimony that the resident confused faces and names, created more than a reasonable doubt that the grievant was the responsible party.

The legal liability of the County is not at issue and there is no dispute that the resident should be lifted by the hoist, or that the punishment was proper. The dispute is whether the grievant did it.

The Union asserts that Doro never testified he put this resident to bed and the other two thought they did, but were not positive. The grievant cannot be faulted for not mentioning Dan Holbach as nothing in the record shows that the grievant knew Holbach transferred the resident. The Union also takes issue with the County's assertion that Holbach came forward to help the grievant or that the two reports of the supervisors contain the same information or that the

grievant's failure to mention Holbach somehow should be held against him.

The Union concludes that the County cannot prove the grievant transferred the resident, the resident is not sure it was the grievant, and that Holbach admitted he did the transfer, while the grievant denied it. For these reasons, it asks that the grievance be sustained.

Discussion:

In determining whether there was proper cause for the one day suspension the first question that must be answered is whether the grievant committed the misconduct as alleged. It is the County's burden to sufficiently establish by the evidence that the grievant transferred the resident, LN, from his bed to a chair, on Friday, March 18, 1994, by himself without a hooyer lift. For the reasons set forth below, it is concluded that the County has not met its burden in that regard.

The resident, LN, told the day shift Supervisor on 3 South, Jan Hurm, that four days earlier the grievant had moved LN from his bed to a wheel chair by himself and in doing so, had injured LN's knee. LN also told Hurm he had reported the incident the next day to one of the nursing assistants, but could not recall who that was. None of the nursing assistants interviewed about the matter were aware of it and no one had reported anything before LN's discussion with Hurm on March 22nd. LN's "Care Plan Fact Sheet" (County Exhibit No. 3) indicates under "Mental Status" that he is "oriented" and that was supported by testimony. However, the "Care Plan" also indicates under "Impairments" that LN has hearing and vision impairments and elsewhere on the "Care Plan" it indicates LN wears glasses and has a hearing aid. Without seeing the resident, the arbitrator is unable to determine the degree of those impairments. There is also no indication in the record as to whether LN was wearing his glasses and hearing aid when he was moved from the bed to a chair. Holbach testified LN knew people by name, not by their face. All of this leaves one to question whether LN knew which nursing assistant was helping him at the time, beyond the person being a male. There is also some question as to the ability of LN, being confined to the repetitive routine of a nursing home, to go back four days in time and pick out a specific person who was helping him at a specific time.

The grievant claims not to have transferred LN at all on March 18th, and while his motive for denying that is apparent and his recollection of March 18th is hazy at best, his claim is supported by the testimony of others. Doro testified that he and the grievant worked together on March 18th and were not covering that section of 3 South where LN is located. Doro also reported to Jean Saunders, the PM Shift Supervisor, that the grievant was helping him at the time in question. However, it also appears that Saunders questioned employes about moving LN from the chair to the bed on March 18th, rather than from the bed to the chair. Two of the employes questioned about it, Verhelst and Riese, reported to Saunders that they had transferred LN from the chair to the bed on the evening of March 18th and Riese told Saunders there was nothing unusual. There is no report of LN complaining about his knee to Verhelst and Riese or mentioning anything to them about having been transferred from his bed to his chair two to two and a half hours earlier by the grievant and hurting his knee.

While the County's need to act upon a resident's complaint is recognized, the above noted inconsistencies and improbabilities in the County's case results in a conclusion that there is not sufficient evidence in the record to find that the grievant committed the alleged misconduct. That

being the case, it is concluded that the County did not have proper cause to suspend the grievant.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The County is directed to immediately make the grievant, Michael Mayer, whole under the Agreement for the loss of one (1) day's pay and to remove all mention of the matter from his personnel records.

Dated at Madison, Wisconsin this 17th day of August, 1995.

By David E. Shaw /s/
David E. Shaw, Arbitrator