

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 265
No. 52330
MA-8920

Appearances:

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

Ms. Louella Conway, Personnel Director, Sheboygan County, 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 a grievance over a suspension. The undersigned was so designated. Hearing was held on June 6, 1995, in Sheboygan, Wisconsin. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on August 8, 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. On June 16, 1994, the wife of a resident complained to Terry Frank, the PM Nursing Supervisor, that her husband was treated roughly by the grievant. Frank spoke with the resident who told him that the grievant's care was rough and the grievant put him off when he had to go to the bathroom saying he is too busy and did not clean him off well when he has an accident. 1/ The resident stated he didn't want the

1/ Ex. 20.

grievant caring for him. 2/ The resident had a reputation of not being a complainer and was usually good natured and had a good disposition. At the time of the hearing, this resident was deceased. The grievant was suspended with pay pending an investigation of the complaint. On June 20, 1994, the Employer held an investigatory interview with the grievant who denied that he was rough with the resident and that he cleaned him well. The grievant pointed out that the resident had a very sore bottom on the day in question and the resident wanted to get out of bed so he could smoke. The grievant told him he had to speak to a nurse first about his sore bottom and he did so and Terry Frank said he wanted to look at the sore before the resident was moved. 3/ The grievant denied any mistreatment of the resident. On June 21, 1994, the grievant was suspended for one day for poor work performance and violation of residents' rights. 4/ The grievant filed a grievance over his suspension. 5/ The grievance was denied and was appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

Did the Employer violate the contract when it gave Michael Mayer a one-day suspension on June 17, 1994?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

2/ Id.

3/ Ex. 11.

4/ Ex. 12.

5/ Ex. 2.

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 asks the undersigned to take judicial notice of the legal responsibilities under which the grievant's employment occurs. The County points out that it has a legal obligation to care for its clients, and in that regard, it must be licensed by the State to operate a nursing facility and comply with applicable state and federal laws as well as state and federal regulations. It notes that Section 50.10(1)(L), Stats., grants residents specific rights and HSS 132 requires residents be kept comfortably clean and well groomed and additionally, nursing personnel must use techniques to prevent bed sores. The County claims that when the grievant "put off" the resident or failed to clean him properly, the resident was humiliated and this loss of dignity violated the rights of the resident.

The County points to the testimony of Terry Frank as to the "rough" treatment given the resident and Frank testified that the resident told him that the grievant's application of salve to his bottom was "rough" and not gentle and caring. It alleged that the resident's cares were not met as the grievant provided them real quick or hastily and was "cutting the corners." The County notes that the resident was not a complainer and only complained about the treatment given him by the grievant. The County notes the resident told Frank, "I don't want to bitch but this bothers me and I feel he has no understanding or compassion." The County asserts that when a resident makes a complaint, the County is obligated to investigate, particularly where the resident is not a complainer. It observes that the grievant was trained on resident rights on a number of occasions and was counseled about another incident on March 5, 1994. It claims that the grievant knew what his responsibilities were with respect to the care of residents, yet he failed to provide the level of care required and clearly violated the resident's rights.

The County contends that grievant's testimony creates cause for concern in that he first testified that Barb Gruenke told him to go home when he was suspended and later stated he could not recall who told him to go home and that it was Terry Frank or possibly Jean. It notes that he has been counseled in the past about an incident in which he denied any wrongdoing. It observes that while the grievant denied treating the resident roughly, the resident stated otherwise. It urges that only one conclusion be drawn and that is the resident had a reason to complain which was the rough care given by the grievant.

The County submits that the grievant did not have authority to determine that the resident should not get out of bed because he had a sore bottom. It states that the care plan does not state the resident should stay in bed, and if the resident wanted to get up, the grievant was obligated to get him up. It notes that no witnesses supported the grievant's version and the resident made no complaint on this issue. It rejects the grievant's theory that the resident was upset because the grievant had him remain in bed until his sore could be checked by a nurse.

The County maintains that the grievant was disciplined in accordance with the County's progressive discipline policy. It notes that the grievant had been advised to change his performance or be subject to discipline regarding a February 21, 1994 incident so the one-day suspension was not arbitrary and capricious but fair and in compliance with established policy.

In conclusion, the County maintains that the record speaks for itself and no testimony or witnesses support the grievant's testimony that he questioned others on the resident's skin care. It insists that it investigated thoroughly and determined the grievant gave "rough" care to the resident and the one-day suspension was justified. It asks that the grievance be denied.

UNION'S POSITION:

The Union points out that the State of Wisconsin investigated this incident and concluded that there was an "insufficient basis" for any further investigation. It submits that there is insufficient evidence to find just cause for the discipline. The Union argues that the County only offered hearsay evidence and this is an "absent accuser" case. It notes that no one came forward with firsthand knowledge that poor performance took place. It states that the County has the burden of proof in disciplinary actions and the Union observes that it could not cross examine with respect to the resident's alleged "rough" treatment because of the "absent accuser." The Union submits that the arbitrator is denied the opportunity to judge the accuser. The Union claims that a case based solely on hearsay is suspect. It cites Brown County (Mental Health Center), unpublished (McCrary, 1/84) for the proposition that hearsay must be supported by factual and direct evidence that a certain situation did occur. The Union notes that the Employer only has the in-house supervisors' statements, not even a signed statement from the accusers.

The Union alleges that the County failed to do a thorough investigation by failing to

question the grievant's work partner and it asks why not? It maintains that the grievant was a credible witness as his testimony was consistent with his prior statement and with Terry Frank's testimony. The Union further observes that if the resident had asked for a change in care givers, why did the grievant continue to work with the resident and there were no further complaints by this resident and/or his wife. It refers to the County's witnesses who testified that residents' requests to change care givers are honored without prejudice or discipline given to employees. It asks why the grievant was allowed to continue to care for this resident, suggesting that the County did not believe the resident. The Union argues that this really flies in the face of residents' rights. It hypothesizes that the resident was having a bad day and the County did not fully believe the resident or it would have respected his wishes.

It contends that the grievant felt he got along well with the resident and the resident wanted to get up on the day in question so he could smoke, and the grievant told him he had to wait to get an okay from a nurse. It argues that having a sore bottom and a need for a cigarette could make anyone complain. It questions why the grievant was disciplined. The Union submits the prior counseling form cannot be used to determine guilt of the immediate offense.

In conclusion, the Union maintains that the County failed to meet its burden of proof and the grievant never hurt any resident. It requests that the grievance be sustained and the grievant made whole.

COUNTY'S REPLY:

The County contends that the Union's reference to the State's investigation is misplaced. It submits that all incidents which could be patient abuse must be reported to the State which investigates to determine if patient abuse occurred, a serious allegation which would result in termination of employment and removal from the nurse aide registry. It claims that the State did not find patient abuse but made no determination as to other forms of inappropriate behavior which could result in lesser discipline.

With respect to the hearsay evidence offered, the County states that the resident is deceased and his widow's testimony would be hearsay. It argues that the issue is one of credibility. It notes that the grievant has an interest to protect which weakens his credibility and the statements of the witnesses are consistent with respect to what the resident reported. The County asserts that it did not question the grievant's work partner because that person was not involved in the incident and had no information to add, and if that person did, the Union would have called her to testify. The County observes that the Union raised a number of questions in its brief and suggests that these should have been brought up at the hearing so they could have been clarified then. It claims that bringing them up after the hearing is extremely suspect. The County maintains that the witnesses clearly defined and documented the resident's complaint. Its opinion is that there is no question that the resident was not properly cared for and the discipline was appropriate for this reason. It

insists that the grievance must be denied.

UNION'S REPLY:

The Union does not object to the undersigned's taking judicial notice of the legal setting recalling the State said the matter was not even worth investigating further. The Union notes that nothing in the chart indicated that the resident was not cleaned off and no neglect was documented. The Union cannot believe the County is faulting the grievant for not letting the patient out of bed because there was no order to keep him in bed. It asserts that the grievant, based on his observations of the resident's sore, questioned whether he should get up and sought an answer from the proper authority. He was not disciplined for this. The Union points out that the County uses the accusation that the grievant put off the resident but does not reference it to any particular time. It contends that this accusation is too vague to be the basis for discipline. The Union claims that the County has forgotten that Terry Frank's definition of the word "rough," when asked in the context of the grievant's work performance, was "not physical." The Union also submits the counseling is not discipline and is not part of the disciplinary procedure and there was no evidence that the grievant ever saw the counseling form.

The Union states that the County can never explain why it did not dignify the resident's request for a new care giver and the grievant continued to care for the resident. It asks that the grievance be sustained as the County has failed to prove the grievant did anything wrong.

DISCUSSION:

The issue presented in this case is whether the County had proper cause for suspending the grievant for one day. Inasmuch as this is a disciplinary case, the County has the burden of proving by a preponderance of the evidence that the grievant engaged in the alleged misconduct. The alleged misconduct was poor work performance and violation of residents' rights. 6/ The written suspension states:

On 6/16/94, Resident stated grievant handles him roughly, states he is too busy to assist him to the bathroom and doesn't clean him off properly after he has an accident. 7/

6/ Ex. 12.

7/ Id.

The grievant denied the allegation. One of the problems in this case is that the resident is deceased so that the Employer has had to resort to hearsay as the only persons who were present at this incident were the resident and the grievant. Hearsay evidence is not excluded in arbitration and even in courts there are valid exceptions to the hearsay rule. Although hearsay is admitted by arbitrators, its weight depends on its trustworthiness and is given greater weight when it is corroborated by other testimony or supported by direct evidence. A related problem is the inability for cross examination as well as the inability to observe the demeanor of the witness. Another problem is that hearsay may be vague, ambiguous, conclusory or an opinion.

A review of the allegations of the written warning can be separated into three areas:

1. "Rough" treatment;
2. Too busy to assist to bathroom; and
3. Not cleaning resident properly after an accident.

With respect to the first of these, the "rough" treatment was testified to by Terry Frank. Frank testified that he never witnessed the grievant giving care to the resident, but the resident reported to him that the grievant's giving him care for his skin condition was "rough." It is undisputed that the resident had a very sore bottom and the grievant put Bara cream on the sore skin. When someone has a very tender skin condition, the application of cream may be very painful. There was no testimony or evidence that the resident's condition was worse or showed signs of rough application after the grievant applied the cream. This allegation is vague and ambiguous and subject to personal interpretation. It is possible that the grievant applied the Bara cream as gently as possible and the resident felt it was "rough" treatment. On the other hand, the grievant's application of the cream could have been done more deftly. It appears to the undersigned that there is not enough evidence here to conclude that the application was done so unskillfully that this treatment constituted poor work performance.

With respect to item 2, the evidence does not indicate when or how often this took place. Did it occur once or twice or every day? Did it occur a year prior or yesterday? How long was the resident put off? The care plan states that a urinal be kept at bedside. 8/ This allegation is too vague without any additional evidence to support it.

With respect to item 3, not cleaning the resident properly after an accident would be very easy to check as it should be readily observable. No one testified in support of this allegation and it remains unproven that anyone observed that the resident had not been properly cleaned after an accident on any particular date. Additionally, the same questions as noted above under item 2 were not answered. Thus, this charge is not proven.

8/ Ex. 10.

The allegations noted above have not been established by the hearsay evidence because they were not corroborated by sufficient direct or supporting evidence and they were just too vague and ambiguous, and it must be concluded that the evidence failed to prove that the grievant violated the resident's rights.

The undersigned is mindful of the many statutory and administrative regulations that the County must abide by. It is always necessary to take seriously a resident who makes a complaint. It is also understandable that the County would accept as true a complaint by a resident who has a reputation of not being a complainer. His complaints may be legitimate and the grievant's denial might be suspect because of his interest to protect himself. However, a review of the objective facts results in the conclusion that there is just not sufficient evidence to support the conclusion that the grievant failed to do his job properly and mistreated the resident. This conclusion is further supported by the grievant's continuing as the resident's care giver after the reported incident despite the resident's request that the grievant not give him care anymore.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

AWARD

1. The County violated the agreement when it gave the grievant a one-day suspension on June 17, 1994, without proper cause.

2. The County is directed to make the grievant whole for June 17, 1994, and remove the written suspension from the grievant's personnel file.

3. The undersigned will retain jurisdiction for a period of thirty (30) days from the date hereof solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin, this 31st day of August, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator