BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SAUK COUNTY HEALTH CARE CENTER EMPLOYEES' UNION, AFSCME LOCAL 3148

and

SAUK COUNTY

Case 139
No. 56843
MA-10432

(Sharon Radke Discharge)

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, appearing on behalf of Local 3148.

Mr. Todd J. Liebman, Corporation Counsel, Sauk County, Administration Building, 505 Broadway Street, Baraboo, WI 53913, appearing on behalf of Sauk County.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Sauk County Health Care Center Employees' Union, Local 3148, AFSCME (hereinafter referred to as the Union) and Sauk County (hereinafter referred to as the County or the Employer) selected the undersigned from a panel of five staff arbitrators provided by the Wisconsin Employment Relations Commission to hear and decide a dispute over the discharge of Sharon Radke. Hearings were held in Baraboo, Wisconsin, on January 20 and February 17, 1999, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and argument as were relevant to the dispute. The parties submitted post-hearing briefs, and reply briefs, the last of which were exchanged through the arbitrator on April 30, 1999, whereupon the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Now, having considered the testimony, exhibits, and other evidence, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the undersigned makes the following Award.

ISSUE

The parties stipulated that the issues before the arbitrator are:

(1) Was the appeal to arbitration timely? and, if so

(2) Did the employer have just cause to terminate the grievant and, if not

(3) What is the appropriate remedy?

BACKGROUND

The County provides general municipal services to the people of Sauk County in south central Wisconsin. Among these services is the operation of the Sauk County Health Care Center (HCC), a skilled nursing facility. The Union is the exclusive bargaining representative for the employes of the health care center. The grievant, Sharon Radke, was employed at the center for 17 years until she was discharged on June 17, 1998. The basis for the discharge was an allegation of patient abuse.

One of the residents at the center is D-- B----y, a mildly retarded man who suffers from cerebral palsy and spastic quadriplegia. B----y is wheelchair bound, and communicates with the assistance of a message board. The board has words and symbols printed on it, and B----y points to these to communicate. As he often cannot point at the precise word or symbol, a nurse or aide will narrow down the possible choices by going through the list in the general area he indicates, and asking him, one by one, which he means.

According to Heidi Jarvis, an active treatment aide and certified nursing assistant at the HCC, at about 1:30 p.m. on June 2, 1998, she was working in the laundry room with B----y and another resident. They were folding laundry. She was chatting with B----y, and she mentioned another employe of whom B----y was particularly fond. She said "you like that Sue Horner, don't you?" and he smiled in response. At that point, the grievant said to him "You're damned lucky anyone takes care of you, anyway." On hearing this, B----y let out a big sigh and his head sank down and remained down. B----y was very quiet after this, and approximately an hour and a half later, as Jarvis took B----y and another resident up to their floor, B----y started crying in the elevator. She asked what was wrong, and whether it was the statement that upset him. He indicated that it was. Jarvis asked if he wanted to speak with anyone, and he indicated Patricia Behn, the Director of Occupational Therapy. Jarvis called

Behn, who said she was busy, but would try to come to B----y's room. At 9:00 p.m. Behn called back. She said she was leaving on vacation, and asked if B----y would speak with the QMRP. B----y indicated that that was agreeable.

On the morning of June 3rd, B----y was interviewed by LPN Mary Hasse and QMRP Judith Middleworth. He indicated that he was upset about an incident the prior day during which the grievant had made a statement to him and used profanity. He indicated that Jarvis had witnessed it. When they spoke to Jarvis, she confirmed the incident and supplied the exact quote. QMRP Amy Suemnicht was assigned to investigate the possible abuse case, and she spoke with Jarvis at 5:00 p.m. on the 3rd. She gave Suemnicht her version of events, which was the same as is detailed above. Suemnicht spoke with B----y on the morning of June 4th. She asked a series of leading questions, to which he answered "yes" or "no." When asked about the statement "You're just damn lucky anyone will take care of you," he answered "yes" that someone had made the statement. He was asked if Jarvis had made the statement and he indicated "no." He was asked if Sharon Radke had made the statement and he answered "yes." Asked if she was serious, he answered "yes."

Suemnicht and Center Administrator Jane Zuehlke interviewed the grievant later on the morning of the 4th, in the presence of her steward. She denied making the statement attributed to her by Jarvis. When asked if she had said anything like that, she said "There was so much confusion. Not that I can recall." She said she thought she had had an exchange with B----y, but that she could not remember what was said. Following this interview, Zuehlke told Suemnicht to suspend the grievant without pay, pending further investigation.

The grievant was terminated on June 17th. The letter of termination cited her statement to B----y that "he was damn lucky that anyone would take care of him" and stated that this behavior deviated so markedly from the standard of care expected of employes that her employment could not be continued. The letter also cited a September 1997 notice of deficient performance for seven incidents, and an October 16, 1997 letter of reprimand and fourteen day suspension. This grievance was immediately filed.

The third step grievance meeting before the County Personnel Committee was held on July 31st. A tentative settlement was reached, whereby the grievant would withdraw her grievance and release all claims against the County in return for a cash payment. Corporation Counsel Todd Liebman drafted a settlement agreement and release of claims for the grievant's review, and sent it to her and to Union Representative Michael Wilson on August 12th. The cover letter accompanying the draft set forth the timelines for considering the draft:

. . .

> Ms. Radke must take twenty one days to consider this agreement. She should then sign and return the agreement in the stamp (sic) addressed envelope

> provided. Ms. Radke will then have an additional seven days to revoke her signature on the agreement. I am requesting that Ms. Radke return the signed agreement to my office. I will then have the agreement signed by the County and send it to the Union for final signature and hopefully return to my office during that seven day period.
>
> . . .

On September 1st, Wilson wrote to Liebman, advising him that the grievant believed there was not just cause for her discharge and thus had rejected the offer of settlement. He advised Liebman, on behalf of the local union, that the grievance was being appealed to arbitration. Liebman replied on September 2nd:

> Because the Personnel Committee never really considered the grievance at the original Step Three scheduled hearing, I would suggest that matter be formally heard by the Personnel Committee.
>
> The next meeting is September 11, 1998, and I would hope that would work for you. I will take the liberty of scheduling this matter for September 11, but will be willing to discuss a reasonable extension should that date be impossible for you to meet.

The Personnel Committee did meet on September 11th, and on September 21st, County Personnel Director Patrick Glynn wrote to Wilson, advising him that the grievance had been denied. On September 25th, Wilson again advised the County that the matter was being appealed to arbitration, and filed a request with the Wisconsin Employment Relations Commission.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Arguments of the County

The County takes the position that the grievance was not properly advanced to arbitration and should be dismissed as procedurally inarbitrable. The contract is clear that any appeal to arbitration from the Third Step must take place within ten days, unless that period is extended by mutual agreement. Here, the Union delayed in its appeal. Even though it claims

to have relied on the 21 day period for responding to the County's settlement offer, that offer dealt with other rights, and did not affect the grievant's obligation to appeal the grievance denial in a timely fashion.

Even if this matter was procedurally arbitrable, the grievance must be denied on the merits. The proper standard of proof is a preponderance of the evidence, and here the great weight of the evidence shows that the grievant was a pathetic employe, the worst in the history of the health care center. Against the backdrop of a prior discharge, multiple warnings and disciplinary suspensions, the grievant committed the cardinal offense in a care facility. She abused a patient. She was well aware of the rules regarding a patient's right to be treated with dignity, courtesy and respect. She had previously been disciplined for discourtesy to a resident. Yet she told a wheelchair bound patient that he was "damned lucky" that anyone took care of him. This is obviously a degrading and offensive comment. The evidence overwhelmingly establishes that this comment was made, notwithstanding the grievant's feeble attempts to explain that she either didn't say it or does not remember saying it. There is no reason to doubt the testimony of Heidi Jarvis, nor the supporting testimony of D-- B----y. No one had a motive to lie, except the grievant whose job is at stake. Given the seriousness of the offense -- an offense that is completely at odds with the mission of the health care center -- and the abysmal prior record of the grievant, discharge is the only appropriate penalty. For all of these reasons, the grievance must be denied.

The Arguments of the Union

The Union asserts that the appeal to arbitration was timely. Ordinarily an appeal must be taken within ten days of the Third Step meeting. However, in this case the County made a settlement offer at the Third Step, and told the grievant she had 21 days to consider it. Within that 21-day period, she declined the offer. The parties met again, the County denied the grievance and the Union appealed to arbitration. The County cannot propose a period for consideration of the offer of settlement and then argue that the grievant waived her rights by relying on that timeline.

On the merits, the Union takes the position that the grievant did nothing wrong, and that she should be reinstated and made whole. The allegation against the grievant is the most serious that can be leveled against a health care worker, and the County is obligated to prove it by clear and convincing evidence. It has clearly failed in that duty. Heidi Jarvis was the primary witness for the County. She acknowledged numerous inconsistencies and inaccuracies in the letter stating the grounds for discharge, and was herself impeached in the course of the hearing. She was unusually emotional, becoming upset for no apparent reason. She did not respond to the alleged abuse with an immediate report as required by the rules, and there is substantial reason to completely disregard her testimony. One reason to disregard her

testimony is her blatant violation of the sequestration order. Following her testimony, she went to the room where D-- B----y was waiting to testify, repeated portions of her testimony to other witnesses, including B----y, and upset him to the point that he started crying.

The testimony of D-- B----y cannot be given any weight. It was apparent during the hearing that whether he was saying "yes" or "no" to something is a matter of interpretation by his nurse or aide. Moreover, he indicated that he did not know why he was at the hearing, that he never complained of his treatment by the grievant, that other people told him the grievant hurt his feelings, and that he had no complaint about his treatment in the summer of 1998 other than a concern about the shower.

Given that Jarvis was utterly incredible, and that D-- B----y was not a competent witness, the charges against the grievant are not supported by a preponderance of the evidence, much less by clear and convincing evidence. Accordingly, the grievance must be granted and the grievant must reinstated and made whole.

DISCUSSION

Timeliness

The County alleges that the Union delayed too long in appealing this matter to arbitration. Without going on at undue length, this is a somewhat disingenuous argument. The County made a settlement proposal at the July 31st Step III hearing. The County sent a write-up of the proposed settlement on August 12th to the grievant and to Staff Representative Michael Wilson. The settlement agreement advised the grievant that she "must take twenty-one days to consider this agreement," and that if she then signed it she would have up to seven days to revoke her signature. She elected not to accept the settlement, and Wilson faxed Corporation Counsel Liebman a letter to that effect on September 21st, demanding arbitration. Clearly September 1st is more than 10 days after the Step III meeting and the August 12th settlement letter. However, the 10-day limit can be extended by mutual agreement, and the County's unilateral offer of 21 days to consider the settlement agreement constitutes a waiver of the 10 days.

The arbitrator cannot credit the County's argument that the settlement agreement primarily addressed non-contractual claims. The settlement was proposed in the grievance procedure, during a meeting over this grievance. By its terms, the settlement agreement bound the grievant and the Union. The inclusion of the Union plainly flows from its status as the exclusive bargaining representative for employes and her representative on this grievance. The agreement waived any claim to re-employment, and expressly specified that the monies to be paid to the grievant were a compromise of "currently pending employment claim and all other

claims." The "currently pending employment claim" referred to in the proposed settlement is this grievance. This agreement obviously addressed the settlement of this grievance, and the County cannot plausibly assert otherwise.

Even if the County's stipulation of 21 days to consider the settlement agreement did not toll the ten day limit for appealing to arbitration, the County never actually provided a Step III answer to the grievance until September 21st. Liebman admitted that there had been no consideration of the merits of the grievance at the July 31st meeting, and asked Wilson to appear on September 11th so that the Personnel Committee could address the merits. The resulting denial of the grievance was issued on September 21st. Wilson filed another appeal to arbitration four days later, well within ten days of the County's formal Step III response.

The procedural challenge to this grievance is wholly without merit. The grievance is properly before the arbitrator.

Quantum of Proof

The first question in this case is the applicable quantum of proof. The County argues that the proof of guilt need only rise to a preponderance of the evidence, while the Union argues for a clear and convincing standard. This is an abuse case, but not all abuse charges are of equal gravity. In a case of physical abuse of a resident, the employe stands accused of an act which is both morally repugnant and criminal, and the higher standard is obviously required. 1/ Verbal abuse is somewhat harder to categorize. In some instances, verbal abuse may be so degrading, offensive or cruel that it does raise issues of moral turpitude. In others, it may be abuse in the broad sense that that term is used in the industry to include unpleasant, rude or inappropriate remarks, but not be of such a nature as to genuinely reflect on the moral character of the speaker. In the context of this case, it is more a work rule violation than a charge involving criminal conduct or moral turpitude. As discussed more fully below, the alleged comment is inappropriate and would open the speaker to some measure of discipline, but it is not so egregious as to demand the higher level of proof.

1/ See Bornstein, et al., Labor and Employment Arbitration, (2d Edition, Matthew Bender), Volume 1 (Release No. 18, April 1998), at §506, footnote 1:

"… it is almost certainly the "clear and convincing evidence" standard that will be applied (either expressly or by implication) by arbitrators in cases involving accusations of criminal conduct or moral turpitude…"

To some extent, the analysis of the evidentiary standard is beside the point. This is a case where the employe is alleged to have said something, and she denies having said it. The critical question is that of credibility, and if the arbitrator is able to credit one version over

another, the case is answered under any standard. If the arbitrator is not able to answer the credibility question, neither standard can be met and the Employer, as the party bearing the overall burden of persuasion, loses the case.

Just Cause for Discipline

The grievant is accused of verbally abusing D-- B----y. She acknowledged during her testimony that, if she said what she is alleged to have said, it would be grounds for discipline. Even if she had not made that acknowledgment, telling a resident that he was damned lucky anyone took care of him is plainly a form of verbal abuse. It highlights the dependency of the resident, and carries with it an implication that the staff might choose not to care for him. The statement, on its face, is disrespectful and degrading. Depending upon how it is said, it could also be seen as a form of threat. Thus if the grievant said this, or words to this effect, 2/ she is subject to discipline. This case then, turns on credibility. Heidi Jarvis testified that the grievant said these words. The grievant denies she said these words. There is no room for compromise between them. One of them is lying and the other is telling the truth.

2/ The Union, at some length, parses the various versions of this statement contained in the record, and argues that it is subject to a great deal of interpretation depending upon whether it was "You're damn lucky that anybody takes care of you anyway" as testified to by Jarvis, or "he was damn lucky that anyone would take care of him" as reported in the termination notice. The Union also argues that the termination notice, because it reports a different statement, did not give the grievant proper notice of the charges. These are not persuasive arguments. The grievant cannot have been misled by difference in phrasing between the letter and Jarvis's testimony, nor is there much room for interpretation in either statement. They are essentially identical statements under any common sense reading of them.

Having carefully weighed the record, I have concluded that Jarvis should be credited over the grievant. Jarvis had nothing to gain by making false charges against the grievant. There is no history of animosity between them. It does not appear that Jarvis is some sort of headhunter, intent on making a name for herself by leveling charges of abuse against other employes. She did not come forward immediately, leaving it to B----y whether he wanted to report this incident. She was plainly a reluctant witness, at turns hostile and emotional. However, the substance of her testimony was basically consistent with her prior tellings of the story.

Jarvis's accusations are supported by the actions of D-- B----y, in that something upsetting happened to him that caused him to want to speak to Behn. The Union suggests that he might have been upset by the death of his mother, but speaking to Behn would not have done anything to help with that. In interviews with Hasse and Suemnicht, he supported

Jarvis's statements. Clearly B----y is subject to being led and his answers require a great deal

of interpretation. It would be difficult to base a finding of guilt on his testimony standing alone, particularly in light of the fact that Jarvis violated the sequestration order at the hearing, and obviously upset B----y before he testified. Here, however, his testimony does not stand alone. Instead it serves to support the testimony of Jarvis, who is a fully competent witness. Further, his testimony at the hearing is not so important as his actions and statements immediately after the incident. Those actions were not influenced by the breach of the sequestration order.

In making my credibility determination, I have considered the inherent implausibility of the grievant blurting out this statement with no apparent provocation. While that is a troubling aspect of this case, the alternative is a conclusion that Jarvis and B----y both conspired to get her into trouble. That is an even less plausible conclusion. I have also weighed the demeanor of the three witnesses -- Jarvis, B----y and the grievant. All of them had marked flaws as witnesses. Jarvis, as noted, was very hostile and emotional, and flagrantly breached the sequestration order. B----y was influenced by Jarvis's breach, and was also clearly hampered by his disabilities. The grievant was, quite simply, not convincing in her denials. Given the flaws in each witness, I have attached no weight to demeanor in arriving at my decision.

For the reasons set forth above, I have credited Jarvis and, to the extent that his actions supported Jarvis, B----y, and I have not credited the grievant. Accordingly I find that she did make the statement to B----y. This statement is grounds for discipline. The remaining question is whether it justifies a discharge.

Appropriateness of the Penalty

Verbal abuse of a resident is a breach of the work rules, as well as being inconsistent with the Center's public mission and the entire purpose of the grievant's employment. On the other hand, the grievant is a long service employe. While every case must be judged on its own merits, absent any evidence of a standard practice of discharge for a first offense of verbal abuse, this incident alone would not justify a discharge. This incident is, however, just the latest in a series of disciplinary problems for the grievant. Since her reinstatement from a previous discharge in October of 1994, the grievant has been disciplined twelve times. Within the thirteen months preceding this incident, she was suspended for failure to follow safety procedures, suspended for negligence, warned for sleeping on the job, warned for failing to perform her duties, warned for refusing orders, and suspended for abandoning clients on an outing. Her last suspension, fourteen days in October of 1997, was accompanied by a warning that "Future performance issues will result in discipline that will likely include termination of your employment." It went on to describe the suspension as "one last chance to conform your conduct to the standards of the Center."

By its nature, a progressive system of discipline leaves open the possibility that an employe who is not getting the message may ultimately reach the stage of discharge for an offense that would not by itself justify termination. This appears to be such a case. Given that the grievant has been repeatedly disciplined without apparent improvement, the Employer is justified in believing that a further suspension will not have any corrective effect. Sooner or later, progressive discipline reaches an end point. The Employer's judgment here was that the end point had been reached for the grievant. That judgment cannot be said to have been unreasonable.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The grievance was timely appealed to arbitration, and is properly before the arbitrator.

2. The Employer had just cause to discipline the grievant.

3. The penalty of discharge is consistent with a just cause standard, given the nature of the offense and the grievant's prior disciplinary record.

4. The grievance is denied.

Dated at Racine, Wisconsin, this 8th day of June, 1999

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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