

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

HOMEWARD BOUND, INC)	
)	BMS CASE NO. 09-RA-0636
)	
“EMPLOYER”)	
)	DECISION AND AWARD
And)	
)	
AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 65, LOCAL. 105)	RICHARD R. ANDERSON ARBITRATOR
)	
“UNION”)	September 23, 2009

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on August 4, 2009 in Plymouth, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into evidence by both parties and received into the record. A transcript of the proceedings was prepared by Paradigm Reporting & Captioning, Inc. through RPR Kelley Zilles. The hearing closed on August 4, 2009. Timely briefs were received from the parties by regular mail on September 12, 2009, at which time the record was closed and the matter was then taken under advisement.

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties’ collective bargaining agreement, hereinafter the Agreement, which is currently effective from February 8, 2008 through September 30, 2009.¹ The relevant language in Article 19 of the Agreement [ARBITRATION] provides for the arbitration to resolve all

¹ Joint Exhibit No. 1.

grievance issues. The parties stipulated that the instant grievance is properly before the undersigned Arbitrator for final and binding decision. The parties further stipulated that this matter does not involve any substantive or procedural arbitrability issue.²

APPEARANCES

For the Employer:

Marko J. Mrkonich, Attorney
Don Priebe, Chief Executive Officer
Deb Voigt, Director of Human Resources
Cheryl Foley, Assistant Director of Programs/Operations
Martha Duclos, Program Research Coordinator
Lindsey Shoemaker, Program Research Coordinator
Jan Gunderson, Human Resource Recruiter

For the Union:

Leanne Kunze, Staff Representative
Sarah Lewerenz, Staff Attorney
Carla D. Bonds, Grievant

THE ISSUE

The parties stipulated to the following issue, *“Whether the Employer terminated the Grievant Carla Bonds for just cause in accordance with the collective bargaining agreement, and if not, what should the appropriate remedy be?”*

BACKGROUND

Homeward Bound, Inc., hereinafter the Employer, is a non-profit community-based alternative to institutional care that is one of the largest providers of residential services to individuals with severe and complex disabilities. It provides personalized, long-term support to both children and adults in the metropolitan area and offers families with adult or minor children with disabilities in home and respite care. It operates a facility in Brooklyn Park that serves 32 individuals in four separate areas of the facility. The

² The Employer in its initial denial of the grievance maintained that the grievance was untimely filed. With this stipulation,

Employer also operates four-bedroom homes located in local communities. The Brooklyn Park facility, which is the only facility involved herein, serves residents, or individuals as the Employer refers to them, with more severe disabilities than the individual local community group homes do. These individuals have severe intellectual or developmental disabilities, severe physical disabilities, and often, severe medical disabilities.

Since 2005, the American Federation of State County and Municipal Employees (AFSCME), AFL-CIO Council 65, Local 105, hereinafter the Union, has represented a unit of approximately 90 employees including the classification of Direct Service Staff at its Brooklyn Park facility.

On January 5, 2009³, the Employer terminated the employment of Carla Bonds, hereinafter the Grievant, for sleeping while on duty.⁴ On January 12th, the Union filed a grievance via e-mail alleging that the discipline was excessive and that the Employer failed to meet the just cause threshold for termination.⁵ On January 16th, Director of Human Resources Deb Voigt denied the grievance via e-mail.⁶ Thereafter, the Union via e-mail dated January 19th filed for arbitration.⁷ The undersigned was notified by letter from the Union dated May 8th that I had been selected as the neutral Arbitrator in this matter.

RELEVANT CONTRACT PROVISIONS

ARTICLE NO. 5 — MANAGEMENT RIGHTS

SECTION 1. *All prior management rights, authority and functions shall remain vested exclusively in the Agency except as specifically surrendered or limited by express provisions of this Agreement*

it no longer maintained that position. Joint Exhibit No. 4. See also page 128 of the Transcript.

³ Unless otherwise indicated, all dates herein are in 2009.

⁴ Joint Exhibit No. 3

⁵ Joint Exhibit No 4

⁶ Id.

⁷ Id.

SECTION 2. *It is understood and agreed by the parties that the Agency possesses the sole power, duty, and right to operate and manage its departments, agencies, and programs. The powers, authority, and discretion necessary for the Agency to exercise its rights and carry out its responsibilities shall be limited only by the express terms of this Agreement. Any term or condition of employment except as specifically established by this Agreement shall remain solely within the discretion of the Agency to determine, modify, establish, or eliminate.*

SECTION 3.

A. *Except as expressly restricted by this Agreement, management rights reserved to the Agency by this Article include, but are not limited to: the right, without engaging in negotiations, to determine matters of managerial policy; the services to be provided, their level, and by what means; the method, means, and personnel by which the Agency's operations are to be conducted; the organization's structure; standards of service and maintenance of efficiency; the scheduling of work hours, days, and shifts of operations (including overtime); the location, size, and number of all facilities or service areas; the establishment of quality standards, and standards for provision of services; the right to establish, change, combine, or eliminate jobs, duties, job classifications (if any), and job descriptions based on legal requirements, program changes, or economic considerations; the right to introduce new or improved procedures, methods, processes, locations, training programs, and equipment or to make other changes to promote efficiency; the right to maintain order and efficiency and to issue, modify and enforce rules and regulations; the right to lay off employees; the right to discipline or discharge employees for cause; the determination of which facility or facilities, or part thereof, shall be operated, relocated, shut down, sold or abandoned; the right to terminate, merge, consolidate, sell or otherwise transfer its business or any part thereof; the determination of the number of employees; the assignment of duties to employees; the manning of equipment and the right to change, increase or reduce the same; the direction and control of the workforce; the right to be the sole judge of applicants for employment, their qualifications, and fitness; the right to hire or refuse to hire any employee; the right to train; and the right to take whatever action within the limitations established by this Agreement that is or may be otherwise necessary in the Agency's judgment and discretion to administer its operations and to direct its employees.*

ARTICLE NO. 9 WORK RULES

SECTION 1. *The Agency shall have the right to adopt, implement, delete, enforce, and change work rules, subject to and without violating the terms of this Agreement.*

SECTION 2. *At the time the Agency adopts, deletes or changes any work rule, it shall provide a copy of the rule to the designated Union representative, and shall post the work rule in a prominent place at the Agency's facilities. The Agency shall provide a ten(10) day notice of proposed work rule changes when reasonably possible in the judgement (sic) of the Agency, and excluding situations where prompt action is required.*

ARTICLE NO. 18 — ADJUSTMENT OF GRIEVANCES

SECTION 1 *A grievance shall be limited to a good faith complaint by an employee that the Agency has violated or failed to apply correctly a specific provision or provisions of this Agreement. A past practice related to a specific provision or provisions of this Agreement can be considered as evidence of whether the specific provision or provisions of this Agreement have been violated or applied correctly.*

SECTION 2. *The provisions of this Agreement constitute the sole procedure for the processing and settlement of any claim by an employee or the Union of a violation by the Agency of this Agreement. As the representative of the employees, the Union has the exclusive right to decide how and whether to process grievances through the grievance procedure, including arbitration, in accordance with this Agreement and to adjust or settle the same.*

ARTICLE NO. 19 — ARBITRATION

SECTION 3. *The authority of the arbitrator shall be limited to making an award relating to the interpretation of or adherence to the written provisions of this Agreement, and the arbitrator shall have no authority to add to, subtract from, or modify in any manner the terms and provisions of this Agreement. The award of the arbitrator shall be confined to the issues raised in the written grievance and notice of intent to arbitrate, and the arbitrator shall have no power to decide any other issues.*

ARTICLE NO.20 — DISCIPLINE AND DISCHARGE

SECTION 1. *This Article does not apply to an employee who is on probation as defined in Article 14 of this Agreement.*

SECTION 2. *The Agency may discipline or discharge an employee for just cause. For purposes of this Article, it is expressly agreed that just cause includes, but is not limited to, substantiated abuse, substantiated neglect, financial exploitation, safety violations creating a risk to residents or others, and violations of regulatory or licensing requirements.*

SECTION 3. *In all cases of discharge or discipline, the Agency shall notify the discharged or disciplined employee in writing of his discharge or discipline within three (3) days of the discharge or discipline. A copy shall be sent to the Union.*

SECTION 4. *In the event that the Union desires to protest the discharge or discipline of an employee, such protest shall be filed in writing with the Agency within five (5) working days from the date the notice of discipline and/or discharge issues. The matter shall be taken up in accordance with the machinery for the adjustment of grievances, commencing at Step 3. Discharge cases shall take precedence for disposition under said grievance procedure.*

SECTION 5. *Employees have a right to the presence of an (sic) Union representative during any meeting during which discipline will be imposed. The employee will be informed of these rights prior to the meeting and it is the employee's responsibility to retain a representative.*

EMPLOYER EMPLOYMENT GUIDE

EMPLOYMENT STATUS/CLASSIFICATION

III. *Employee and volunteer JOB DESCRIPTION explain the type of work you do, the qualifications and skills required for your position, the level of responsibility required, physical and mental demands and supervisory responsibilities, if any. All positions, including overnight shifts, require staff to be awake. Copies of job descriptions are available at the administrative office*

Employment Expectations

IV. MISCONDUCT

A. ***ANY EMPLOYEE OR VOLUNTEER WHO COMMITS AN ACT OF MISCONDUCT during work time or on HBI premises will be subject to disciplinary action and may be discharged. Although it is impossible to provide a complete list, examples of misconduct include but are not limited to:***

6. *Violation of regulatory standards.*

FEDERAL REGULATIONS

CFR 42 § 483.430 (c) 2

(c) Standard: Facility staffing.

(1) The facility must not depend upon clients or volunteers to perform direct care services for the facility.

(2) *There must be responsible direct care Staff on duty and awake on a 24-hour basis, when clients are present, to take prompt, appropriate action in case of injury, illness, fire or other emergency, in each defined residential living unit housing—*

(i) *Clients for whom a physician has ordered a medical care plan;*

(ii) *Clients who are aggressive, assaultive or security risks;*

(iii) *More than 16 clients; or*

(iv) *Fewer than 16 clients within a multi-unit building.*

(3) *There must be a responsible direct care staff person on duty on a 24 hour basis (when clients are present) to respond to injuries and symptoms of illness, and to handle emergencies, in each defined residential living unit housing—*

- (i) Clients for whom a physician has not ordered a medical care plan;*
- (ii) Clients who are not aggressive, assaultive or security risks; and*
- (iii) Sixteen or fewer clients,*

(4) *The facility must provide sufficient support staff so that direct care staff are not required to perform support services to the extent that these duties interfere with the exercise of their primary direct client care duties.*

(d). *Standard: Direct care (residential living unit) staff.*

(1) *The facility must provide sufficient direct care staff to manage and supervise clients in accordance with their individual program plans.*

(2) *Direct care staff are defined as the present on-duty staff calculated over all shifts in a 24-hour period for each defined residential living unit.*

(3) *Direct care staff must be provided by the facility in the following minimum ratios of direct care staff to clients:*

(i) For each defined residential living unit serving children under the age of 12, severely and profoundly retarded clients, clients with severe physical disabilities, or clients who are aggressive, assaultive, or security risks, or who manifest severely hyperactive or psychotic-like behavior, the staff to client ratio is 1 to 3.2.

(ii) For each defined residential living unit serving moderately retarded clients, the staff to client ratio is 1 to 4.

(iii) For each defined residential living unit serving clients who function within the range of mild retardation, the staff to client ratio is 1 to 6.4.

FACTS

The Employer has operated a licensed Intermediate Care Facility for Persons with Mental Retardation (ICFMR) in Brooklyn Park, Minnesota since 1979. The facility is a single structure with inner core offices and four homes located at the corners of the building each housing eight individuals⁸. Each home has a central living room with access to eight bedrooms, two bathrooms, a laundry room, a “meds” room and a storage room. Each home operates on a 24-7 basis. During the overnight shift, which is relevant herein, each home has one awake Direct Service Staff employee assigned to it. There are also two Nurses for the four homes and one individual assigned to oversee overall

operation of the facility known as the Building In Charge or BIC.⁹ Assistant Director of Programs/Operations (ADPO) Cheryl Foley testified that while BIC's are in charge of the facility, they do not directly supervise the staff on their respective shifts. This is a function reserved for the Program Resource Coordinators (PRC) at each home who are only on duty during day hours. BIC's also relieve Direct Support Staff during breaks, meals and at other times they are not available.

Most of the 32 individuals housed at the facility suffer from severe mental retardation (IQ's between 20 and 32) and some with profound mental retardation (IQ's less than 20). In addition, the individuals also suffer from various severe physical ailments and health conditions.

The facility is governed by Federal ICFMR regulations and licensing requirements, which the Minnesota Health Department enforces. Pursuant to CFR Chapter 42 Section 483.340, there must be one staff member who is on duty and awake in each home on a 24-hour basis.¹⁰ CEO Don Priebe testified ICFMR regulations require this because they have vulnerable individuals that cannot communicate on their own. They have individuals with uncontrolled seizures that require immediate staff intervention to make sure that they do not swallow their tongue or make sure that they do not fall out of bed.

They also have individuals who are capable of pulling their feeding tubes out, one of whom has a propensity to fall. In fact, he once fell and shattered his jaw. In addition, they need staff to be ready to intervene or act immediately based on their own observations.

⁸ The Employer refers to the clients as individuals.

⁹ BIC's can call in replacement employees if someone is unable to continue working according to Foley; however, they have no disciplinary authority.

¹⁰ Employer Exhibit No. 2.

Direct Support Staff employees are also required to make rounds every two hours, periodically reposition individuals and check incontinent individuals, changing their diapers if necessary. The Direct Service Support employees also have scheduled routine tasks during their shift such as cooking, cleaning, and passing out meds.

CEO Priebe testified that they have had dialogues with State regulators after they learned that the facility had sleeping staff members. As a result, the Employer put in a protocol to ensure that staff members are awake during their night shift. During the past several years the Employer has utilized a drop-in plan whereby PRC's, who have direct supervisory authority over each individual home, will visit the facility.¹¹ During this unannounced visit, the PRC's will check each home to ensure that staff members are awake. If a staff member is found to be asleep, they are awakened and sent home. This misconduct will then be reported to Foley for further appropriate action.

The Employer maintains a zero tolerance "awake policy". Twenty-five staff members have been discovered asleep since 2003 and all have been terminated according to the testimony of CEO Priebe and Human Resource Manager Voigt. Human Resource Recruiter Jan Gunderson testified that during the course of her initial hiring and interview process, she apprises applicants, which included the Grievant, of the Employer's "awake policy" and that a violation of this policy results in termination. Foley testified that all staff members, including the Grievant, are given a copy of the Employer's Employment Guide, which they are required to sign for.¹² The Employment Guide on page 3 states, "*All positions, including overnight shifts, require staff to be awake.*"¹³

¹¹ PRC's report to Assistant Director of Programs/Operations Foley.

¹² Employer Exhibit No. 4.

¹³ Joint Exhibit No.2.

The Grievant acknowledged that she was apprised of the Employer's "awake policy" during the hiring and orientation process; but denied that she was ever told that she would be terminated for falling asleep. She testified that she became aware of this fact "*by hearing it around the building*".

The Grievant was re-employed as a Direct Support Staff employee from October 2007 until January 5, 2009.¹⁴ While employed, she worked on the overnight shift in the Pine Valley Home at the Employer's Brooklyn Park facility. PRC Martha Duclos was her immediate supervisor.¹⁵ On or about December 22, 2008, the Grievant received a leave of absence as a result of a non-work-related knee injury. She was given a leave of absence because she did not have personal leave left to cover her projected absence. While on her leave of absence, the Grievant sought emergency medical treatment at North Memorial Hospital because of chest and abdominal pain, nausea and vomiting.¹⁶ She was released with no restrictions after a doctor's examination. The attending doctor prescribed inter alia Tylenol 3 (300 MG Tylenol and 30 MG codeine) for pain.

After she was cleared to return to work by her doctor, who was treating her knee injury, the Grievant contacted Duclos on December 30, 2008 about returning to work. The Grievant worked the overnight shift beginning on December 31, 2008 without incident. During the January 1st to January 2nd overnight shift, the Grievant testified that she had a bad headache and asked BIC Sue Fredrickson if she could take her pain medication, which Fredrickson approved. The Grievant further testified that during her first shift back

¹⁴ Prior to this tenure, she had worked for the Employer for approximately eight months before resigning and going to work for Hennepin County.

¹⁵ Duclos supervised all the Direct Service Staff at the Pine Valley Home, however, she worked days exclusively.

¹⁶ The Grievant believed that she had pneumonia; however, the medical records did not support this. Union Exhibit No. 2.

she had shown Fredrickson her North Memorial medical records which listed her medication, and also received permission to take her pain medication during this shift.

PRC's Lindsey Shoemaker and Perneesha McCallister, who supervise Fernbrook Home and Woodland Home respectively, conducted a drop-in inspection at the Brooklyn Park facility during the early morning hours of January 2nd. During the inspection they discovered two employees sleeping.

Shoemaker testified that McCallister arrived at the facility before Shoemaker and discovered BIC Fredrickson asleep in the Woodland Home.¹⁷ When Shoemaker arrived she was informed of this development and accompanied McCallister to the Woodland Home where both observed Fredrickson sleeping in a recliner that faced the TV. This was approximately 3:15 a.m.

They then went to Shoemaker's office and discussed the situation wherein they decided to check the other homes before they confronted Fredrickson. During this check of the Grievant's Pine Valley Home, they observed her sleeping in the living room in a wooden futon chair that had been turned to face a TV. They returned to Shoemaker's office, discussed the situation and decided to wake up Fredrickson.

Shoemaker further testified that they arrived back at the Woodland Home at approximately 3:30 a.m. and discovered Fredrickson was awake.¹⁸ They then informed her that they had observed her sleeping and she was going to be sent home. Fredrickson denied that she was sleeping. During the ensuing discussion, Shoemaker testified that Fredrickson made the comment, "*So I better start looking for another job.*" Whereupon

¹⁷ Shoemaker prepared a document on January 5th at the request of Foley that tracts her testimony of the events January 2nd. Employer Exhibit No. 5.

¹⁸ In her testimony, the Grievant indicated that she was asleep from 3:50 a.m. to 4:00 a.m. based on her watch observations.

Shoemaker informed her that it was not up to them, and that someone from the office would be contacting her.

The two then returned to the Pine Valley Home where they observed the Grievant awake. They did not confront her about previously finding her sleeping. Instead, they decided to back to the Woodland Home to discuss the situation. They attempted to call Foley and later Assistant Director of Program and Operations Kathy Tucker, but received no response to either call. They then decided that they would act as the facility BIC and allow the Grievant to continue to work because she was familiar with the care of the individuals in her home whereas they were not.¹⁹

Foley was informed of the Grievant's and Fredrickson's sleeping episodes when she arrived at the facility at approximately 8:15 a.m. on January 2nd. The Grievant was then called into Foley's office at 8:45 a.m. where Foley and Shoemaker were waiting for her.²⁰ Shoemaker testified that prior to the meeting, she had prepared a Performance Review (disciplinary action) for the Grievant that spelled out the impending suspension.²¹

According to the Grievant, Foley and Duclos²² informed her that Shoemaker and McCallester witnessed her sleeping and that she was suspended until Monday when she would find out more. The Grievant further testified that she was not aware that she was going to be disciplined prior to the meeting and never asked if she wanted a Union representative present for the meeting.

¹⁹ According to Shoemaker, finding two people sleeping during an inspection was a unique situation. While McCallester could function as the BIC, Shoemaker, who only had five months of experience, felt uncomfortable about taking over the Grievant's duties, so they decided to keep the Grievant working.

²⁰ When the Grievant arrived Shoemaker believed that the Grievant was asked whether or not she wanted a Union representative present to which the Grievant answered affirmatively. Neither Foley nor the Grievant indicated that this event ever happened. Since no Union representative was identified as being present in the room during any discussions, it appears likely that Shoemaker was confusing this meeting with the termination meeting of January 5th.

²¹ This document was not introduced as an Exhibit.

²² The Grievant misidentified Duclos as being present. Duclos was present at the January 5th termination and not the January 2nd suspension.

According to Shoemaker, the Grievant was informed that she was found sleeping by McCallester and her. The Grievant admitted that she had dozed off because she was not feeling well. During the discussion the Grievant was informed that she was suspended until management could speak to her.²³ According to Shoemaker, the Grievant was very emotional since she knew that employees are terminated if they are caught sleeping.

Duclos testified that after the Grievant had been suspended, she returned to the facility to retrieve keys that she had left there. While there, the Grievant apologized to them for sleeping.

Later that day Human Resource Director Voigt was informed that the Grievant had been suspended along with 22-year employee Fredrickson for sleeping during their previous shifts. Voigt testified that it was her decision to terminate both individuals on the recommendation of Foley and Duclos because they were both found sleeping. Voigt further testified that there are no exceptions or excuses for sleeping on the overnight shift, and that the Employer's zero tolerance "awake policy" has been consistently enforced since 2003 with 25 employees who had been caught sleeping.

On Monday January 5th, Duclos called the Grievant via speakerphone with Foley present. The Grievant was initially asked if she wanted to discuss her situation in person or on the phone, and whether she wanted a Union representative present. The Grievant indicated that she wanted both a phone discussion and Union representative present. At that point Katheryn Cox, whom Foley and Duclos had selected as the Grievant's Union representative, was brought into the meeting.

Staff Representative Leanne Kunze, who services Local 105, testified that Cox is not a designated Union representative, adding that she (Kunze) is the only designated Union

²³ According to the Grievant, she was informed of her suspension at the onset of the meeting.

representative for the Brooklyn Park facility. Kunze also testified that the Employer violated the Agreement when it failed to notify her that the Grievant had been suspended or terminated. Kunze further testified that the denial of a Union representative during the suspension and the termination meetings also violated the Agreement.

The evidence adduced at the hearing also disclosed that the Grievant received a written warning for excessive absences on April 6, 2008. The Grievant testified that the absences were due in part to her illnesses. They were also due to her having to take care of her son who has continuing special needs because of his spinal bifida. She is a single parent and has no one else to care for him at times.

Finally, the evidence disclosed that the Grievant's sleeping while on duty was not reported to State Health Department authorities. Priebe testified that while the Grievant's misconduct violated federal licensing and regulatory standards, there is no requirement to report such violations. The sleeping incident also did not have to be reported to the State under the Minnesota Vulnerable Adults Act because there were other individuals in the building who were awake and nothing happened as a result of the two sleeping episodes.

EMPLOYER POSITION

The Employer's position is that it had just cause to terminate the Grievant on January 5th. The Grievant was found sleeping on the January 1st thru 2nd overnight shift, which justified termination. The Employer argues that:

- The Employer operates an ICFMR facility that is governed by federal regulations administered by the State of Minnesota Health Department. The physical and mental impairments of the individuals are of such an extreme nature that Direct Support Staff members, including the Grievant, are required to give the individuals one hundred percent of their attention at all times.

- Federal regulations require that the Employer provide awake staff in each of the four homes at its Brooklyn Park facility on a 24-hour basis, without exception.
- The Employer's Employment Guide requires that all positions, including those on the overnight shift, are awake positions. The Grievant was also informed at both the hiring interview and new employee orientation that all positions are awake positions.
- The Grievant was further informed during the hiring and orientation processes that falling asleep on duty was grounds for termination. The Employers Employment Guide also spells out that staff members can be terminated for violating safety and regulatory standards. The Grievant testified she received a copy of the Employment Guide and acknowledged in her testimony that she knew sleeping on the job was a terminable offense.
- The Grievant was discovered sleeping by two PRC staff members and admitted that she was asleep while on duty.
- She was subsequently suspended and then terminated according to a long-standing Employer policy. Since 2003, 25 employees have been discovered asleep and all have been terminated. The Employer has consistently followed its zero tolerance "awake policy" because it is a serious transgression.

The Employer further argues that the Grievant contends that she fell asleep because of the pain medication that she took that evening, which BIC Fredrickson allegedly approved. She also contended that BIC Fredrickson had approved her taking the pain medication the night before after she showed Fredrickson the North Memorial medical records. However, the Grievant admitted that she had no problem with remaining awake after taking medication the first night back to work and concedes that at no time during either shift was she sleepy.

The Employer also argues that the Union's testimony at hearing suggests that in light of the fact that no Union representative was present during the Grievant's suspension and termination discussions taints the Grievant's termination is futile. This fact is irrelevant to the matter at hand as the Employer does not contest the timeliness of this Grievance. Similarly, the obligation to secure Union representation for such meetings belongs to the employee pursuant to the parties' Agreement. The grievance contains no reference to such an issue, and the Union did not present any evidence at the hearing to suggest that Grievant requested time to secure Union representation or otherwise objected to these discussions.

Finally, the Employer argues that arbitrators have found that even in the absence of express contract language or work rules sleeping on the job is widely regarded as a serious transgression for which severe consequences are justified. Also, many arbitrators have found that sleeping on the job is the type of conduct that violates the basic work-for-pay bargain underlying the employee-employer relationship.

UNION POSITION

The Union's position is that the Employer did not have just cause to terminate the Grievant. The Grievant was placed on a suspension and subsequently terminated for a single incident of falling asleep for less than 10 minutes after taking a prescription pain medication with her supervisor's approval. She did not intentionally or negligently violate any expectation of her duties as a Direct Service Staff employee. The Agreement requires that termination be for just cause. Just cause in the Agreement, *"includes, but is not limited to, substantiated abuse, substantiated neglect, financial exploitation, safety violations creating a risk to residents or others, and violations of regulatory or licensing requirements."*

The Union argues that there was no regulatory or license violation. In support of this the Union states:

- There is a distinct difference between regulatory or licensing requirements and regulatory and licensing guidelines. The Employer testified that the facility's license is regulated by Federal Rule 483.430, specifically pointing to starred Tag Number W183 on the bottom half of Employer Exhibit No. 1. This states that, "*there must be responsible direct care staff on duty and awake on a 24 hour basis, when clients are present, to take prompt, appropriate action in case of injury, illness, fire or other emergency, in each defined residential living unit housing- - (i) Clients for whom a physician has ordered a medical care plan; (ii) Clients who are aggressive, assaultive or security risks; (iii) More than 16 clients; or (iv) Fewer than 16 clients within a multi-unit building.*"
- According to the Employer's testimony, there is one license that covers the Brooklyn Park facility. The standard overnight staffing levels for this 32 bed facility included two nurses, one supervisor (BIC) and four Direct Service Staff members. The Employer's own testimony supports that the minimum staffing requirement was exceeded on the evening the Grievant believes she dozed off for 5-10 minutes; and in fact, is exceeded on a daily basis.
- The license and regulatory guidelines also include "a test of adequacy about awake staffing". The test is "*how well the facility has organized itself to detect and react to potential emergencies, such as fire, injuries, health emergencies described in the medical care plan (e.g., aspiration, cardiac or respiratory failure, uncontrolled seizures) and behavioral crises*". Testimony confirmed that sufficient awake staff was present

that evening. There were also functioning alarms utilized for residents with specific behavioral and seizure disorder.

- The Employer testified that the facility's license is issued and governed by the State of Minnesota based on federal regulations and guidelines. Employer testimony also confirmed that license violations carry the same reporting obligations as those for the State of Minnesota. The Minnesota Vulnerable Adult Maltreatment Statute requires a written report to be filed with proper authorities when alleged abuse, neglect or financial exploitation may have occurred involving vulnerable adults. Per the Statute, such reports would be screened for merit by and may only be substantiated by the public authority investigating the allegation. According to the Employer's testimony, no report was filed because it determined that there was no obligation to do so. If there was no obligation to do so, then the Employer cannot allege that the Grievant's dozing off created a significant safety risk, neglect, abuse or otherwise reportable action or the Employer would be in violation of Minnesota Statutes requiring such mandated reports involving individual caregivers and/or facilities.

The Union further argues that the Employer failed four of the seven arbitral just cause standards when it terminated the Grievant.²⁴ These are:

1. Notice. Did the employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
2. Reasonable rule or order. Were the employer's rules reasonably related to (a) the orderly efficient and safe operation of the employer's business; and, (b) the performance that the employer might properly expect of the employee?
4. Fair investigation. Was the employer's investigation conducted fairly and objectively?

²⁴ The Union is referring to the standards of just cause initially set forth by Arbitrator Carroll R. Daugherty in *Enterprise Wire Co. and Enterprise Independent Union*, 46 L.A. 635 (1966). These are (1) Notice; (2) Reasonable rule or order; (3) Investigation; (4) Fair investigation; (5) Proof of the investigation to the judge; (6) Equal treatment; and (7) Penalty.

7. Penalty. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense; and, (b) the record of the employee in his/her service with the employer?

The Union argues that the Employer failed the "notice" and "reasonable rule" requirement of the just cause standard by:

- The policy does not forewarn employees of expectations and possible consequences.
- The Employer is arguing that its interpretation of the term "awake position" in the Employment Guide is giving notice that a single incident of dozing will lead to automatic termination. However, this term does not assume that a zero-tolerance policy exists. If there was such a policy, the Union was never informed of it nor received a copy of it.
- The zero-tolerance work rule or policy on "inadvertent dozing off" impacts on the terms and conditions of employment. The Employer is required to notify the Union and then engage in bargaining before implementation.
- Article 9 (Work Rules) in the Agreement requires that the Employer provide a copy of the work rules and post them on the bulletin board when the Employer "*adopts, deletes or changes any work rule*". This has never been done.

The Union further argues that the Employer violated the "fair investigation" criterion of the just cause test by:

- The Employer violated the Grievant's due process rights.
- The Employer never informed the Grievant of her right to Union representation during her investigative interview. Also, when the Grievant was asked and requested Union representation in her termination meeting, they simply pulled a co-worker, who had no standing as a Union representative, into the room to represent her.

Finally, the Union argues that the Employer violated the just cause standard by the severity of the “Penalty”:

- The penalty was unreasonable given the Grievant’s service to the Employer. There is no evidence of performance concerns. Her only discipline was her excessive absences warning in April of 2008 when she missed work due to both her and her son’s medical issues. This warning should never have been issued because the Employer knew the basis for her absences.
- There is no valid Employer past practice argument of terminating all Union employees for sleeping. In order to be a past practice all parties have to be aware of the practice. The Employer never presented any evidence that the Union was aware of this practice.
- The Employer also did not present any evidence that any other Union members were terminated under the zero-tolerance policy.
- The Grievant did not intentionally or negligently doze off while working the overnight shift.

OPINION

The issue before the undersigned is whether the Employer had just cause pursuant to the Agreement to terminate the Grievant for sleeping on January 2, 2009; and if not, what is an appropriate remedy. This issue presents a well-settled two-step analysis. First, whether the Grievant engaged in activity which gave the Employer just and proper cause to discipline her; and second, whether the discipline imposed was appropriate under all the relevant circumstances.²⁵ It is the Employer’s burden to establish that the Grievant

²⁵ Elkouri & Elkouri, *How Arbitration Works*, p. 948(6th ed. 1997)

engaged in conduct warranting discipline and that the appropriate discipline was termination.

The evidence established that the Grievant was discovered sleeping during the early morning hours of January 2nd by supervisors Shoemaker and McCallister. The evidence further established that the Grievant admitted she was sleeping when she was informed by Foley and Duclos that she was being suspended for sleeping.

The evidence also established that sleeping while on duty violates the Employer's "awake policy" outlined in the Employment Guide. This Guide's sleeping proscription is a direct result of the Federal ICFMR licensing and regulations that require the Employer to have "*direct care staff on duty and awake on a 24-hour basis, when clients are present, in each residential living unit...*"²⁶ A violation of the "awake policy" is a violation of "*regulatory standards*" listed under the heading "Misconduct" on page 8 of the Employment Guide, and any employee committing misconduct "*will be subject to disciplinary action and may be discharged*".

Finally, the Agreement specifically states just cause in Section 2 of Article 20, "*includes, but is not limited to, substantiated abuse, substantiated neglect, financial exploitation, safety violations creating a risk to residents or others, and **violations of regulatory or licensing requirements.***" [Emphasis added]

Based upon all the evidence adduced, it appears that the Employer had just cause to discipline the Grievant. However, the Union's arguments must be addressed before a definitive finding can be made. The Union argues that the Grievant never had notice that falling asleep would result in discipline (termination). The Union further argues that the

²⁶ The Union, citing Employer Exhibit No. 1, argues that this is just a guideline and not a licensing requirement. CFR 42 § 483.430 (c) 2 (Employer Exhibit No. 2.; however, established that this is a regulation.

Employer's "awake policy" was never conveyed to the Union or employees either through actual notice or posting, which also violated the parties' Agreement. Finally, the Union argues that the Employer did not engage in bargaining with the Union prior to implementing the policy. If the Union had knowledge of this policy or rule it could have challenged its reasonableness and its subsequent impact on terms and conditions of employment.

The evidence, however, does not support the Union's argument that the Grievant did not have notice that she could be disciplined (terminated) for sleeping on duty. Both Foley and Gunderson testified credibly that they inform all new hires that the Direct Service Staff position is an awake position; and if they are discovered sleeping, they will be terminated. Even if the Grievant is to be credited that she was not so informed by Foley or Gunderson, she readily admitted that she knew this would happen if she was found sleeping because "*she had heard it around the building*". She also admitted during her testimony that she was aware that other employees had been terminated for sleeping while on duty.

The Grievant also had notice through the Employment Guide that she acknowledged in writing that she had received, which states all positions are "*awake positions*", and employees can be disciplined, even terminated, for engaging in misconduct by violating "*regulatory standards*".²⁷ While the Employer could have stated more succinctly in the Employment Guide that sleeping on duty violated regulatory standards and is cause for termination by listing it directly in the "Misconduct" section of the Employment Guide; nevertheless, it is clear that the Grievant had sufficient notice that she faced discipline/termination for violating the Employer's "awake policy".

²⁷ Misconduct section on page 8 of the Employment Guide.

The Union's argument that the Employer's zero-tolerance termination rule on "inadvertent dozing off" is an unreasonable work rule which the Union would have challenged had the Union known about it also does not mitigate against disciplinary action. A rule prohibiting an employee from sleeping on duty is presumptively reasonable especially in the work environment involved herein. However, the discipline imposed as a result of the work rule is more appropriately addressed in the discussion of the penalty later herein.

The Union's allegation that the Employer's failure to bargain before implementing this work rule which nullified the discipline has no merit. The Union did not produce any evidence to support this allegation. Moreover, it appears that the Employer can unilaterally formulate and implement work rules and policies since the Management Rights provision in the Agreement gives the Employer the right, "*Except as expressly restricted by this Agreement, management rights reserved to the Agency by this Article include, but are not limited to: the right, without engaging in negotiations, to... and to issue, modify and enforce rules and regulations....*" Article 9 Section 1 (Work Rules) also gives the Employer the "*right to adopt, implement, delete, enforce, and change work rules, subject to and without violating the terms of this Agreement.*"

In addition, while Section 2 of Article 9 requires posting of existing work rules on the bulletin board or notice to the Union before a work rule is changed there is no evidence to sustain this allegation that the "awake policy" was not posted. Assuming *arguendo* that the Employer was required to post this policy on the bulleting board even though it was contained in the Employment Guide; the failure to post does not in and of itself render the Grievant's discipline moot.

The Union's argument that the Employer violated the just cause fair investigation standard does not support sustaining the grievance. The evidence established that the meeting on January 2nd wherein the Grievant was confronted about sleeping was not an investigative interview. Rather, it appears that the Grievant was being notified by supervision that she was being suspended until the following Monday when she would find out more.

Further evidence to support that the meeting was not "investigative" was adduced through Shoemaker who testified that she had prepared a Performance Review (disciplinary action) form before the Grievant was called into the meeting. Even assuming that this was an investigative interview and the Grievant's *Weingarten*²⁸ rights were violated, as the Union alleges, such conduct does not negate the Grievant's termination.²⁹ Also even assuming that the Employer violated the Agreement when the Grievant was not informed of her right to Union representation during this meeting, it also does not negate the Grievant's termination.

The January 5th meeting wherein the Grievant was informed that she was terminated was also not an investigative interview. It was specifically conducted to inform the Grievant that she was being terminated. Again, the Employer's actions when it did not notify the Union of the termination meeting but instead chose an employee to represent the Grievant may have violated the Agreement; however, it does not negate the discipline imposed for the Grievant's misconduct for the reasons set forth in *Taracorp*.

Finally, the Union's argument that because there was no regulator or license violation the Grievant should not have been disciplined is also without merit. This argument is based on the Union's assumption that the Grievant violated an "awake position" guideline

²⁸ NLRB v. Weingarten 420 US 251 (1975)

and not a regulation. The Federal regulations for IFCMR facilities clearly spell out that the Employer is required to have all awake positions no matter if the staffing levels, as argued by the Union, are exceeded. Also, because the Employer did not or was not required to report the Grievant's sleeping to the Minnesota Department of Health does not remove the Grievant from disciplinary action.

Based on the foregoing, I conclude that the Employer had just cause pursuant to the Agreement to discipline the Grievant. Having so decided, I will now address the Union's argument that the penalty was excessive for the Grievant's misconduct.

The Employer argues that it has consistently applied its "awake policy" to require termination if an employee is found sleeping while on duty. As I recently stated in Metropolitan Council d/b/a Transit Police BMS Case No. 08-PA-0766 (September 16, 2009) assuming arguendo that the Employer is correct and termination pursuant to this policy has been consistently enforced, this in and of itself does not justify per se the Grievant's termination

There may have been valid reasons why a termination for sleeping was never questioned by the Union, especially since the Union testified that it has never been informed by the Employer of any bargaining unit employee, including the Grievant herein, being terminated for sleeping.³⁰ Just because the Union has never filed a grievance in the past does not foreclose the Union from forever grieving this action. This is especially true where there is no evidence that the Union has waived this right.

The fact remains that the Grievant was caught sleeping while on duty. The Grievant testified that she only dozed off for five to ten minutes. Based on the timeline that

²⁹ See *Taracorp Industries* 273 NLRB 221 223 (1984)

³⁰ The Grievant and Union testified that it was the Grievant who alerted the Union of her termination.

Shoemaker testified to, that period could have been much longer.³¹ It is also conceivable that the Grievant could have been sleeping for an extended period of time. However, it does not matter how long the Grievant was sleeping; her actions constituted a serious breach of the Employer's policy and Federal regulations involving having awake positions at ICFMR homes. The Employer has treated sleeping as a serious offense as evidenced that it consistently terminated both employees and supervisors for violating its "awake Policy". Sleeping on the job constitutes major misconduct as other arbitrators have so found. It is especially egregious when the Grievant was sleeping while she was supposed to be taking care of vulnerable adults who cannot care for themselves or even communicate that they are in distress or need care.

It is equally immaterial that a supervisor sanctioned her use of pain medication as the Grievant alleged in her hearsay testimony. It was her duty to provide health care for the individuals in her home. By falling asleep, she placed herself in a position to deny health care to these helpless individuals whose interest must always be paramount. If the Grievant felt drowsy she should have taken measures to keep busy rather than relaxing in front of a television set. She could have also asked BIC Fredrickson to be allowed to go home for the remainder of her shift if she was in pain and needed to take pain medication that could make her drowsy.

It is also immaterial that there were no adverse patient consequences during the Grievant's sleeping episode; the fact remains that vulnerable individuals were placed in a position that could have jeopardized their safety and well-being. Finally, the Employer would have a hard time attracting any clients if it merely "slapped the wrist" of an

³¹ The Grievant testified that she dozed off for 5-10 minutes just before 4:00 a.m. while Shoemaker testified that she initially discovered the Grievant sleeping just after 3:15 a.m.

employee for sleeping when he/she was supposed to be providing care to their loved ones.

In view of the foregoing, I conclude that the Employer had just cause to suspend and then subsequently terminate the Grievant on January 5, 2009. Therefore, I will dismiss the grievance in its entirety.

AWARD

IT IS HEREBY ORDERED that the grievance be and hereby is dismissed in its entirety

Dated: September 23, 2009

Richard R. Anderson, Arbitrator