

In the Matter of the Arbitration

between the Washington Federation of State Employees
("Federation") on behalf of grievant Sara Sarabia Morales,

and

the State of Washington, Department of Social and Health
Services ("DSHS"), Western Washington State Hospital
("WSH" or "Agency").

Findings,
Discussion and
Award.

Case Numbers:	Arbitrator's OB5.
Representing the Agency:	Charlynn R. Hull, Asst. Attorney General, PO Box 40145, Olympia, WA 98504-0145.
Representing the Federation:	Sharon English and Younglove & Coker, PLLC, PO Box 7846, Olympia, WA 98507.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In the office of the Attorney General in Tacoma, Washington on April 24, 2014.
Witnesses for the Agency:	Julia Florence Cook, Deborah Singleton, Jessica Wade, Austin Lee, Bill Bungard, and Mary Ellen Keogh Hoss.
Witnesses for the Federation:	Sara Sarabia Morales, Carl F. Jones, and Dean Dannen.
Post-hearing argument received:	By email from both parties on June 10, 2014.
Date of this award:	June 25, 2014.

This is a dismissal arbitration arising from an alleged single incident of patient abuse at Western Washington State Hospital. The parties stipulate that the issue presented in arbitration is: Did DSHS have just cause for the discharge of Sara Morales, and, if not, what is the appropriate remedy? There are no preliminary issues of substantive or procedural arbitrability, and the parties agree that the burden is on the Agency to establish just cause for the discharge. The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. A court reporter took down the testimony, and counsel had a transcript to aid in the preparation of post-hearing briefs, which were both timely filed and have been carefully considered.

FACTS

WSH is very large; it is the facility of last resort for patients with severe psychiatric or behavioral problems; and it is, accordingly, the most dangerous workplace in the State of Washington. Ms. Morales was a Mental Health Technician 1 (MHT1) at WSH for eight years. On Saturday, May 5, 2012, two of her co-workers alleged that she had kicked a patient. The Agency immediately removed her from patient contact and later placed her in a non-contact position in food preparation pending investigation of that charge.

I take Ms. Morales' account to the investigating Officer to be accurate at least with respect to the early parts of the patient encounter on May 5. The patient in question was an elderly man who has been diagnosed with bipolar and cognitive disorders and had been at the facility for at least a year.¹ Although he is ambulatory, he will not self-feed and must be fed by an attendant. Ms. Morales began her workday day assigned to him one-on-one. She called him out of his room, and he came into the day room and sat on a cushion chair so that she could feed him breakfast. The breakfast was on a small table, and Ms. Morales stood directly in front of the patient and within easy reach in order to feed him.

At that point, a sharp factual dispute arises. Two of Ms. Morales' coworkers, Ms. Wade and Ms. Singleton, who were in the day room at that time, reported her for kicking the patient. Here are their initial written reports, written just after the incident, at the manager's request. Ms. Singleton's wrote:

I'll was helping pass out Breakfast. Sara was helping [the patient] for Breakfast. [He] Grabbed Sara and Sara kicked him with force on his leg (left).

Ms. Wade's written report was more extensive:

1. There is no dispute that he was not able to provide coherent testimony or a formal witness statement.

I was doing vital signs and the med-line, when I turned to the day area to call a patient for his meds I saw Sara kick ___ in the leg with Force[.] I stated, "Sara Don't do that!" She stated I'm not going to let him hit me!" Then I told her I don't care you do not do that. And I reported to RN2 Ayelech Tadesse and Frances Keyes RN3.

While escorted patient back to his room approximately 20 min. later after he came out again, and patient stated to me I grabbed a broad and she kicked me!"

Ms. Morales was promptly removed from the floor and provided this brief written report:

I was feeding a Pt on the day room about 820 suddenly a pt punch me in the stomach I tried to stop him and Jessica LPN yelled at me "said do not do that again"

Due to the nature of its mission and clientele, assaults by patients and charges by patients against other patients or against staff at WSH are quite common; and WSH funds a full-time Lakewood Police Officer to investigate them. Based on the allegation that Ms. Morales had kicked a patient, that Officer initiated a criminal investigation. He spoke first to Ms. Singleton, on May 25, and he was provided with the three initial written statements. This is his summary of that interview with Ms. Singleton:

At around 1250 hours, I interviewed Deborah Singleton (W-2). Singleton provided me with the following story. Singleton was a mental health tech (MHT) working the day shift hours at ward E-7. The incident occurred during the first weekend of May between 0815 and 0820 hours. Sara Sarabia-Morales (S-1) was a co-worker assigned to the same shift in the same [ward]. While Singleton (W-2) was in the day area passing out breakfast trays to patients, Sarabia (S-1) asked Singleton for her help in feeding ___ (V-1). Singleton said that ___ had to be fed by the staff most of the time. ___ was in a chair in the day room when Sarabia asked Singleton for help. Singleton then helped Sarabia in feeding _____. Singleton was standing next to ___ to his left when Sarabia kicked ___ without warning or provocation. Singleton stated that the kicking was fully intended and forceful. Sarabia kicked ___ in the left leg from her position of standing in front of _____. Singleton described that Sarabia was within the kicking distance from _____ so she didn't have to take a step or otherwise move forward in order to kick _____. Singleton didn't know, which leg that Sarabia used in kicking _____ because it happened so fast. Singleton called Sarabia's name immediately after she kicked _____. Singleton yelled "Sara!" in shock. Sarabia immediately claimed that ___ just grabbed her. Singleton, however, didn't see ___ making any attempts to grab Sarabia. After being kicked, ___ looked at Singleton as if he wanted her to talk to Sarabia on his behalf. ___ was then taken to his room and Sarabia was removed from the ward by the ward supervisor. Singleton advised that it didn't appear that Sarabia was upset when the incident occurred.

That interview, together with the initial written statements, presented possible grounds for a criminal charge against Ms. Morales, and the Officer began his June 19 interview of her with a formal *Miranda* warning. That interview was filmed and the video is in the record and I have studied it very carefully. (Ms. Morales waived her *Miranda* rights to an attorney.) Ms. Morales' account in the interview expanded on her original written

statement: About ten minutes into the meal, she claimed, the patient without warning or provocation drove both fists simultaneously into her stomach, not together in the center but apparently straight out from his shoulders. In reaction, she raised both her arms—rather like a boxer defending against incoming blows—and she raised her right knee. The blow was “pretty hard” but Ms. Morales did not fall down nor did she step back out of range of the seated patient. It was when she raised her knee, according to Ms. Morales, that Ms. Wade saw that action from across the day room and “yelled” something like “don’t do that.” Ms. Morales insisted that she had not made contact at all with the patient in covering up to defend herself. She had “little bruises” the next day from the blow to her stomach, but she had already been reassigned to food prep pending the investigation and did not show those bruises to anyone. Here is the Officer’s summary of that interview:

Sarabia has been working at WSH for about 8 years and has known the patient, ____ (V-1) for about a year (ever since he came to the ward). Sarabia was a mental health technician (MHT) at WSH. Sarabia didn’t know ____ outside of WSH and claimed that she had no personal issues with _____. Sarabia explained that the whole incident occurred as a result of a “power trip” by Jessica Wade (W-1), who was recently promoted. Sarabia initially denied kicking or making any physical contact whatsoever with ____ using her foot. Sarabia remembered that the incident occurred on 05-05-12 at -820 hours. Sarabia was assigned to ____ (V-1) as [an] one-on-one staff that morning. At around the time of the incident, ____ was sitting on a chair and she was assisting him with breakfast. Sarabia was feeding ____ at the time when he delivered a double fist punch to Sarabia in her stomach. Sarabia explained that she was standing directly in front of ____ and was within the reaching distance from ____ when he punched her. Sarabia instantaneously placed her hands in front of her in a blocking motion and raised her foot. Sarabia demonstrated her actions, which were recorded on video.² Sarabia insisted that she didn’t kick ____ nor make any physical contact with ____ following him punching her. At this time, Wade yelled at her and told her not to do what she did. Sarabia continued feeding ____ and carried out her normal business until she was relieved of her duty by the charge nurse. Sarabia later told me that ____ also threw milk at her following the incident. Sarabia repeatedly stated that it was Wade who was falsely accusing her. I asked Sarabia if Deborah Singleton helped her while she was feeding _____. Sarabia said Singleton helped her after the incident. I asked Sarabia if she had any issues with Singleton. Sarabia said no.

I mentioned to Sarabia that her story of not kicking and not making any contact with ____ didn’t sound convincing as there were two independent witnesses who claimed that she kicked ____ forcefully. Sarabia insisted that she didn’t kick. I then mentioned that I didn’t think she would pass a polygraph test if she was to take the test. ____ agreed with me on that (the probability of her not passing the polygraph). After repeated questioning, Sarabia admitted to kicking _____. Sarabia, however, stated that she only kicked ____ in response to him punching her and she kicked him softly. I asked Sarabia why she lied to me in the beginning. Sarabia said it was because she didn’t kick in her “conscience” and “mind.” I logged the DVD into evidence at Lakewood Police station.

2. This part of the summary is not quite accurate. Ms. Morales remained seated at the interview table with a large white purse across her lap. One can see her knee lift under the purse, but the Officer never invited her to stand up and really “demonstrate her actions.”

Finally, here is the investigating Officer's report of his June 26 interview with Ms. Wade:

On 06-26-12 at around 1009 hours, I interviewed Jessica Wade (W-1) at the police station in reference to the case. Wade (W-1) provided me with the following story. On 05-05-12, Wade was managing the med line taking vital signs of patients before they receive their meds. The incident occurred sometime around the breakfast time. Wade turned toward the day area to call the next patient to the med line as only one patient was allowed to be in the med line at a time. As Wade turned to call the patient, she saw Sarabia kicking in the left shin with her right leg. Wade immediately told Sarabia "Sara, what are you doing?" Wade followed up with another statement, "Don't do that!" The intensity and the motion of Sarabia kicking were like "kicking a football" Sarabia was feeding at the time. Wade was about two and a half car lengths away from Sarabia and when she observed the incident. Wade didn't remember having any responses to Sarabia's kicking. Wade reported the incident immediately to the supervisor (Ayelech Tedessa). Wade said it could be possible that ____ punched Sarabia prior to her witnessing Sarabia kicking _____.

WSH served Ms. Morales with a Notice of Intent based on the original employee complaints and on the investigating Officer's subsequent report. After she and her Federation representative responded to the charges WSH discharged her effective January 9, 2014. The dismissal decision was based on the initial witness statements, the investigative report, and Ms. Morales' final response to the charges at the pre-dismissal hearing. She was also charged criminally, with Assault in the Fourth Degree; and she entered a Stipulated Order of Continuance with Conditions which in effect did not contest the investigating Officer's findings.

DISCUSSION

The vast majority of just cause issues divide into three fundamental requirements: The employer must show that the grievant actually did whatever he or she was disciplined or discharged for; the employer must show that the grievant should have known in advance that such misbehavior might have these disciplinary consequences and that the disciplinary consequences are not grossly disproportional to the misbehavior at issue; and the employer must show that the disciplinary process was not unfair or irregular. In the case at hand, the Union challenges the Agency on each of those three requirements.

Did she do it? The most fundamental dispute here is whether or not Ms. Morales kicked the patient as alleged. In brief, she insists that the patient struck her unexpectedly with both of his fists and that her only response was an automatic attempt to protect herself by raising her arms and knee in a blocking fashion. The two witnesses, on the other hand, allege that she "forcibly" kicked the patient. Ms. Wade did not see whatever happened between Ms. Morales and the patient before the kick; but Ms. Singleton did. Ms. Singleton's initial written statement mentions the patient grabbing Ms. Morales just before the kick, but the investigating Officer's summary of her interview includes a denial of her having seen a

grab. (At the arbitration hearing Ms. Singleton testified that the patient's prior action was simply an attempt to fend off Ms. Morales giving him another bite to eat—a common gesture of patients being fed by an attendant—which is not quite a “grab” in the usual sense and may explain the inconsistency.) Whether or not that prior action was a “grab,” however, Ms. Singleton was only about three feet away just before the kick, and she did not see the patient striking Ms. Morales.

Apart from that conflicting testimony, however, my first problem with Ms. Morales' account is that it does not seem to me to be probable all by itself. There are two reasons. First, when a standing person lifts both arms and a knee reflexively and protectively, it seems to me that the foot is likely to come straight up, not to extend toward the assailant. I cannot quite imagine extending the foot at the same time that the knee is coming up. That is not necessarily a flaw in Ms. Morales' picture, because through most of the investigation she consistently insisted that she never made any contact with the patient as she reacted to his striking her. My second problem with her account, however, is that I cannot quite imagine the two-fisted blow and the reaction she describes without seeing her being driven back, which she has never mentioned and which neither of the two other witnesses mentioned. If she was struck on both sides of the stomach hard enough to leave bruises in the following days—as she claims—and if she raised a knee in response, I cannot picture her not being driven to take a step back from the patient. And, of course, a simple step backwards would seem to be the most obvious defense of all in the picture Ms. Morales paints. In light of the uncontested fact that a simple step backwards would have taken her out of range, her claim that she feared the patient would continue to attack her rings quite false. In short, I simply cannot find a plausible picture in Ms. Morales' description of what happened.

There is a bit of a factual disconnect throughout this case because of two versions of Ms. Morales' account. Before the arbitration hearing, she consistently insisted that she never made any contact at all with the patient. The alternative account, that she accidentally came in contact in the course of defending herself after the blow, was entirely the creation of the investigating Officer. In his recorded interview with Ms. Morales he repeatedly insisted that her hazard of facing criminal prosecution would be reduced if she gave up her 'no contact' version of the story and agreed that she had made contact in self defense; and she finally, halfheartedly said “I guess I made contact with him” because she “just want[ed] to get finished with this problem.” In my opinion, no reasonable study of the video could conclude that she ever really accepted the Officer's suggestion that she had made contact in self defense. And that fundamental fact rather undermines the Federation's defense of “Ms. Morales' version of the events which is that, after being assaulted herself, she spontaneously responded in an effort to protect herself” and “Ms. Morales simply had an instinctive, reactionary response to being assaulted herself by a patient, an assault which was painful and done with enough force to have caused bruising.” (Post-hearing brief at 5 and 9.) It is just not possible to explain even an accidental contact after she so ardently denied that such contact ever happened.

By the time of the arbitration hearing, Ms. Morales had accepted a version of the investigating Officer's proposal and testified, not that she kicked the patient in self defense, but that she accidentally made contact with him in the process of taking defensive action. But, for the reasons set out above—and also because this is such a new and revised version of the events in question—I find that claim unconvincing. On any reasonable standard of proof, the Agency established that Ms. Morales did what she was discharged for.³

Should she have known of these possible consequences? And are they unreasonably out of proportion to the offense? Ms. Morales testified that “I knew I was going to lose my job,” and the Federation agrees (Post-hearing brief at 16 quoting Tr. 205 & 233) that “all employees are aware that if you are accused of touching a patient, you will be terminated,” so there is no room for doubt that she was on notice of the possible consequences of kicking a patient.

The Federation argues (Post-hearing Brief at 12ff) that the “discipline imposed was too severe.” But the Federation's fundamental argument here rests primarily on accepting Ms. Morales' version of the incident at issue—i.e., a defensive reaction and accidental contact—which I cannot do. Because I cannot conclude that there was accidental contact, I am left with the witnesses' claim that there was intentional and forceful contact. The record here provides no reason at all for Ms. Morales to have kicked the patient—which is a weakness from the Agency's point of view—but the record does show pretty clearly that Ms. Morales did kick a patient forcefully and on purpose. Even though she had eight years of prior service with no disciplinary history, and even though the patient was not marked by her kick, I cannot conclude that the Agency is unreasonable in protecting its patient population by a stringent policy of discharge for such misbehavior.

Was the disciplinary process irregular? The arrangement the Agency has with the local police department makes sense because of the volume of claims that arise around this patient population and because many of those claims amount to criminal assault as well as to disciplinable misbehavior. The Federation argues (Post-hearing Brief at 10-11) that the “investigative report relied on by the Employer had inaccuracies.” The Federation focuses on the inconsistency between Ms. Singleton's initial statement and the investigating Officer's summary of Ms. Singleton's subsequent interview with respect to the patient's grabbing Ms. Morales before the kick. I agree that it would have been better if the Officer had pursued that issue in his interview with Ms. Singleton; but I cannot agree that that inconsistency was a material flaw in the investigation. Ms. Morales' basic account was that there was *no* contact; her secondary version with slight, unintentional contact, is unconvincing. The minor inconsistencies in the investigatory report are not material. Overall, the investigation was conducted fairly.

3. It is not necessary to address the parties' dispute over the proper measure of the Agency's burden of proof in this case.

The Agency argues (Post-hearing brief at 13) that “the sum of the evidence can lead the Arbitrator to only one conclusion: Ms. Morales kicked the patient with force in his leg and thus deserves to be fired.” I cannot quite agree with that summary, but only because it is not for me to decide whether the grievant “deserves” to be fired. The parties’ just cause agreement gives me no such authority. But the Agency is correct in its general conclusion that, to the extent that I am authorized to review this discharge under the just cause standard, I must conclude that Ms. Morales kicked the patient with force and that the Agency therefore had just cause to discharge her. The grievance must be dismissed.

AWARD

DSHS had just cause for the discharge of Sara Morales. The grievance is dismissed.

Respectfully submitted,



Howell L. Lankford
Arbitrator