

In the Matter of the Arbitration between

LOCAL 509, SEIU

and

NuPATH, INC.

**OPINION
AND
AWARD**

EMPLOYEE Termination

The parties submitted this case to arbitration pursuant to their collective bargaining agreement effective October 22, 2014. A hearing was held on November 9, 2015. Jillian Ryan, Esq., appeared on behalf of the Union; and Michael Harrington, Esq., appeared on behalf of the Employer. Post-hearing briefs were received from the parties by December 22, 2015.

ISSUE

Whether EMPLOYEE's employment with NuPath was terminated for just cause? If not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 19 – DISCIPLINE AND DISCHARGE

19.1 NuPath shall have the right to discipline, including suspend or discharge, any non-probationary employee for just cause.

19.3 Where appropriate, NuPath will utilize progressive for non-probationary employees. Generally, the steps of progressive discipline shall be imposed in the following order:

1. Verbal Warning
2. Written Warning

3. Suspension without pay
4. Discharge

However, NuPath may deviate from these steps in a non-arbitrary or capricious manner, depending on the severity of the offense.

Section 19.7 Certain conduct shall be subject to immediate discharge. If discipline is grieved and arbitrated, an arbitrator shall only decide whether the employee engaged in any of the following conduct, and, if so, the grievance shall be denied. The offenses subject to this section are:

- . . .
2. Conduct in the workplace or while on duty, that is harmful to the health, welfare, or safety of a client or staff member, including conduct harmful to property or the community;

. . .

The parties recognize that the list of offenses for which NuPath may discipline or discharge set forth above is not intended to be all-inclusive. If an employee is disciplined or discharged for a reason that is not set forth above, the provision of Section 19.1 shall apply.

BACKGROUND

Woburn Street House. The Employer is a nonprofit organization that runs seventeen residential homes for men and women with significant developmental disabilities, as well as three day programs. One such residential home is on Woburn Street, where five adult men live. The residential homes are staffed twenty-four hours a day by direct care specialists. Staff to resident ratios are three to five during the times that the residents are in the house, except for overnight, when there are two specialists on duty, one of whom may be asleep.

Among the residents at Woburn Street is CLIENT I. For each resident, the program staff develop Individual Behavior Guidelines, which are revised annually be

provided to the house staff. CLIENT I's guidelines note that his challenging behaviors include being aggressive and attempting to elope. On occasion he had run out of the house or the day program where he went, gone into a busy street, and lain down on the road. To protect against elopement, the guidelines require that staff maintain "eyes on" CLIENT I at all times. Alarms have been installed on all three external doors of the house that emit a loud sound whenever a door is opened, so the staff will be alerted if he manages to leave the building. The alarms turn off and reset when the door is closed, or the alarm can be manually turned off and reset with a touchpad. A fence was installed around the house to slow CLIENT I down, but he has learned to open the latch. At night, the one staff member who is allowed to sleep does so on a pull-out couch located outside CLIENT I's bedroom.

EMPLOYEE's Employment History. EMPLOYEE began working at Woburn Street as a direct care specialist in 2011. He had prior experience in a residential care setting, having worked in a similar position for six years for a place called Tawny Point. Throughout his employment at Woburn Street, EMPLOYEE maintained his thirty hour a week position at Tawny Point. EMPLOYEE's schedule at Woburn Street in recent years was Sunday, Monday, Thursday, Friday from 3:00 pm to 11 pm, and Saturday from 9 am to 3 pm.

EMPLOYEE was regarded by managers as a reliable and conscientious employee who was well-liked by co-workers and residents. At some point he was given the Shining Star Award in recognition of his high level of performance. Until the incident that gave rise to his termination, he received no discipline. In 2012, three employees of Woburn Street were called to the office and spoken to by SUPERVISOR, the vice

president for Human Resources. Another NuPath employee had alleged that when he went to Woburn Street he looked through the window and saw all three staff members sleeping. The three employees denied that they had been sleeping. SUPERVISOR imposed no discipline on anyone, but stressed to EMPLOYEE and the others that NuPath had no tolerance for employees sleeping on the job, and said such an offense would lead to termination.

SUPERVISOR's Observations. On June 29, 2015, the on-site manager of Woburn Street was either on leave or it was his day off. Vice President of Residential Operations SUPERVISOR testified that she came by the facility at about 4:50 pm to see if the staff needed anything. She saw that the trash barrels were at the curb and brought them back to the house. After that she entered the front door, causing the alarm to go off, which she reset manually.

As SUPERVISOR walked from the entrance hall to the living room, SPECIALIST I, a direct care specialist who had begun working a few weeks before, greeted her. SUPERVISOR walked past SPECIALIST I into the living room. CLIENT I was sitting on a chair near the doorway to the hall and AI, another resident, was across the room. SUPERVISOR saw EMPLOYEE sitting on a couch with his hand on his head, his cell phone on his lap, his shoes off, and he appeared to be asleep. SUPERVISOR spoke loudly with CLIENT I and AI and AI answered her in a loud voice, but EMPLOYEE did not stir. SUPERVISOR then left the living room to look for SPECIALIST III, the third specialist on duty, and found that he was in the bathroom off the kitchen. SUPERVISOR opened another exterior door, setting off that alarm. She went outside and called RESIDENTIAL DIRECTOR under whose jurisdiction Woburn

Street fell. SUPERVISOR explained that she had found EMPLOYEE asleep in the living room, which disappointed her greatly.

SUPERVISOR then returned to the living room and found EMPLOYEE in the same position, sleeping on the couch, but now he was snoring. SUPERVISOR took a picture and then approached him, leaning over and speaking his name twice. Only after SUPERVISOR shook EMPLOYEE's shoulder did he awake, wiping saliva from his mouth. SUPERVISOR stated that he had been sleeping and he now had to leave.

EMPLOYEE said he had not been asleep. He groggily stumbled while putting on his shoes, and he left the house. SUPERVISOR called SUPERVISOR II back and told her EMPLOYEE had been sent home. SUPERVISOR directed SUPERVISOR II to make arrangements to get another specialist to cover the rest of the shift. After the relief person arrived SUPERVISOR went back to her office and wrote out a statement that was largely the same as her testimony.

Subsequent Investigation. An investigation was conducted by Human Resources staff starting on July 1. When contacted, SPECIALIST III reported that when he arrived at the house on June 29 EMPLOYEE was already there. EMPLOYEE told SPECIALIST III that he was not feeling well, but he did not want to call out sick. SPECIALIST III suggested that EMPLOYEE go home, but EMPLOYEE insisted that he would be fine. When the residents arrived at the facility, SPECIALIST III was already in the kitchen beginning to prepare dinner, having volunteered to do the cooking normally done by EMPLOYEE. EMPLOYEE brought the residents into the house and EMPLOYEE gave out the 4 pm medications. Later SUPERVISOR came into the kitchen

and told SPECIALIST III that EMPLOYEE had been sleeping, something that SPECIALIST III had not observed because he was cooking.

SPECIALIST I told the Human Resources representatives that she had observed EMPLOYEE sleeping and SUPERVISOR attempting to wake him. She also reported that she had been trying to wake EMPLOYEE, telling him that he needs to be awake, but he would only wake for a moment, and then go back to sleep. SPECIALIST I further stated that she had seen EMPLOYEE sleep on shift on other days as well. In an email SPECIALIST I submitted two days later, she noted that “Staff had tried to wake him a couple of times in the past.” SPECIALIST I, who was subpoenaed by NuPath, gave similar testimony at the arbitration.

At a July 2nd meeting that EMPLOYEE attended with Union representatives, EMPLOYEE explained that he came to work on June 29th, but was suffering from a migraine, for which he had taken medication, which he clarified was ibuprofen. In response to a question, EMPLOYEE stated that he had not told SUPERVISOR he was on medication or not feeling well. EMPLOYEE mentioned that he had earlier gotten a call from SUPERVISOR II, and he confirmed that he had not told her he had a migraine or wanted to go home. EMPLOYEE insisted throughout the interview that he had not been asleep and had no idea why anyone would report that he had been sleeping. At one point a Union representative prompted him about whether he was going to a doctor for his migraine, and EMPLOYEE finally said he was seeing a doctor on the 15th.

SUPERVISOR ultimately made the decision to terminate EMPLOYEE, which she documented in a July 6, 2015 letter to EMPLOYEE. SUPERVISOR wrote that EMPLOYEE was guilty of “deliberate and willful negligence” when he was so sound

asleep on June 29 that he was not awakened by two door alarms and loud talking in the living room. She said his behavior jeopardized the safety of CLIENT I and the co-workers who could have had to deal with CLIENT I's documented behavioral tendencies. SUPERVISOR alluded to the fact that EMPLOYEE had been observed sleeping on other occasions by his co-workers. She asserted that pursuant to Section 19.7, conduct that is harmful to the health, safety, and welfare of a client or staff member is grounds for immediate discharge. She further noted that on June 29 and during the July 2 interview, EMPLOYEE continued to deny that he had been sleeping. In her arbitration testimony, SUPERVISOR explained that NuPath is always looking for employees to take responsibility for their actions, and it was significant that until the arbitration hearing EMPLOYEE never acknowledged that he was asleep at work.

EMPLOYEE's Testimony. EMPLOYEE recounted that he had not worked at Tawny Point on Monday, June 29, his prior shift there having been on Sunday. While driving to work on the 29th, he felt a migraine coming on. He got to the house about 2:50, wearing jeans, a shirt, and slip-on shoes with no back. When SPECIALIST III arrived around 3 pm EMPLOYEE told him he was not feeling well. SPECIALIST III suggested that EMPLOYEE call the manager, but EMPLOYEE said there was a policy about having to call in four hours before a shift begins, and he preferred not to call out sick now. EMPLOYEE suggested that he would take some medication and a drink and see if he felt better. SPECIALIST III offered to take over the cooking and told EMPLOYEE to provide the medications to the residents when they returned to the house from their day activities between 3:30 and 4:00.

EMPLOYEE said he gave CLIENT I his medication at 4:00 and the residents had snacks. Sometime between 4:30 and 4:45, he heard the telephone in the living room ring, and he sat down on the couch to answer it. It was SUPERVISOR II, who was calling to see how things were going in the absence of the manager. After he hung up the telephone, he put his hand on his aching head and closed his eyes. The next thing he was aware of was SUPERVISOR calling his name, stating that he had been sleeping, and telling him to go home. He said he had not realized that he had fallen asleep, which is why he insisted at the investigatory meeting that he had not been sleeping. EMPLOYEE testified, however, that due to the headache and the medicine he had taken, the probability was that he had dozed off.

SUPERVISOR II was recalled by NuPath after EMPLOYEE's testimony. She stated that she had called the home and spoken with EMPLOYEE at 3:15. She said she was sure of the time because she had another scheduled meeting at 3:25, and that meeting lasted until 4:45. Soon thereafter she received the calls from SUPERVISOR, who reported that she had found EMPLOYEE asleep.

Other Sleeping Incidents. On August 11, 2011 SUPERVISOR terminated two care specialists for activities that occurred on three consecutive days, but which supervision only learned about on August 11. On the first day, the two employees left a third specialist at a swimming pool with two aggressive clients, and departed with the balance of the residents for two and one-half hours, despite the fact the schedule called for all of them to be swimming. The next day the two employees were observed by a co-worker sleeping in the front of the van, while the residents were strapped in their seats in the back of the van. On August 11, the co-worker rebelled when the two employees were

again going to sleep in the van and reported the matter to management. This occurred three years before the Union won representation rights and before there was a collective bargaining agreement with a just cause provision.

On April 9, 2015, a probationary employee was terminated after two specialists reported to management that the new employee had been sleeping in a recliner, covered with a comforter and snoring, for over an hour. This was at a time when the employee was responsible for putting one of the clients to bed.

Subsequent to EMPLOYEE's termination, two other employees were discharged because of sleeping. An employee named FORMER EMPLOYEE was terminated on August 18. He had been found sleeping on July 18 and August 4, during periods when he was supposed to be supervising a resident. FORMER EMPLOYEE acknowledged during the investigation that he fell asleep, but explained that he was taking medication that caused drowsiness, and had consulted with his physician, who was going to modify the medication. Based on these representations, SUPERVISOR agreed to give FORMER EMPLOYEE a final written warning, telling him that any further incidents of sleeping would result in his termination. On August 13, the very day FORMER EMPLOYEE returned to work, he fell asleep on three occasions during his shift, and SUPERVISOR terminated his employment.

Lastly, an employee named FORMER EMPLOYEE II was terminated after she was reported by co-workers as having separated herself from the residents during an outdoor sports event, lain down on some bleachers, covered herself with a scarf, and fallen into a deep sleep. In the termination letter, SUPERVISOR also mentioned that

during the investigation FORMER EMPLOYEE II made unsubstantiated retaliatory allegations against two co-workers whom she believed had filed reports about her.

COMPANY POSITION

Although EMPLOYEE had been a good employee, he had been specifically warned that sleeping on duty would result in termination. The collective bargaining agreement provides that conduct that is harmful to the health, welfare, or safety of a client may lead to immediate discharge. This is because the clients like CLIENT I are vulnerable and in need of constant supervision. By falling into such a sound sleep that he was not even roused by two door alarms, SUPERVISOR II and the residents speaking in a loud voice in the same room, and SUPERVISOR's initial attempts to wake him, EMPLOYEE clearly endangered the residents and put the remaining staff members in a compromised position. This was not a situation where an employee fell asleep accidentally. EMPLOYEE had taken off his shoes and he had been on the couch for nearly two hours, from the time he spoke with SUPERVISOR II around 3 pm. Further, until the arbitration EMPLOYEE consistently denied that he had been asleep, meaning he never took responsibility for his actions. He had failed to mention to SUPERVISOR or SUPERVISOR II on June 29 that he had been suffering from a migraine. If he had been ill, he should have asked to be replaced, rather than jeopardizing the safety of the residents. The Company imposed the same discipline on him as it has on other employees found sleeping.

UNION POSITION

EMPLOYEE fell asleep briefly while at work because he was suffering from a migraine headache. He had mentioned this malady to SPECIALIST III at the beginning of the shift, and he resisted the option of calling out sick because SPECIALIST I was a very new employee and the regular supervisor was not at work that day. This situation was readily distinguishable from cases where employees create a nest, or secrete themselves, and intentionally sleep during a shift. EMPLOYEE was sitting in the living room of the facility, among residents, in full view of everyone. His time asleep was brief. SUPERVISOR II's testimony about the timing of her call was not credible, given that the residents were not yet back at the facility when she claims to have called to check on how they were doing, and it was well before EMPLOYEE had given the residents their 4:00 pm medication. It is true that EMPLOYEE disputed to SUPERVISOR that he had been asleep and he did not mention that he had taken medication to try and relieve his headache, but that was because he was unaware that he had been asleep. Even assuming some discipline is warranted, discharge is far too severe a penalty. It was acknowledged that EMPLOYEE was an excellent employee with an unblemished record. There was no proof he had ever before slept at work, the prior warning having been issued to all the employees on a shift after an unsubstantiated allegation by an employee who had been denied access to a gas card, and SPECIALIST I's assertion that EMPLOYEE had slept on other shifts lacking any specificity. The other cases cited by the Employer resulting in termination for sleeping involved employees who intentionally shirked their duties and set about to sleep. In contrast, FORMER EMPLOYEE was given a final warning after he explained that he had fallen asleep inadvertently because of the medication he was on.

EMPLOYEE's termination should therefore be overturned. He should be retroactively reinstated and made whole for all losses.

OPINION

Unintentional Sleeping On The Job. As EMPLOYEE finally acknowledged at the arbitration, he fell asleep while at work on June 29. Given that this occurred in the afternoon while two other staff members were present in the facility, it cannot be said that EMPLOYEE's inappropriate behavior fell into the category of conduct that is harmful to the health, welfare, or safety of the residents or a staff member, which would preclude an arbitrator from evaluating the quantum of discipline imposed according to the just cause standard. There is no question that EMPLOYEE was in a deep sleep and was not easily awakened, but there was no evidence that any resident was actually harmed by his conduct. Importantly, this was not the type of intentional sleeping on the job infraction for which arbitrators typically support termination for the first offense. EMPLOYEE did not remove himself from the residents and other staff and set up a nest with a pillow and a blanket. He was sitting in the living room, telephone in hand, with residents and other staff walking in and out.

While EMPLOYEE did not tell SUPERVISOR II when she called that he was suffering from a migraine, nor did he mention it to SUPERVISOR when she finally roused him, it is not disputed that he told SPECIALIST III about his affliction as soon as SPECIALIST III arrived at work. EMPLOYEE resisted SPECIALIST III's suggestion that he call out sick. The import of this is that it proves that the claim of an illness was not an after-the-fact fabrication. Further, it lends credence to EMPLOYEE's assertion

that he sat on the couch after taking some medicine and closed his eyes to try and get relief from the headache. That one might drift off in such a circumstance is entirely plausible. The Company's claim that EMPLOYEE had actually been asleep for more than an hour, rather than a few minutes, was unsubstantiated. Whatever the timing of SUPERVISOR II's call, SPECIALIST III's report during the investigation that EMPLOYEE gave out the 4 pm medication tended to corroborate EMPLOYEE's version of what occurred and disproved any inference that EMPLOYEE had been asleep since a 3:15 pm call from SUPERVISOR II.

Appropriate Level of Discipline. In cases where employees have unintentionally fallen asleep at work, arbitrators look at the employee's prior work record and the parties' practice in assessing how much discipline is justified. As the supervisors testified, they regarded EMPLOYEE as a good employee, one who was well-liked by residents and co-workers, so much so that they emphasized that they took no pleasure in terminating him. He had no prior disciplinary record. He and other employees had been orally warned that sleeping on the job could lead to termination, but absent proof that he and the others had in fact been sleeping, the Company imposed no discipline.

The Company has terminated employees for their first offense of sleeping, but those cases all involved people whose actions were intentional. EMPLOYEE's situation is most like that of FORMER EMPLOYEE, who asserted that he had fallen asleep on two occasions due to medication he was taking. The Company agreed to give FORMER EMPLOYEE a final warning, with the understanding that he would be seeing his doctor to have his medication modified. Only when he fell asleep repeatedly on his very next shift did the Company terminate him.

What distinguishes FORMER EMPLOYEE from EMPLOYEE was that FORMER EMPLOYEE readily acknowledged during the Company's investigation that he had fallen asleep at work. The Company understandably expects employees to take responsibility for their actions, since acknowledging one's shortcomings is an important step in making sure they will not recur. One can excuse EMPLOYEE for not immediately confirming to SUPERVISOR that he had been asleep. He was feeling ill, he had not realized that he had fallen into a deep sleep, and he was surprised and likely chagrined at having been awakened by a high level supervisor. None of these explanations apply to EMPLOYEE's statements at the July 2 meeting with Union representation. Until EMPLOYEE took full responsibility for his actions, which at best placed an unfair burden on his co-workers and deprived the residents of his full attention, there was no reason for the Company to offer the same level of progressive discipline that it later offered to FORMER EMPLOYEE.

In conclusion, the Company did not have just cause to terminate EMPLOYEE for unintentionally falling asleep at work, but until he acknowledged that he had in fact been sleeping, the Company was not compelled to give him a final warning and return him to work. Because that acknowledgement did not come until the arbitration hearing, the appropriate remedy is that the termination be reduced to a final warning, that EMPLOYEE be reinstated, but without back pay or benefits.

AWARD

EMPLOYEE's employment with NuPath was terminated without just cause. The termination shall be reduced to a final warning, and he shall be reinstated, but without back pay or benefits.

Mark L. Irings

Mark L. Irings

Arbitrator

January 20, 2016