

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
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SERVICE EMPLOYEES INTERNATIONAL :
UNION, LOCAL 150 : Case 13
 : No. 43744
and : A-4610
 :
UNICARE HEALTH FACILITIES, :
d/b/a JACKSON CENTER :
 :
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Appearances:
Mr. Thadd Hryniewiecki, Union Representative, SEIU Local 150, appearing
on behalf of the Union.
Mr. William Isaacson, Labor Attorney, Unicare Health Facilities,
appearing on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the Employer respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on May 24, 1990, in Milwaukee, Wisconsin. The Employer's brief was filed June 15, 1990 and the Union waived its right to file a brief on July 16, 1990, whereupon the record was closed. Based on the entire record, I issue the following Award.

ISSUE

The parties stipulated to the following issue:

Did the Employer have just cause for the discharge of
Regina Clark for patient abuse?

PERTINENT CONTRACT PROVISION

The parties' 1987-89 collective bargaining agreement contained the following pertinent provision:

ARTICLE XI - Discharge

Section 1. The Employer may discharge or suspend an employee for just cause, but in respect to discharge, shall give warning of the complaint against such employee to the employee, in writing, and a copy of the same to the Union, except that no warning notice need be given to an employee if the cause of such discharge is dishonesty, drinking, four or more garnishments, or recklessness that could result in an accident to a patient, abuse of a patient, verbal or physical, sleeping on the job, leaving patients unattended, disclosing privileged information or if an employee does not report unavailability for work at least one hour before starting time. However, no action shall be taken if the employee can show to the satisfaction of the Employer that his/her availability prevented him/her from doing so. The Union will be notified as soon as possible after a member is discharged.

FACTS

The Employer operates a nursing home in Milwaukee, Wisconsin which provides nursing care and services to elderly and infirm residents. It is licensed by the state and is subject to state regulations. The nursing home employs resident living assistants (RLAs) to help the residents with their daily living tasks. The grievant, Regina Clark, was employed by the Employer for four and one-half months as a RLA before she was terminated on January 8, 1990. She was terminated for patient abuse which allegedly occurred on January 1, 1990.

These facts surrounding the January 1, 1990 incident are undisputed.

Clark and another RLA, Loistien Versey, were working about 9:00 p.m. attempting to put bed clothes on a mentally retarded elderly resident. This resident, who has a history of being extremely difficult with the staff, was abusive toward both Clark and Versey because she did not want to get her bed clothes on. She cursed at both Clark and Versey calling them "nigger bitches" and spit, kicked and scratched at them. Versey told the resident to quit calling them names.

What happened next is disputed. Versey testified that Clark, after being scratched by the resident, scratched the resident in return on her upper arm three or four times and said, "That's the way we take care of people who do that!" Versey testified that next, after the resident kicked Clark in the stomach, Clark grabbed the resident by the collar and shook her for about five seconds. Versey testified that afterwards the resident told Clark she was going to report her to management whereupon Clark slapped the resident's head with medium force and the resident yelled "Mother Theresa, she hit me -- did you see that?" In Versey's opinion none of Clark's actions toward the resident were defensive in nature.

Clark denies that she scratched, shook or slapped the resident.

Versey reported her account of the incident to management the next day, whereupon Director of Nursing Bernadette Pier began an investigation into the matter to determine the facts. In the course of this investigation Pier interviewed Versey, Clark, the resident, RLA Theresa Kelley and shift manager Melosandra Ruffin for their accounts of the incident. Versey's and Clark's accounts were as identified above. The resident told both Pier and Nursing Home Administrator Joann Adams that Clark had hit her and scratched her. Kelley told Pier she did not see the incident but heard the resident say "she hit me", and so testified at the hearing. Ruffin did not see the incident and did not testify at the hearing.

Pier suspended Clark on January 3, 1990 pending the investigation. The Employer thereafter credited Versey's and the resident's account of the incident over Clark's. On January 8, 1990 the Employer converted the suspension to discharge for patient abuse. Her discharge was grieved and processed to arbitration.

A week after Clark was discharged Versey was promoted to shift manager. Nursing Home Administrator Adams testified that the basis for Versey's promotion was her substantive knowledge of the job; it was not because she reported Clark for patient abuse.

POSITIONS OF THE PARTIES

The Union contends that the Employer did not have just cause to discharge the grievant. It argues that the Employer bears the burden of proving that the grievant engaged in wrong doing (specifically patient abuse). In the Union's view, the Employer has not met this burden because it believes that the record evidence falls short of establishing that the grievant engaged in patient abuse as alleged by the Employer. The Union therefore requests that the grievant be reinstated with a make-whole remedy.

It is the position of the Employer that it did not violate the parties' collective bargaining agreement by discharging the grievant. According to the Employer the grievant was properly discharged for patient abuse because she grabbed and shook a resident, deliberately scratched her and slapped her head with medium force. The Employer asserts it conducted a thorough investigation into the matter after learning of it which included speaking with the resident, Versey, Clark and others. That investigation convinced management that the complaint against Clark was well founded and that Versey's eyewitness account should be taken over Clark's denial. The Employer contends that any of Clark's three reactions to the resident constitute grounds for patient abuse termination, while the combination of all three was totally unacceptable. The Employer submits that such conduct, if not completely and quickly eradicated, could lead to licensure problems with the state. The Employer therefore contends that the grievance should be denied and the discharge upheld.

DISCUSSION

The stipulated issue requires a determination whether the Employer had just cause to discharge the grievant. Two separate, although interrelated, considerations are involved in such a determination. The first is that the Employer demonstrate that the grievant committed acts in which the Employer has a disciplinary interest and the second is that the Employer show that the discipline imposed reasonably reflected its disciplinary interest in the grievant's conduct.

The Employer discharged the grievant for allegedly abusing a resident. Patient abuse in a nursing home is an extremely serious matter because of the home's legal obligation to care for its residents. The home must therefore

protect its residents along with its reputation. Failure to do so would be to the detriment of all persons connected with the operation. That being so, it is clear that the Employer has a legitimate concern with, as well as a direct interest in, preventing patient abuse. The issue here regarding the first element of the just cause determination turns, then, not on the Employer's interest in preventing patient abuse by its employees, but instead on whether the grievant committed patient abuse.

Since the resident involved did not testify, this call involves a head-on credibility dispute between Clark and Versey, with Versey contending, and Clark denying, that Clark shook the resident, scratched her with her fingernails, and slapped the resident's head with medium force. Obviously the charge turns on credibility.

After weighing the conflicting testimony, the undersigned concludes that Versey's testimony that Clark shook the resident, deliberately scratched her with her fingernails and later slapped the resident's head with medium force should be credited for the following reasons. First, no evidence was offered why Versey would make up charges against Clark and testify falsely against her.

There was no showing of any animosity between Versey and Clark. Thus, there is no apparent reason for Versey to lie or fabricate her account of the incident. In contrast though, the grievant is trying to save her job. Versey's credi-bility is further strengthened by the fact that she initially protected the grievant by not reporting the incident to management until the next day. Although the Union notes that Versey was promoted shortly after Clark was discharged and implies that this is significant, there is nothing in the record to support any inference that Versey's promotion was a payoff or related in any way to the fact that she reported the incident to management. Second, Versey's testimony regarding the incident was direct, precise, detailed and confident. Clark did not challenge Versey's veracity or offer any facts to support her position, but instead simply gave a blanket denial to Versey's account of the incident. Third, Versey's account was corroborated in part by what the resident told Pier and Adams and also by Kelley's testimony that she heard the resident say "she hit me." In contrast though, no witnesses corroborated the grievant's testimony or account. Given the foregoing then, the undersigned credits Versey's testimony which establishes that the grievant shook the resident, scratched her and slapped her head.

Having concluded that Clark engaged in the misconduct complained of, it must next be determined whether this conduct warranted discipline. The Employer's work rules expressly prohibit physical abuse of a resident and provide that violation of this rule will be grounds for disciplinary action. Inasmuch as that is exactly what happened here, it follows that Clark's actions constitute misconduct warranting discipline. The fact that the resident was both physically and verbally abusive to Clark does not excuse her (i.e., Clark's) actions because it is the responsibility of all care-givers to ensure that their work conduct toward residents is appropriate. Clearly the grievant's was not.

In light of the conclusion that cause existed for disciplining the grievant for patient abuse, the question remains whether the punishment of discharge was proper. I believe that it was for the following reasons. Some offenses are so serious they are grounds for summary discharge even if the employe has not been previously disciplined. Such is the case here because the parties have contractually agreed in Article XI, Section 1 that patient abuse is one of the offenses the does not require a warning or suspension prior to discharge. Moreover, there is nothing in the record to indicate the Employer has been lax in enforcing its rule prohibiting patient abuse in the past or applied that rule in less than an even handed fashion. That being so, it does not appear that the grievant was subjected to any disparate or arbitrary treatment in terms of the punishment imposed. Accordingly then, it is held that the severity of the discipline imposed here (i.e., discharge) was neither disproportionate to the offense nor an abuse of management discretion but was reasonably related to the seriousness of the grievant's proven misconduct.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Employer did have just cause for the discharge of Regina Clark for patient abuse. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 5th day of September, 1990.

By _____
Raleigh Jones, Arbitrator

