

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, AFL-CIO : Case 14  
 : No. 44965  
 and : A-4731  
 :  
UNICARE HOMES, INC. :  
d/b/a JACKSON CENTER :  
 :  
- - - - -

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys  
at Law, by Mr. Matthew R. Robbins, appearing on behalf of the  
Union.  
Mr. C. William Isaacson, Corporate Labor Counsel, appearing on behalf of

the Em

ARBITRATION AWARD

Service Employees International Union, Local 150, AFL-CIO, hereinafter referred to as the Union, and UniCare Homes, Inc. d/b/a Jackson Center, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Milwaukee, Wisconsin on February 26, 1991. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on April 3, 1991.

BACKGROUND

The Employer operates a nursing home in Milwaukee, Wisconsin with approximately 125 residents. The grievant was employed by the Employer as a Resident Living Aide (RLA) commencing in September, 1989 and worked the third shift from 11:30 p.m. to 7:30 a.m. On August 19, 1990, the grievant worked a double shift, i.e. his normal third shift and the first shift. As part of his duties on the first shift, the grievant was assigned to take the hourly census. The hourly building census policy and procedure requires the Resident Living Aide to visually spot check each resident in the building every hour starting 15 minutes before the hour and finishing before 15 minutes after the hour. 1/ The grievant was aware of this policy having signed a copy of it on December 6, 1989. 2/ There is also an Hourly Resident Census Report and after visually spot checking a resident, a check is placed after the resident's name in the hour column and the report is initialed by the person taking the census. 3/ August 19, 1990 was a Sunday and some residents went on a field trip to the Kiwanis picnic from approximately 11:30 a.m. to 5:30 p.m. A certain resident, hereinafter referred to as X, went on this field trip but another Resident Living Aide responsible for checking the residents on a Field Trip Report did not include X's name. 4/ The grievant checked X as being present on August 19, 1990 at 12:00 Noon, 1:00 p.m., 2:00 p.m. and 3:00 p.m. when, in fact, X was at the picnic and was not present. 5/ The Resident Living Aide for the second shift who conducted the hourly census at 4:00 p.m. reported X missing and the building was then checked as well as the pass list. X was discovered when the field trip to the picnic returned. The grievant was questioned by the Director of Residential Services as to his marking X present the four hours when X was absent and the grievant indicated that this was the first time he had taken the first shift census and he mistook another resident for X. 6/ On August 21, 1990, the grievant was discharged for deliberately falsifying the Census Report. 7/ The grievant filed a grievance on August 22, 1990 over his discharge which is the subject of this arbitration.

ISSUE

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- 1/ Ex-6.
  - 2/ Ex-6.
  - 3/ Ex-4.
  - 4/ Ex-5.
  - 5/ Ex-4.
  - 6/ Ex-7.
  - 7/ Ex-2.

The parties stipulated to the following:

Was there cause for the discharge of the grievant?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE XI - DISCHARGE AND DISCIPLINE

The safe and efficient operation of the facility requires that all employees comply with our work rules. These rules are designed to maintain a safe and pleasant environment for residents, visitors, and staff.

The purpose of the Discipline Procedure is to correct improper employee behavior by the use of the least severe penalty possible, consistent with the employee's offense.

The following are the disciplinary penalties, in order of severity:

1. First Warning: An initial warning outlining the improper conduct, its consequence(s), and a warning against repeated violations. A copy of this warning is recorded in the personnel file.
2. Second Warning: More serious than the first warning, this penalty is also recorded in the personnel file.
3. Final Warning: The final warning against work-rule violations which does not impose financial loss on an employee. This is documented in the employee personnel file.
4. Suspension Without Pay: This severe penalty can last up to five (5) scheduled workdays. It is the last step before discharge and is recorded in the personnel file.
5. Discharge from Employment: This is the last step, and the employee's employment is terminated.

Work rules, and the penalties associated with their violations, are grouped into three (3) general categories as follows:

Class I: These are normally small breaches of policy which can be simply corrected without serious disciplinary measures. Supervisors will issue a First Warning to employees for minor violations with an emphasis on correcting the behavior.

Class II: These are violations which necessitate immediate disciplinary action in the form of a final written warning for the first offense.

Class III: These are serious violations of facility rules or employee misconduct which justify immediate discharge without regard to the employee's length of service or prior conduct.

GROUPS OF OFFENSES AND ASSOCIATED PENALTIES

CLASS I OFFENSES:

. . .

CLASS II OFFENSES: Examples of these offenses include, but are not limited to:

. . .

2. Improper documentation of resident medical records.

. . .

Penalties for Class II Offenses:

First Offense: Final Warning.  
Second Offense: Suspension without pay.  
Third Offense: Discharge from employment.

CLASS III OFFENSES: An employee will be subject to immediate discharge for such offenses as the following:

. . .

3. Deliberate falsification of any document, including the employee's employment application, punching someone else's time card, or having someone punch yours.

#### EMPLOYER'S POSITION

The Employer contends that it had just cause for terminating the grievant under Article XI of the agreement. It argues that the grievant deliberately falsified the Hourly Resident Census Report on the four entries he checked X present and this is a Class III offense which is punishable by immediate discharge. It submits that falsification of the census is a terminable offense because of the general helplessness of the residents and their tendency to wander occasionally thereby exposing themselves to risks from traffic and other hazards. The Employer maintains that the grievant's claim that he simply made a mistake is not credible because this was not a single mistake but there were four false entries in a row and no reason was given for the four false entries.

It points out that if the grievant had mistaken someone else for X, then that resident would be missing but this did not happen. It insists that there was no justification for the life-threatening action by the grievant.

The Employer takes the position that the evidence presented on other discipline where termination was not the penalty is irrelevant because these occurred before the present contract language (Exh. 8, 9, 10, 11 and 15) or deal with a different situation (Ex-14) or were aberrations. (Exh. 12 and 13). It maintains that immediate termination for falsification of census entries was established to insure accuracy of the census because it is necessary to protect the lives and well-being of the residents. It insists that the grievant deliberately committed a serious offense which could have put X at great risk and the agreement provides for immediate discharge for such an offense. The Employer points out the grievant's conduct could have resulted in the loss of the Employer's license and the ability to remain in business. It submits that falsification of the census is such a serious offense that the safety of residents' demands that termination be the result. It submits that the grievance should be dismissed.

#### UNION'S POSITION

The Union contends that the Employer failed to meet the burden of proving just cause for the grievant's discharge. It submits that the Employer disciplined the grievant under the wrong provision of the contract because the generic Class 3 offense, "deliberate falsification of any document", refers to employment related documents such as employment applications and time cards. It points out that the offense here is specifically covered under Class 2, Rule 2, "improper documentation of resident medical records." It asserts that the Census Report is closer to resident medical records than to employment related documents and the Employer's prior discipline of employes for carelessness supports such a conclusion. The Union notes that for a Class 2 first offense, the appropriate discipline is a warning letter, and the grievant's discharge for a first offense violated this provision.

The Union argues that the just cause standard requires the Employer to treat persons engaging in the same misconduct in a similar manner. It claims that the record shows that numerous employes have checked a resident in when that resident was out or out when in and none were discharged for the first offense but received a warning letter or a three day suspension where there was prior similar misconduct. The Union further contends that the grievant was not on notice that such conduct would result in discipline because of the lax treatment of other individuals and the failure to give notice to employes that checking in a resident who was out would result in discharge.

The Union contends that the August 19, 1990 incident did not merit discharge for a first offense. It argues that the grievant made a mistake and did not engage in serious intentional misconduct. It notes that while the grievant had taken census on the third shift on one floor, this was the first time he took a full facility census and, contrary to normal practice, was not taken through it with an experienced employe. It also notes that he was working a double shift. It points out that the employe who checked residents going on the field trip and who erroneously failed to include X on the Field Trip Report received only a warning letter for this mistake. It asserts that perhaps another resident did not go on the field trip and that resident was mistaken by the grievant for X, likely for the same reason as the person

checking residents going on the field trip. It argues that if there was any intentional misrepresentation, it was by the person who checked the residents going on the field trip, as the number of residents on the trip was limited. On the other hand, the grievant understandably made an error by mistaking another resident for X given his lack of experience and his working a double shift. It maintains that the Employer has failed to show any intentional misconduct by the grievant, and therefore, the grievant should have received no more than a warning letter. It requests that the discharge be set aside and the grievant be given full back pay with benefits.

#### DISCUSSION

The grievant was discharged for deliberately falsifying the Hourly Resident Census Report on August 19, 1990. The grievant denied that he deliberately falsified the Census Report and admits to mistaking someone else for X. The facts are undisputed that the grievant was responsible for taking the census and making the Census Report on the first shift on August 19, 1990.

The grievant checked resident X as present from 12:00 Noon to 3:00 p.m. inclusive when in fact X was not present but on a field trip. Article XI provides for immediate discharge for deliberate falsification of any document.

The initial question presented is whether the grievant made a mistake or deliberately falsified the Census Report. Generally, the rule in discharge cases is that the Employer has the burden of proving that the grievant is guilty of the misconduct asserted.<sup>8/</sup> Here, the Employer alleged that the grievant deliberately falsified the Census Report. The use of the term "deliberately" requires proof of a state of mind to consciously commit the act involved, i.e. intentionally falsifying the report. One argument submitted by the Employer was that if the grievant had mistaken someone else for X, then that someone else would have been missing. Additionally, a single wrong entry could be a mistake but four wrong entries had to be intentional. These arguments have merit but are not persuasive in light of the evidence presented in this case.

The field trip to the Kiwanis picnic also involved a mistake in the identity of X. A review of the Field Trip Report shows a number of stricken names as well as check marks for others.<sup>9/</sup> X's name does not appear on the Report but it is undisputed that X went on the field trip and there was no evidence that one more person was on the field trip than was accounted for. It appears that perhaps as many as four employes accompanied the residents on the field trip.<sup>10/</sup> It is reasonable to assume that the number of residents going on the field trip would be known based on a head count and there was no evidence that X was not part of this count. If 20 residents went on the trip, X would be part of the twenty as there was no showing that 21 went when only 20 were accounted for. While it is possible that an extra resident went on the trip without being accounted for, it is not probable. It is more likely that X was mistaken for someone who stayed behind or someone was checked as going on the field trip but did not. Thus, if the number of residents going on the field trip matched the number checked as being on it, then it follows that the number remaining at the Center would also match the census. When the grievant took the census, he could mistake someone else for X and this mistake would not show up because the census would tally, i.e. the census would not show someone else missing because that someone else did not go on the field trip rather X did. The argument by the Employer that someone else would show up beyond the census was not established. The grievant is a relatively new employe and while this alone would and should not excuse any intentional misconduct, this factor supports a finding that a mistake occurred because it is unlikely that a long term experienced employe would mistake one resident for another, where as a less experienced employe could. In other words, the evidence failed to show that the grievant consciously marked X present when X was absent.

With respect to the four entries in a row for X, this is consistent with the grievant's assertion that he mistook someone else for X. As the grievant testified, had he been falsifying the Census Report deliberately, there would have been other errors besides X. There was no evidence showing that the grievant was not doing the hourly spot checks for four hours. Only X was on the Field Trip without it being known and only X was marked as present when X was not present. It is more likely that the mistake in identity was repeated each hour because there is no rationale for repeated deliberate falsification only with respect to X. There was no advantage to the grievant to falsify the entry related to X. He had nothing to gain and the next shift would discover any discrepancy. It must be concluded that the Employer's evidence fails to establish deliberate falsification by the grievant. The evidence merely establishes a compound mistake on the part of the grievant and fails to establish the requisite state of mind for intentional falsification of the Census Report.

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8/ Elkouri & Elkouri, How Arbitration Works (4th Ed., 1985) at 661.

9/ Ex-5.

10/ Id.

The parties' collective bargaining agreement provides immediate discharge for a Class III offense of which deliberate falsification of any document is a listed offense. The Employer has failed to show deliberate falsification, a Class III offense. At most, the evidence establishes a Class II offense which provides that a Final Warning be given for a first offense. The grievant has no prior record of discipline, so the penalty as agreed to by the parties is a final warning. A false census, whether deliberate or negligent, can subject residents to great risks as noted by the Employer and could be a matter of life or death and perhaps the procedures need be more stringent or the penalties changed, however, as the undersigned is bound by the language agreed to by the parties and must apply the language to the instant facts, the penalty agreed to by the parties must be applied.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes and issues the following

AWARD

The Employer did not have cause to discharge the grievant. The grievant's discharge is set aside and changed to a final warning. The Employer shall immediately reinstate the grievant and pay him all back pay and benefits less interim earnings, if any.

Dated at Madison, Wisconsin this 22nd day of April, 1991.

By \_\_\_\_\_  
Lionel L. Crowley, Arbitrator