BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration<br>of a Dispute Between<br><br>MOUNT CARMEL HEALTH CARE CENTER<br>(HILLHAVEN CORPORATION)<br><br>and<br><br>LOCAL 150, SERVICE EMPLOYEES<br>INTERNATIONAL UNION, AFL-CIO | Case 15<br>No. 45255<br>A-4754<br>(Discharge of Queen Moore) |

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee WI 53212 by Mr. Matthew R. Robbins, appearing on behalf of Local 150, Service Employees International Union, AFL-CIO.

Jackson, Lewis, Schnitzler & Krupman, Attorneys at Law, 2100 Daniel Building, 301 North Main Street, Greenville, SC 29601-1381 by Mr. J. Steve Warren, appearing on behalf of Mount Carmel Health Care Center.

## ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Local 150, Service Employees International Union, AFL-CIO (hereinafter referred to as the Union) and the Mount Carmel Health Care Center (hereinafter referred to as the Employer or the Center) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the discharge of Queen Moore. The undersigned was so designated. A hearing was held on May 22, 1991 in Milwaukee, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made of the proceedings and a transcript was received on June 10, 1991. The parties submitted post-hearing briefs Which were exchanged through the undersigned on July 9, 1991, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties stipulated that the following issue should be determined herein:
"Was the grievant discharged for just cause under the collective bargaining agreement? If so, what is the appropriate remedy under the contract?"

PERTINENT CONTRACT PROVISIONS

ARTICLE 1 -- RECOGNITION
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1.3 Employees shall be required to comply with rules as prescribed by State and City agencies governing the regulation of nursing homes, as well as the rules prescribed by the Employer.
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ARTICLE 7 -- DISCHARGE

7.1 The Employer may discharge or suspend an employee for just cause, but in respect to discharge shall give a warning of the complaint against such employee, except that no warning notice need be given to an employee if the cause for such discharge is dishonesty, drinking, or recklessness resulting in an accident to a patient, abuse of a patient, verbal or physical, sleeping on the job, leaving patients unattended, or if an employee does not report unavailability for work for at least one (1) hour before starting time. Should an employee be unable to report unavailability due to illness (accompanied by a doctor's certificate) or another emergency, no disciplinary action shall be taken. The Union will be notified as soon as possible after a member is discharged.
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ARTICLE 14 -- GRIEVANCE PROCEDURE
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14.7 The jurisdiction and authority of the arbitrator shall be confined to the interpretation of the provisions of this Agreement. The arbitrator shall not have the power to add to, ignore or modify any provisions of this Agreement. The award of the arbitrator shall be final and binding upon the parties to this Agreement.
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ARTICLE 18 -- GENERAL PROVISIONS
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18.7 Department Heads possess the authority to discharge an employee without notice for any of the following actions. This shall not prevent an employee from filing a grievance under Article 14.

A. Dishonesty

B. Use of alcoholic beverages on duty or reporting for duty with liquor odor on breath.

C. Carelessness resulting in an accident to a resident or fellow employee.

D. Verbal or physical abuse to a patient.

E. Sleeping on duty.

F. Failure to report for duty as assigned without proper notice.

G. Insubordination.

H. Any other event which seriously affects the functioning of the Home.

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BACKGROUND FACTS

The Employer operates a 690 bed skilled nursing care facility in Greenfield, Wisconsin. The Union represents certain of the non-professional employees at the facility, including personnel employed in the classification of Patient Care Assistant 1 (PCA1). The grievant was employed at the facility from September 10, 1984 through the date of her discharge on December 18, 1990. At the time of the discharge, she was working in the Nursing Department on the first shift as a PCA1.

Among the patients cared for by the grievant was a man referred to for the purposes of this case as G. G was a physically powerful man, a 70 year old retired bricklayer who had been admitted to the facility in September of 1989. He had suffered a stroke leaving him paralyzed on the left side, but still alert and able to communicate. G was subject to depression and sudden mood swings and during his time at the nursing home he developed a reputation as a difficult and abusive patient. He had been subject to several psychological examinations while at Mount Carmel, and was taking a number of psychotropic drugs. At the time of the incident that is the focus of this case, he was taking Xanax. A partial history of the incidents involving G was admitted as Joint Exhibit #3 in this proceeding:

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| 09/15/89 | ADMITTED | |
| 10/12/89 | 1350 | agitated - calling out |
| | 1945 | calling out at intervals |
| 10/16/89 | | combative when vitals taken |
| 12/13/89 | | becoming noisy and demanding |

| | | |
|---|---|---|
| 12/15/89 | 0800 | agitated, banging dentures on bedside table |
| | 1000 | yelling out loudly and banging on bedside table |
| 12/16/89 | 1400 | very agitated |
| 01/02/90 | 0830 | banging on food tray - "if you don't take this away I'll throw it on the floor." |
| 01/05/90 | | combative - staff had difficulty feeding him. |
| 01/22/90 | | uncooperative with staff feeding him - dumped food and threw on floor |
| 02/16/90 | 1500 | try to stab PM aide with supper utensils |
| 03/03/90 | | loud and agitated most of day - banging dentures on tray |
| 04/12/90 | | pushed breakfast tray off table |
| 04/13/90 | | impatient, didn't want to finish metamucil, stated "I will throw this on the floor" and proceeded to do so |
| 04/17/90 | 1800 | loud and demanding |
| 04/26/90 | | having agitated morning, calling out |
| 05/01/90 | | grabbed cup from nurse and threw it on the wall - threw right fist out toward nurse - nurse swayed body to avoid blow from fist "You kiss my ass" Resident spit med in nurse's face |
| 05/02/90 | 1420 | threatened to throw juice at daughter and raised hand to strike nurse |
| 05/04/90 | | yelling and banging side rails |
| 06/19/90 | | yelling at roommate - kicking roommate and striking him in left knee<br>loud and disruptive |
| 08/04/90 | | shaking bedrails and yelling out |
| 08/05/90 | 1730 | grabbed med tech's neck - leaving scratch marks |
| | 1915 | alluding to aides, punching his stomach and pulling the hair down there when taking his pants off 1/ |
| 08/06/90 | | 2 episodes of crying and shaking siderails 2/ |

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1/ Later on August 6th, G was transferred to the Milwaukee Medical Complex for a psychological examination because of his combative behavior. He was returned to Mount Carmel later that same day. While at the home, G was also seen by the staff psychiatrist and his own psychiatrist from Trinity Memorial Hospital. (Transcript, page 96-98).

2/ Additionally on this day, the Nurses Progress Notes indicate that G had two incidents (0300 and 0500) of "agitation or striking out" and one incident (2155) of attempting to hit a nurse who was taking his temperature. (Union Exhibit #23)

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|---|---|---|
| 08/09/90 | | threw breakfast tray on floor |
| | 2200 | shaking rails, crying |
| | 2230 | shaking rails, crying |
| 08/11/90 | 1800 | banging silverware on plate, yelling - able to be heard 1/2 way down hallway |
| 08/11/90 | | out |
| 08/31/90 | | readmitted |
| 09/06/90 | | yelling in clinic |
| 09/12/90 | | shaking his hand or pounding fist, stopped when nurse stopped his arm |
| 09/15/90 | | rattling siderails most of NOC |
| 09/16/90 | | rattling siderails |
| 10/09/90 | | swinging out - shaking rails and spitting |
| 10/29/90 | | kicked PCA in mouth - states sorry for kicking |
| | 1845 | pounding on supper tray<br>banging on siderails |
| 10/31/90 | | calling out and banging on siderails |
| 11/25/90 to 11/24/90 | | no nurse's notes |
| 12/16/90 | | date of incident |
| 12/25/90 | | while being repositioned - swung his arm hitting the aide in the jaw. |

In addition, the Nurses' Progress Notes disclose that G frequently used foul language to others. He accused one medical technologist of being part of a plot to poison him and alleged that this information was given to him by Nazis. 3/ He struck a nurse's aide in the face, giving as his reason that he believed she was trying to choke him. 4/ He grabbed another, knocked her glasses off and called her a "son of a bitch". 5/

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3/ G had had experience with the Nazis in occupied Yugoslavia during World War II. This particular accusation was made on August 6, 1990 at 1915 hours. *See* Nurses Progress Notes. (Union Exhibit 23)

4/ This occurred on February 7, 1990 at 1515 hours. Later on that same shift, he attempted to kick a nurse's aide. *See* Nurses Progress Notes. (Union Exhibit #24)

5/ This occurred on February 22, 1991. *See* Nurses Progress Notes (Union Exhibit #25)

On December 16, 1990 the grievant was working her normal assignment, the first shift on the "Hickory" wing of the nursing home. She was assigned to G's side of the hall. At approximately 9:00 a.m. she approached Susan Weisman, an LPN working on the unit. She told Weisman that G had grabbed at her and that she had bumped his nose with her elbow while pulling away. Weisman went into G's room, and found that he had a small amount of blood coming out of both nostrils. G told her that the black lady had punched him in the chest, hit him in the nose, and called him a "son of a bitch". When Weisman asked whether it could have been an accident, he responded that it was no accident. Weisman gave him a cold towel which stopped the bleeding, and then called the nursing supervisor. She was advised to tell the grievant to punch out and go home and to call Diana Schwingle, the Assistant Director of Nursing, the next morning. The grievant went home.

G was separately interviewed the next day by Schwingle and by Andrea Ludington, Mount Carmel's Acting Administrator. He told Schwingle that the grievant had tried to jam a spoon in his mouth while feeding him, and that he had pushed her away. She then hit him in the nose once and in the stomach twice and said things about his country. He said they were both shouting during this. Schwingle found him very alert when she spoke with him. She had him repeat the story several times, because his daughter was interrupting, and it did not change in any material way with the retelling.

In discussing the incident with Ludington, G said that the grievant was putting too much thickened juice in his mouth while feeding him and that he was choking. He grabbed her chest to push her away, and she hit him in the nose, the temple and the stomach. She said to him "your folks beat my folks" and "I've got more rights today than whites do." As did Schwingle, Ludington questioned G closely in the presence of his daughter, and he did not change the version he related to her.

Schwingle also spoke with the grievant, who returned her call late on the afternoon of December 17th. The grievant told her that she had been feeding G thickened juice, and that he grabbed some toast and filled his mouth with it. She told him he couldn't eat it all at once. He grabbed her shirt in the area of the collar and pulled her towards him, ripping several buttons off. He called her a "son of a bitch" and threw a punch at her. She threw her arm up to block it, hitting him in the nose with her elbow. This was what caused the nose bleed.

Martha Dickinson is another aide, who was working on the unit, across the hall from G's room at the time of the incident. Dickinson told Schwingle that G was in a combative mood that day. She heard G yelling at the grievant and heard the grievant yell back. She heard the grievant say "Now see" and come out of the room.

On the 18th, Ludington met with the grievant and the Union's Chief Steward. She had previously spoken with Weisman and with Schwingle, who had reported on her interviews with

the grievant, G and Dickinson. The grievant told Ludington that she was feeding G thickened juice. The juice was gone, but he wanted more and started yelling at her, among other things calling her a "son of a bitch". She began to clean him up and he grabbed her in the chest. She tried to get away and hit him in the nose with her arm. The grievant denied hitting G in the stomach or the side of the head.

Ludington discharged the grievant for patient abuse, and the instant grievance was filed. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration. Several weeks before arbitration hearing, G suffered a massive stroke which left him unable to speak. He died the day before the hearing. Additional facts, as necessary, will be set forth below.

## POSITIONS OF THE PARTIES

### The Position of the Employer

The Center takes the position that the grievant was discharged for just cause and that the grievance should be denied. The Center takes issue with the Union's attempt to impose a criminal level burden of proof in this case. While "beyond a reasonable doubt" is appropriate in the very different setting of a criminal prosecution, the Center argues that arbitral precedent and common sense dictate that the "preponderance of the evidence" should suffice in an arbitration. In this case, the preponderance of the evidence clearly establishes that the grievant hit the patient. With or without intent this constitutes patient abuse under the contract, and calls for discharge.

Acknowledging that the death of G left them with a case built substantially on hearsay, the Center asserts that the hearsay statements of G are worthy of great credibility. His statement that the grievant intentionally struck him was an excited utterance and a present sense impression. The statements were taken by disinterested members of the professional staff, and their testimony clearly established that G was competent to identify the person who struck him and the circumstances of the attack.

Turning to the substance of the evidence, the Center cites Arbitrator Daugherty's seven questions for discipline, and asserts that the Center's case must be sustained under each:

1. Did the Center give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? The answer is plainly yes. The collective bargaining agreement itself lists patient abuse as grounds for immediate discharge, and the grievant was further advised about patient's rights through in-service sessions and initial orientation.

2. Was the Center's rule or managerial order reasonably related to the orderly, efficient, and safe conduct of the Center's business? Obviously patient abuse cannot be allowed in nursing homes.

3. Did the Center, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? Again, the answer is clearly yes. Weisman, Schwingle and Ludington all spoke with both the grievant and G to determine what had happened.

4. Was the Center's investigation conducted fairly and objectively? Ms. Ludington spoke with all of the persons involved, including meeting with the grievant and Union officials to gain their views and hear their arguments.

5. Did Center management representatives obtain substantial evidence or proof that the employee was guilty as charged? The proof, the Center submits, is overwhelming. The patient repeatedly stated that the grievant struck him and gave him a bloody nose. The double nose-bleed indicates a blow of some force, since none of the health care professionals who testified at the hearing had ever seen one before. G's story remained consistent throughout, and was told with a sincerity that convinced each management representative. Furthermore, his past history showed that he would apologize after an incident if he was the one who initiated it. He made no such apology here.

The grievant's testimony should not be credited. Her actions in not immediately contacting Schwingle the next day indicate a guilty state of mind. Her story has been told in various versions, and is riddled with contradictions. She has variously stated that she hit the patient with her hand, arm and elbow. She claims that her blouse was torn, even though Weisman saw no tear. She claims that the patient, paralyzed on the left side, was able to grab her, pull her towards him, let go, pull back his arm and aim a blow at her, all before she had a chance to step away from him. The grievant had been extensively trained in dealing with abusive patients such as G, and knew that she merely had to take one step back to avoid him. This strongly indicates that the conduct was intentional.

6. Has the Center applied its rules, orders, and penalties with an even hand and without discrimination to all employees? Notwithstanding the Union's efforts to suggest some element of racial discrimination, the Center submits that there is absolutely no proof of disparate treatment in this case, a fact that was noted by the arbitrator during the hearing.

7. Was the degree of discipline administered by the Center reasonably related to the seriousness of the offense and the employee's record of service? Patient abuse is a serious offense and the nursing home is obligated to protect its patients -- even the aggressive and abusive patients.

The Center makes several other points in support of its decision to discharge the grievant. First, the Center asserts that it is impossible, or at least improbable, that this was an accident. The patient stated that it was no accident, and an injury as severe as a double bloody nose could not have resulted from the bumping claimed by the grievant. Furthermore, in order for events to

have unfolded as the grievant described, she must have gone close enough to the patient for her elbow to "bump" him, after he had released her from his grasp. As for the claim that G had ripped her blouse, the grievant did not mention this to Weisman at the time, nor did Weisman observe anything amiss with the grievant's clothing.

The Center believes that this was an intentional assault by the grievant. Even if the element of intent were not established, however, the contract here calls for discharge in cases of "recklessness resulting in an accident to a patient" and the discharge would still be justified.

The Center stresses that the grievant's version of events is improbable and inconsistent. She had been trained to deal with abusive patients, and knew G to be such a patient. Physical force is absolutely not allowed in such circumstances. Yet, she claims that G grabbed her with his right hand, even though she was on the left side of the wheelchair. She got away from him, and then either remained or returned, allowing him to swing at her. She variously described the tray table as being at its lowest point, causing her to have to bend in order to retrieve his food tray, and high enough to clear a patient who was almost eye level with her as he sat in his wheelchair.

The grievant had worked at the facility for six years. This, the Center asserts, should impose a higher level of care on her, since she had been extensively trained and had experience in dealing with difficult patients. The Center notes that two prior instances of counselling raise questions about her commitment to patient care and her ability to control her temper. In one case she improperly placed three residents in wheelchairs without padding or sheets to shield their skin from the naugahyde. In a more troubling instance, she became angry when she thought another worker had not cleaned up urine in a patient's bed. As described by the night LPN, the grievant "ripped the blanket off the woman, threw her over on her side and said 'Look, this is old piss. This woman pisses and shits all day and I have to clean it. I will not clean up old piss.'"

Given the overwhelming evidence against the grievant, and in light of the firm commitment of the facility to quality patient care, the discharge should be upheld.

The Position of the Union

The Union takes the position that the grievance should be sustained and the grievant reinstated with full back pay. The grievant here is a black woman with six years of service to the nursing home. She has received consistently high evaluations, and has been recognized by her supervisors as a caring and concerned person. The grievant has no history of violence or even verbal abuse. Her discharge is based exclusively on hearsay evidence of unsworn accusations made by a patient with a long history of bizarre and violent behavior. G had, on prior occasions, accused various staff members of trying to poison him, of hitting him in the stomach, and trying to choke him.

The Union argues that the Center must prove that the grievant intentionally assaulted G,

and must prove this "beyond a reasonable doubt." The high standard is recognized by the majority of arbitrators as being appropriate in cases involving moral turpitude and/or where the offense puts a significant stigma on the employee. Assault on a patient in a nursing home meets both of these criteria. The evidence, the Union asserts, wholly fails to meet the "beyond a reasonable doubt" standard.

The Center's entire case consists of hearsay reports by white employees of the accusations of an obviously mentally ill patient. G was taking Xanax at the time of the incident, and the Union notes that the potential side effects of the drug include "agitation, rage, increased muscle spasticity, sleep disturbances, hallucinations and other adverse behavioral effects." Additionally, G had a history of making false accusations against employees. Despite these warning signs, the Center made no effort to have a deposition taken prior to G's death and made no effort to secure the testimony of G's roommate.

Balanced against the hearsay accusations of G is the consistent and credible testimony of the grievant. In a span of a few seconds, she was attacked by G and accidentally hit his nose with her arm or elbow while trying to get away. This caused a minor nose bleed. Despite several interviews with management and a long and provocative adverse examination at the hearing, the essential elements of the grievant's story remained unchanged throughout. This version is completely consistent with her history as a caring and conscientious employee.

The Union dismisses the suggestion that this discharge may be sustained even if intent is not proven. The basis of this discharge is intentional abuse. Even though the contract allows for waiver of the normally required prior warning letter in cases of recklessness, it does not establish that every instance of recklessness justifies discharge. The Center must still show the existence of just cause in each case. Here there is no evidence of recklessness or even negligence. The grievant was suddenly attacked and in trying to extricate herself, accidentally hit the patient's nose. Nothing in her conduct could possibly justify "economic capital punishment." For all of the foregoing reasons, the Union asks that the grievance be granted and the grievant reinstated and made whole.

## DISCUSSION

### Issues

At the outset, the arbitrator would observe that the issues in this case come down to what standard of proof the Center is required to meet in order to sustain the discharge, and whether the Center's evidence is sufficient to prove the deliberate assault alleged against the grievant.

Contrary to the suggestions of the Union, the undersigned finds that the procedures pursued by the Center in investigating the altercation between G and the grievant were adequate and showed no evident bias or predisposition. The failure to interview G's roommate was

understandable in light of the medical evidence that the person was not a competent witness. 6/ While somewhat more troublesome, the failure to preserve G's testimony in a sworn affidavit or a deposition cannot be characterized as proof of bad faith by the Center. Granting that he was elderly and ill, the Center could not have reasonably anticipated his massive stroke and death shortly before the hearing.

The evidences amply demonstrates that the grievant was well aware of the work rules and government regulations regarding patient abuse, and if she is guilty as charged, there can be no credible claim that she did not understand the consequences of her actions. Finally, there is no evidence that the grievant has been treated differently than any other employee accused of the same offense. For all of these reasons the undersigned finds it unnecessary to address those portions of the Center's arguments directed to the procedural aspects of the Daugherty seven question analysis.

The Center has argued that the discharge must stand even if the arbitrator finds there was no intentional striking of the patient. This argument is based upon the listing of "recklessness resulting in an accident to a patient" as a grounds for discharge without prior warning in Article 7, and "Carelessness resulting in an accident to a resident or fellow employee" as grounds for discharge without prior warning in Article 18. While it is prudent lawyering on the part of the Center's counsel to have an alternate theory of the case, there is absolutely nothing in the record to support the contention that this grievant was discharged for carelessness or recklessness. At each step, the decision to terminate the grievant flowed from the decision by nursing home personnel to credit G's accusation of a violent assault. Weisman testified that she recommended that Ludington credit G's story because after speaking with him and hearing him insist it had not been an accident, she "had such a sick feeling in my chest that something really had happened." 7/ There has never been a question about whether the grievant struck G and caused the nose bleed. The "sick feeling" related by Weisman can only reasonably be interpreted as a belief that there had been an intentional striking of G. Ludington gave great weight to Weisman's evaluation in arriving at her decision. 8/ Similarly, Ludington weighed her belief that the double nose bleed could not have been accidental in deciding to terminate the grievant. 9/ Ludington's notes of her discussion with the grievant and her Union representative conclude:

> "Due to the severity of the complaints Mr. [G] has brought - even though unsubstantiated - no witnesses - Ms. Moore was terminated effective 12-18-90." 10/

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6/ The roommate was characterized as alert but confused, and "oriented x 2", meaning oriented to two aspects of his environment. A fully oriented person would be "oriented x 3" (Transcript, page 189).

7/ Transcript, page 190.

8/ Transcript, page 48.

9/ Transcript, pages 44-45.

10/ Employer Exhibit #12, page 2.

The Center never contended at the time of the discharge or during the processing of the grievance that this was a case of recklessness or carelessness. The Center's investigation did not focus on recklessness or carelessness. There is no persuasive evidence that Ludington, the ultimate decision maker in the matter of this discharge, considered at the time of the discharge what her appropriate course of action would have been had this event occurred exactly as the grievant contended. The collective bargaining agreement permits management to bypass a warning notice in cases of carelessness or recklessness resulting in an accident to a patient, but it does not mandate discharge in such cases, nor does it relieve the employer of meeting the just cause standard in such cases. It is impossible to know what decisions management might have made, or what arguments the Union might have raised, had this been a discharge for negligence.

This is not a case where a number of bases were cited for the decision to discipline the employee. To treat this as a case of recklessness or carelessness for the first time at the arbitration stage amounts to an exercise in pure speculation. The undersigned concludes that the termination decision must stand or fall on the basis on which it was actually made -- management's belief that the grievant intentionally struck G.

The Standard of Proof

The Union argues that the Center must prove its case "beyond a reasonable doubt", since the offense charged is criminal in nature and carries with it the stigma of moral turpitude. The Center asserts that it need only show the grievant's guilt by the preponderance of the evidence. The arbitrator has previously discussed the appropriate burden of proof in a case involving an accusation of theft against a municipal employee:

> The accusation levelled against the grievant is a serious one, carrying with it grave implications for his future employment. Any termination has serious immediate effects on the discharged employee, but those effects are in many ways temporary, flowing from the loss of income, benefits and security. In securing a new job, the worker can recover from those losses. While the fact of having been discharged has some stigma attached to it, an employee fired for low productivity, sleeping on the job, tardiness or the like can generally distinguish the circumstances leading to his discharge from the conditions prevailing at the new work site. Even an employee fired for alcohol or drug abuse can show that treatment has been received, and so conditions have changed sufficiently to make him a good employment risk.
>
> Unlike those fired for other types of unacceptable conduct, an employee fired for dishonesty cannot as a practical matter show that his character has changed because of changing circumstances. Honesty is a personal attribute, highly prized by all employers. A finding that an employee is dishonest is a strike against that person in seeking any other job, since no matter how simple the duties or how tightly supervised the work, an employer must always in some degree trust his employees. For this reason, the undersigned disagrees with the City's claim that a discharge for dishonesty is indistinguishable from other types of cases. The long-term consequences are far more severe, and both the parties and the arbitrator should reasonably be expected to recognize this practical distinction in evaluating the evidence.
>
> While having noted that a dishonesty case is distinguishable from other types of discharge

> cases, the undersigned is not willing to embrace the Union's proposed standard of "proof beyond a reasonable doubt." This burden is drawn from the criminal law, where completely different procedural safeguards and evidentiary standards are applied. Grafting it onto a relatively informal proceeding involving contractual rather than constitutional rights is an awkward and artificial exercise. In the undersigned's view, the rigorous application of a "clear and convincing" standard of evidence appropriately balances the interests of the employee in protecting his reputation, and the interests of the employer in vindicating its right to terminate an unsatisfactory employee in a civil proceeding.
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> Drivers, Warehousemen and Dairy Employees, Local Union No. 75 and the City of Shawano, WERC Reference #A/P M-90-56 (Nielsen, 01/22/90) at pages 11-12.

The instant case lends itself to the same analysis. There is no doubt that the accusation is grave and will cast a shadow on the grievant's future employment prospects. At the same time, the application of the criminal standard is not consistent with the civil nature of the case and the contractual nature of the employee's rights. For these reasons the undersigned concludes that the Center must prove the grievant's guilt by clear and convincing proof.

The Merits

There is no question that the grievant hit G in the face, causing a nosebleed. At base, this grievance turns on whether one credits G's claim that the grievant violently attacked him or the grievant's denial. The Center has a difficult task in that its only witness to the event is a dead man and thus the primary proof consists of hearsay statements he made to nursing home personnel. The hearsay was admitted into evidence subject to a caution that hearsay is not usually entitled to the same weight as direct evidence. Notwithstanding this caution, hearsay evidence is relevant and if sufficiently persuasive can sustain the discharge even without any eyewitness testimony.

The Center argues that G told a believable and consistent story, and told it with great conviction. On the contrary, the evidence suggests that his story was lurid and shifted with each retelling to a different person. He told Weisman that the grievant had called him a "son of a bitch" and hit him in nose and chest. He told Schwingle that the grievant made some comments about his home country and hit him once in the nose and twice in the stomach. He told Ludington that she had hit him in the nose, the temple and the stomach, telling him that "Your folks beat my folks" and "I've got more rights than whites do." The failure of the Center's personnel to identify and question these inconsistencies is puzzling. G had a history of both assaulting staff members and accusing them of assaulting him. His story, particularly the variety of statements he attributed to the grievant, on its face strains credulity. Nothing in the grievant's background as an employee would support the conclusion that she would launch a violent attack on G, even allowing for the provocation of being grabbed.

The only evidence beyond the statements of G which would have supported the conclusion that the grievant assaulted him were the facts that (1) she claimed he had ripped her blouse and Weisman did not observe any problem with her blouse, and (2) G had a double bloody nose. As for Weisman's failure to observe any ripping of the uniform, the grievant explained at the hearing that she had been wearing a wrap around blouse, secured by three buttons. Two buttons had come loose when G grabbed her, but she held it at her side when she went to the nurse's desk. Thus the ripping would not have been apparent. Weisman acknowledged that she was sitting when the grievant approached her and she could not see the grievant's hands.

It is difficult to attach much significance to this supposed discrepancy.

As for the fact of both nostrils bleeding, the undersigned has some difficulty in assessing the significance of this. Several nurses testified that they had never encountered a double nose bleed before, but that they believed that it would have taken considerable force to cause it. From this, the Center concludes that it could not have happened accidentally. It seems that the degree of force involved is the greater variable than whether the blow was deliberate or accidental. On balance, however, the undersigned believes that while the injury is consistent with either version, it is more consistent with the notion of a direct blow as described by G.

Considering the testimony of the grievant, the undersigned finds inconsistencies as noted by counsel for the Center. She did give different descriptions of the height of the tray table in the room. She did not recall that the incident took place at breakfast, testifying instead that it was at lunch. She did not recall yelling at G, although the statement of Martha Dickinson included a reference to hearing the grievant yelling back at G, saying "now see" right before she left the room. There were other discrepancies as well. In short, the grievant was not a model witness. Her recall left something to be desired. On the other hand, her story's main points remained consistent between the incident in December and the hearing in May, and the bulk of the inconsistencies exposed on adverse examination involve relatively small details of an incident that took place in a matter of seconds some five months before. 11/

Weighing all of the evidence after a very careful review, the arbitrator cannot honestly claim to be completely certain what happened in G's room on December 16th. Even completely disregarding the grievant's version of events and her history as an employee, however, the undersigned finds the statements of G so contradictory and unlikely, particularly in light of G's personal history of making unfounded claims of physical attacks by Center personnel, that they cannot be said to be clear and convincing evidence of an attack by the grievant.

As the Center has not been able to meet its burden of proving just cause for discharge by clear and

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11/ At the hearing, counsel for the Center attempted to impeach the grievant's credibility by showing that she had been working at another nursing home while receiving unemployment compensation payments. The Union objected on the grounds of relevance, asserting that her actions in April had no bearing on her veracity as regarded December's events. The evidence was excluded, with the arbitrator stating that "The fact that she may or may not have collected unemployment compensation while working is at best remotely connected to the reliability of the story which she told back at the time -- at the time of this discharge." On further reflection, it would have been better practice to have allowed the offered evidence if for no other reason than the oft-cited therapeutic effects for each side in being given a chance to make its case and tell its story to the arbitrator. In making the ultimate determination that G's story will not suffice under the clear and convincing evidentiary standard, the undersigned has weighed the allegation concerning the unemployment compensation as if it were proven on the record, and still concludes that G's statements are not sufficient. It is the weakness of G's story and the supporting evidence, rather than the strength of the grievant's story, which yields the ultimate conclusion in this case.

convincing evidence, the discharge cannot be sustained. The appropriate and traditional remedy in such cases is to reinstate the grievant to her former position and to make her whole for the losses occasioned by the discharge.

On the basis of the foregoing and the record as a whole, the undersigned makes the following

## AWARD

The grievant was not discharged for just cause under the collective bargaining agreement. The appropriate remedy is to make her whole for any losses suffered by reason of the discharge by t immediately reinstating her to her former position, and paying to her back wages and benefits, including seniority, to which she would have been entitled, less any interim earnings which she would not have received but for her discharge.

The undersigned will retain jurisdiction for a period of thirty days following the date of this Award solely for the purpose of clarifying the remedy ordered herein.

Signed this 28th day of October, 1991 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator