

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
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WAUPACA COUNTY INSTITUTIONS : Case 68
EMPLOYEE'S UNION, LOCAL 2664, : No. 45635
AFSCME, AFL-CIO : MA-6681
 :
and :
 :
LAKEVIEW MANOR OF WAUPACA COUNTY :
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- - - - -

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40,
AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719-1169,
appearing on behalf of Waupaca County Institutions Employee's
Union, Local 2664, AFSCME, AFL-CIO.

Mr. Jeffrey J. Siewert, Corporation Counsel, Waupaca County, 811 Harding Street, Waupaca, Wisconsin

ARBITRATION AWARD

Waupaca County Institutions Employee's Union, Local 2664, AFSCME, AFL-CIO (hereinafter Union) and Lakeview Manor of Waupaca County (hereinafter County) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission) from its staff. On April 17, 1991, the Union filed a request to initiate grievance arbitration with the Commission. The County concurred in said request on June 10, 1991. On June 13, 1991, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on July 15, 1991, in Waupaca, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was transcribed, a copy of which was received on August 6, 1991. The parties filed briefs, the last of which was received on September 30, 1991. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

Sherry Buchholz (hereinafter Grievant) has been a nursing assistant at Lakeview Manor part-time since 1987 and full-time since 1988. On or about November 9, 1990, the Grievant was suspended for three days for violation of work rules and patient abuse. In a letter dated November 21, 1990, Jeanne Zempel (hereinafter Administrator) and Elizabeth Abbott (hereinafter Director) wrote to the Grievant in relevant part as follows:

This letter is to serve as written notice as to the result of the internal investigation into the alleged incident reported on November 9th. It is the opinion of those investigating this incident that for the protection of the residents and the facility, we must establish some corrective plan if you are to continue with employment at Lakeview Manor. Our opinion is based on the following:

In your own account, you did not deny that there was an incident on the evening of October 29, 1990, during which an 83-year-old resident received a spray of water

from a shower nozzle directly into her face. Although you maintained that this incident occurred because the resident grabbed the shower head and directed the nozzle at her own face, you, nevertheless did not request assistance during this incident although another nursing assistant was present in the tub room at the time. When a third nursing assistant entered the tub room, you did not, in fact, report to her that this resident received a spray of water directly into the face and ask this nursing assistant for help nor did you report anything related to the incident to the nurse in charge in order that the patient could be evaluated. Based solely on the information that you provided, those investigating can only conclude that you used extremely poor judgement in this situation by failing to recognize that a direct spray of water into the face of an 83-year-old individual can be an extremely traumatizing experience. On the other hand, we have documented information that you deliberately sprayed the resident in the face in a punitive manner because she was exhibiting uncooperative behavior.

In the interest of the safety and welfare of the residents of Lakeview Manor, we conclude that you will require intensive inservice and reorientation before you can resume your duties as a nursing assistant. . . .

The following represents the basis of our corrective plan of action with respect to allowing you to continue employment as a nursing assistant:

- 1.You will receive an in-depth review of Resident Rights.
- 2.You will be involved in extensive training as to what constitutes resident abuse.
- 3.You will receive a complete period of reorientation to the Nursing Department including the review of the Lakeview Manor Work Rules.
- 4.You will be assigned to the AM shift for close professional monitoring for a minimum of 60 working days.
- 5.You will receive no further assignment to the locked unit.
- 6.You will have no further involvement in resident program ratings.
- 7.You will not be allowed to perform any direct resident care without assistance and/or supervision for a minimum of 60 working days. During this period, your job performance will be evaluated on an on-going basis. At the end of this period you may resume the normal duties of a nursing assistant if authorized to do so by the Director of Nursing and a supervising R.N. from the AM shift.

We are informing you that any further incident of abuse of any kind directed toward any resident of Lakeview Manor

or any infraction of Lakeview Manor Work Rules will result in the immediate termination of your employment with the facility.

. . . .

On January 30, 1991, the Director prepared a Nursing Assistant Performance Evaluation of the Grievant. In the Comments section, the Director wrote as follows:

Please note: This is an interim evaluation due to (the Grievant's) involvement of alleged patient abuse which occurred in October of 1990. The resultant suspension (and) re-orientation is part of the process of correction (and) improvement necessary to continue employment (at) Lakeview Manor.

Although standards are marked as being met, (the Grievant) has not had the opportunity to work independently with residents.

The Grievant did not meet the standard in two areas of evaluation. For "Attendance", the Director noted that the Grievant was absent 13 days in 12 instances in 1990. In the Comments section, the Director wrote as follows:

Absent 2 days in January of 1991. Date of final evaluation has thus been moved backwards 2 days - Feb. 24 is the last day of her 60-day probationary period, as it stands today.

In the area of evaluation titled

Maintains Positive Attitude and Promotes Team Work: helps others willingly when own work is completed both within unit and off

the Director checked the "Meets Standard" column with an arrow into the "Does Not Meet" column. In the Comments section, The Director wrote as follows:

Had not been self-motivated in assisting the Nursing Assistants who had been assigned to work (with the Grievant) until directed to do so. (The Grievant) was counselled in this, and no reports have been heard since this occurred.

On February 13, 1991, the Grievant received an Employee Disciplinary Notice of a written reprimand for absenteeism.

Sharon Schultz (hereinafter Program Instructor) is a program instructor at Lakeview Manor. On February 13, 1991, the Program Instructor was re-orientating the Grievant. At approximately 9:00 a.m., the Program Instructor and the Grievant were making the bed of a patient named Delores (hereinafter Patient). The Patient was in a heavy recliner chair on the Grievant's side of the bed. The Grievant had her back to the Patient and the Patient was poking the Grievant and laughing. The Patient was known to do this as a form of joking. At one point, the Grievant turned around, yelled in an angry voice, "Now stop that", and pushed the Patient's chair a foot, jarring and upsetting the Patient. The Program Instructor reported the incident.

When the incident of February 13, 1991, was reported to her, the Director

requested the Program Instructor to document it, which she did. The Director determined that the incident should be investigated. As both the Administrator and the Director had been involved in the November 1990 investigation, it was determined that Program Coordinator Greg Oerter (hereinafter Coordinator) should do the investigation.

After talking to approximately 12 employees who worked with the Grievant, the Coordinator reported to the Administrator as follows: that the Grievant stated in the presence of other residents in the A wing that if someone would "smuck" the A wing residents once in a while, they would behave better; that the Grievant refused to feed a patient, who did not get fed until another employee fed him, at which time his food was cold; that on several occasions the Grievant had been rough and careless, one time causing a resident's legs to be banged into a bedrail; that the incident involving the Patient reported by the Program Instructor was documented and had occurred; and that sufficient evidence existed to believe that resident abuse behavior by the Grievant was still occurring, in spite of the one-to-one supervision at all times. The Coordinator recommended to the Administrator that the Grievant be removed from resident contact.

In a Nursing Assistant Performance Evaluation dated February 20, 1991, the Director stated that the Grievant did not meet the following standards and made the following comments:

Reports to Work as Scheduled - Comments: unacceptable attendance record

Attendance: Days Absent - Comments: Absent from work during reorientation for 5 (and a half) days claiming illness

Maintains Adequate Hydration/Nutrition - Comments: Refused to feed a resident before his food was cold

Maintains Positive Attitude and Promotes Team Work:

works well with peers - Comments: Certain things that have been said or done have been offensive to co-workers. They have complained that she does not do her fair share.

respects supervisors and supports their decisions/directions - Comments: Has not been reliable in her account of events. has been pleasant to supervisor but has received most of her directions from the assigned NA.

helps others willingly when own work is completed both within unit and off - Comments: Even after counselling, has continued to need many verbal prompts to actively participate in cares (sic). Tends to be an observer rather than a participant. Co-workers have complained that they need to give many cues to receive assistance.

The evaluation was given to the Grievant on February 21, 1991.

In a letter dated February 21, 1991, the Administrator wrote to the Grievant as follows:

Your employment with Lakeview Manor is being terminated effective upon receipt of this letter. In making this decision, consideration has been given to the following:

- (1)Recent allegations of resident abuse or neglect by you forwarded to management by three nursing assistants and thorough investigation of same.
- (2)The three day suspension you received on November 12, 13, 14 of 1990.
- (3)The overall evaluation of your work during the re-orientation period imposed after your return from the suspension.

The letter was given to the Grievant on February 21, 1991.

The Grievant grieved the termination. Said grievance proceeded through

the procedure established by the parties and is properly before this Arbitrator.

PERTINENT CONTRACT LANGUAGE

Article V - Management Functions

The Employer has the sole right to operate the Manor and all management rights repose in it, subject only to clear and specific provisions of this contract and applicable law. These rights include, but are not limited to, the following.

. . .

D) To suspend, demote, discharge and take other disciplinary action against employees for just cause.

. . .

Article XXIV - Disciplinary Files

In the event and employee is disciplined, the employee shall be notified of such discipline within a reasonable time period following the date of the alleged incident.

Any discipline placed in the employee's file that is not challenged and/or sustained through the grievance procedure shall automatically be removed from the employee's file thirty-six (36) months after such discipline was issued. Further, a disciplinary notice placed in the employee's file shall not be used as a building block for future discipline, if any, following twelve (12) months after issuance.

ISSUE

At hearing, the parties stipulated to framing the issue as follows:

Was the discharge of the Grievant for just cause?

If not, what should the appropriate remedy be?

POSITION OF THE PARTIES

Union

The Union asserts that patient abuse is a very serious charge; that not only can a person be disciplined for patient abuse, but he/she is subject to criminal prosecution, civil liability and forfeiture of license; that the stigma of patient abuse has very serious consequences and implications; that the Grievant stands accused of patient abuse; that the employer has the burden of going forward in discipline cases; that the standards of proof in discipline cases are subject to debate; that some arbitrators require proof beyond a reasonable doubt, particularly where alleged criminal conduct is involved; that other arbitrators require a preponderance of the evidence, sufficient evidence or clear and convincing evidence; and that, generally, an employer is required

to have enough facts in hand at the time of the action to establish "just cause".

The Union argues that a reasonable investigation was never conducted; that until the time of hearing, the County was unaware of the animosity the County's chief witness felt for the Grievant; that the County's investigation failed to reveal the County's chief witness' complaints and aggravation with the Grievant's reorientation; and that the investigation failed to corroborate the County's chief witness' version of the incident in question.

The Union also argues that the charges were never specific; that the County could have and should have made specific charges; that the general accusation of resident abuse is insufficient to prepare a defense; that the County did not specify which specific rules were violated; that the display and exhibition of written rules is not enough; that the Grievant is entitled to know up front exactly what rules or regulations she allegedly violated; and that the County is not permitted to wait until the filing of a brief to decide which of the written rules the Grievant supposedly violated.

In addition, the Union argues that the County offered no proof whatsoever of any wrong doing by the Grievant except for the testimony of one nursing assistant; that the letter of discharge refers to three nursing assistants; that the other two were never called as witnesses; that the County has the burden to produce the witnesses; that the Grievant was suspended for three days in November 1990; that the arbitrator may consider the suspension in determining the severity of discipline to be administered; that, first, the County must prove the Grievant is guilty of a subsequent offense.

The Union also argues that the Grievant's evaluation dated January 30, 1991, was satisfactory in all categories except attendance; that the second evaluation was signed on the day the Grievant was discharged; that this evaluation is self-serving and is not proof of anything; that witness Schultz had difficulty answering questions during the hearing; that several times she had to be directed to answer "yes" or "no"; that she was evasive and argumentative; that she was opinionated and slanted her account of the facts to make trouble for the Grievant; that she was prejudiced and her bias was obvious; that Schultz claimed the Grievant abused a patient and, yet, she treated the affair very cavalierly; that she said nothing to the Grievant; that she spent no more than five minutes with the patient; that she did not report the incident immediately; that Schultz felt the Grievant was spying on her; that she complained that the Grievant was being assigned to her; that the Grievant is accused of using the very words that Schultz said she often uses with the patient, "Now stop that"; that even though she claimed a patient was abused, she followed her normal routine for the day; and that she did not say anything to the Grievant because she was "sand bagging" her.

Finally, the Union argues that the worst case scenario is that the Grievant could have done a better job of walking the patient through the movement of the chair to avoid being poked; that learning is what re-orientation is for; that the Grievant was discharged based upon an investigation which did not reveal or understand the significance between the Grievant and the Witness; that it is easy to understand why that information never came to the County's attention because the investigators never talked to the Grievant; that the County discharged the Grievant without giving her the opportunity to explain; that the County has not met its burden of proving just cause; that the Grievant did not abuse the patient; that telling the patient to quit poking and moving a recliner are not abusive acts; and that the tone of voice was not abusive; that neither the chair nor its occupant was violated in any way.

The Union requests the Arbitrator to sustain the grievance, order the Grievant reinstated, make the grievant whole and any and all other remedy appropriate under the circumstances.

County

The County argues that its steps in terminating the Grievant subsequent to a reported patient abuse incident satisfy the seven-step reasonableness test for good cause; that the County provided the Grievant with considerable forewarning of the consequences of patient abuse; that Lakeview Manor's Personnel Policy lay out specific definitions of abuse and the consequences to the employee of patient abuse or failure to report any alleged abuse; that the standard job description and orientation forms which the County used with all employees, including the Grievant, establish that the Grievant knew what was expected and the consequences of not meeting those expectations; and that not only was the Grievant aware of the possible grounds for disciplinary action, but the Grievant received a re-orientation and was in the process of re-orientation at the time of the reported incident at issue here.

The County also argues that Lakeview Manor's policies and training regarding patient abuse is directly related to its providing care for patients; that Lakeview Manor is required by state and federal regulations to protect the rights and dignity of those individuals for whom they are providing care within the facility; that the County conducted a fair and objective fact-finding inquiry by assigning a neutral uninvolved party to investigate the alleged incident; that the results of the inquiry lead the investigator to the conclusion that patient abuse had occurred; that the County made a conscious effort to remain fair and objective to all parties; that the Manor assigned an administrator to investigate the matter who did not supervise the Grievant and

who had never been involved in any personnel matter involving the Grievant; that the investigator used the state and federal regulations as the basis and guide for conducting the investigation.

In addition, the County argues that the Union attempted to show at hearing that there was a bad working relationship between the Grievant and the Witness; that in large part, the question which the investigator was confronted with and with which the Arbitrator is now confronted is a question of credibility of the witnesses; that the investigator's interviewing of twelve co-workers let the Investigator to conclude that the Witness was credible and truthful; that the Union's two witnesses were both on friendly terms with the Grievant, both had been investigated for patient abuse themselves and both were not satisfied with the way the County handled the matters for which they were investigated; and that the Union's witnesses testimony did not establish that the Witness had any other motive other than fulfilling her duty of reporting what she believed constituted patient abuse.

The County also argues that it applied its rules and policies regarding patient abuse to all of Lakeview Manor's employees; that policies regarding patient rights are distributed to all employees and that mandatory training regarding the same is done on an annual basis; that other employees are investigated and disciplined for reported abuse situations; that the Grievant received a three-day suspension for a previous incident; that in a setting such as Lakeview Manor where the majority of the residents are protectively placed, completely dependent on staff and unable to leave, the facility has a tremendous burden to protect its clients; and that where a three-day suspension and re-orientation failed to correct or prevent additional abuse incidents, discharge of the Grievant was justifiable and appropriate.

Finally, the County argues that Lakeview Manor did not abuse its discretion in terminating the Grievant and its decision to do so should not be overturned; that Lakeview Manor made considerable effort to investigate the incident in question and follow progressive disciplinary procedure to the point of re-training and re-orienting the Grievant as to the expectations regarding patient rights and the consequence of abusing those patient rights; and that, if anything, Lakeview Manor was overly concerned with ensuring that the Grievant was given more than ample opportunity to comply with the facility's expectations.

The County asks the Arbitrator to deny the grievance and to uphold the discharge of the Grievant.

DISCUSSION

No doubt exists that the burden of proof in discipline cases is upon the Employer. As noted by the Union, however, the standard for burden of proof in discipline cases is unsettled. In some discipline cases Arbitrators have required proof beyond a reasonable doubt, while in other cases arbitrators have required a preponderance of the evidence or clear and convincing evidence. As noted by the Union, I will determine whether the Employer had enough facts in hand at the time of the action to establish just cause to terminate the Grievant. That analysis will take two parts. First, I will determine if the Grievant is guilty of the conduct alleged by the Employer. If so, I will determine if the conduct is serious enough to justify discharge.

In some ways it is unclear on what basis the Grievant was discharged. On the Employee Disciplinary Notice, the following appears:

The above disciplinary action (Discharge) was taken against

you for the following reason(s).

. . .

 X other (state reason) Resident Abuse

Said form was given to the Grievant on February 21, 1991.

Also given to the Grievant on February 21, 1991, was a Nursing Assistant Performance Evaluation which stated that the Grievant did not meet the standard in the following areas of evaluation:

Reports to Work as Scheduled

Attendance: Days Absent

Maintains Adequate Hydration/Nutrition

Maintains Positive Attitude and Promotes Team Work:
works well with peers

respects supervisors and supports their decisions/directions

helps others willingly when own work is completed both within
unit and off

The Grievant was also given a termination letter on February 21, 1991, which stated that the following were considered in the Employer's decision to terminate her:

- (1)Recent allegations of resident abuse or neglect by you forwarded to management by three nursing assistants and thorough investigation of same.
- (2)The three day suspension you received on November 12, 13, 14 or 1990 for resident abuse.
- (3)The overall evaluation of your work during the re-orientation period imposed after your return from the suspension.

Yet, the thrust of the Employer's case both at hearing and on brief focuses on one particular allegation of abuse; therefore, as the Employer bears the burden of proving just cause for its action of terminating the Grievant, only the one alleged incident of abuse will be reviewed to determine if the Employer had just cause to discipline the Grievant. 1/

On February 13, 1991, the Nursing Assistant and the Grievant were making

1/ Thus, in terms of determining just cause for discipline, I will not take into consideration the Employee Disciplinary Notice received by the Grievant on February 13, 1991, the Nursing Assistant Performance Evaluation dated February 20 and received by the Grievant on February 21, 1991, and the termination letter, other than the allegation of abuse at issue here and included therein. These documents are included in the Statement of Facts to show that the Employer did give the Grievant these documents and that, therefore, the Grievant was aware of the allegations contained therein.

the Patient's bed. The Patient was sitting behind the Grievant in a heavy chair. She was poking the Grievant. It does not appear that these facts are in dispute. The Employer alleges that the Grievant turned around, yelled in an angry voice, "Now stop that", pushed the Patient's chair one foot, and jarred and upset the patient. The Union's theory of the case appears to be that the Grievant turned around, said "Now stop that", and moved the Patient's chair so the Patient would be out of the way. The Employer alleges that the action outlined in its scenario constitutes abuse. The Union denies that abuse occurred here.

To clarify up front, the Grievant had been instructed and trained in the elements of patient abuse when she was first hired. Following her suspension for abuse, she was again instructed and trained in the elements of patient abuse. Said training included elements of both verbal and physical abuse. The Grievant knew or should have known that physical abuse includes any action which inflicts pain and any unnecessary or excessive use of force. The Grievant also knew or should have known that verbal abuse includes using a tone of voice which is unnecessarily harsh or loud.

The Union attacks the credibility of the Program Instructor, the Employer's chief witness. This credibility is important in determining whether the Grievant yelled at the patient, whether the Grievant pushed the chair and whether the patient was jarred and upset by the Grievant's actions. In Park Geriatric Village, the Arbitrator analyzed witness credibility as follows:

Arbitrators have recognized a number of factors in assessing the credibility of witness:

- The demeanor while testifying and the manner in which they testify.
- The character of their testimony.
- The extent of their capacity to perceive, to recollect, or to communicate any matter about which they testified.
- The extent of their opportunity to perceive any matter about which they testified.
- The existence or non-existence of any fact or facts testified to.
- Their attitude toward the action to which they testify.

Arbitrators have recognized in cases involving disciplinary action that in resolving credibility questions between the employee accused of misconduct and the employer's witnesses, weight may be given to the fact that the employee has an incentive for denying the charges in that he or she stands to lose, or gain in the case. (Citation omitted).

81 LA 306, 310-311 (Lewis, 1983).

It is clear on the record that the Program Instructor did not like having to re-orientate the Grievant. Initially the Program Instructor was not candid about this. This, in and of itself, does not convince me that she lied under oath about this event. (Indeed, other employees shared her dislike for re-orientating the Grievant but this did not lead them to wrongly accuse the

Grievant of patient abuse). At times, the Program Instructor appeared nervous as she testified, and she could not recall the normal activities of the day in question with specificity. This is not uncommon. She probably had never testified before, and one does not tend to remember the ordinary activities of the day, especially many months later.

But her testimony regarding the incident, refreshed at hearing by her documentation of that day, was forthright and specific. She did not exaggerate the harm to the Patient or the chair. She acknowledged that, at worse, the Patient was jarred and upset but required nothing other than to be comforted, certainly not any medical attention. She acknowledged that the Grievant did not touch the Patient. She acknowledged that the chair was not damaged. She also did not exaggerate what was said. She testified that the Grievant said only three words, words which, in and of themselves, are not abusive and which are not profane or inflammatory on their face.

In this Arbitrator's experience, one characteristic of a fabricated story is exaggeration or, at least, lack or restraint in the details of the story. The Program Instructor could have easily done that in this case for the Program Instructor was alone with the Grievant and the Patient, and the Patient is unable to talk. If the Program Instructor had wanted to get the Grievant into trouble, as alleged by the Union, it would have been easy for her to create a story which, on its face, was more clearly abusive. If the Program Instructor was vicious and was "sand bagging" the Grievant, as also alleged by the Union, she could easily have charged the Grievant with threatening the Patient or yelling profanities at the Patient. She could have easily accused the Grievant of physically hurting the Patient, either as part of or in addition to pushing the Patient's chair. She could have easily said that the Patient showed a pained look and shed a tear. Instead, she gave an account which on its face falls on the low end of actions which make up the continuum of abuse, not an account which is overly dramatic, not an account which one would make up if one wanted to be sure to get someone in trouble.

In addition, it does not appear that the Union disputes that the Program Instructor was present in the room when the alleged incident of abuse took place, and that she was able to see and to hear what happened. Nor does it appear that the Union disputes that the Grievant said "Now stop that" to the Patient and that the Grievant moved the Patient's chair about a foot. The dispute appears to be whether the Grievant yelled those words in an angry voice at the Patient, whether the Grievant pushed the Patient's chair and whether the Patient was jarred and upset by the actions of the Grievant. As the Grievant did not testify, her credibility as a witness can not be judged.

Since the Program Instructor documented the incident the same day, and since she was in a position to see and hear what happened, and since her testimony regarding the alleged incident of abuse was forthright and specific, and since she did not exaggerate the harm to the Patient or the words allegedly used by the Grievant, I believe her testimony to be credible in regard to the tone of voice used by the Grievant, the action of pushing the chair and the reaction of the Patient to the Grievant's actions. Therefore, even though she was initially less than candid about her feelings regarding re-orientating the Grievant and even though she was nervous in testifying and did not recall other activities of the day in question, I believe the Program Assistant' testimony that the Grievant did, indeed, yell at the Patient in an angry tone of voice, that the Grievant did push the Patient's chair a foot, and that the Patient was, indeed, jarred and upset by the Grievant's actions of yelling at her and pushing of her chair.

The Union argues that the Grievant did not abuse the Patient, that telling the Patient to quit poking and moving a recliner are not abusive acts,

that the tone of voice used was not abusive and that neither the chair nor its occupant were violated in any way.

I agree with the Union that, in and of itself, telling a patient to quit poking is not abuse. I also agree that, in and of itself, moving a recliner is not abuse. But what happened here was that the Grievant yelled at the patient in an angry voice, "Now stop that". The tone of the Grievant's voice was unnecessarily loud and harsh. This is abuse. Verbal abuse. What also happened here is that the Grievant pushed the Patient's chair a foot while the Patient was sitting in it and without telling the Patient what the Grievant was going to do. This was an unnecessary and excessive use of force. This was abuse. Physical abuse. And the Patient has a right to be free from verbal and physical abuse. What happened here is that the Patient was not free from abuse; she was jarred and upset by being subjected to the Grievant's anger which took the form of yelling and pushing the Patient's chair. Granted, as stated above, what happened here was on the low end of the continuum of actions that make up abuse. The Patient was not physically struck by the Grievant, nor did the Patient receive any physical wound. Yet abuse is broader than that; it includes what happened here. For these reasons, I believe that the Grievant is guilty of the conduct alleged by the Employer.

Having found that the Grievant is guilty of the conduct as alleged by the Employer, I must now determine if said conduct is serious enough to justify discharge. As noted above, the actions of the Grievant were abuse, but on the low end of the scale of possible actions which make up abuse. If this was the first such incident with the Grievant, the Union could possibly prevail with an argument that discharge is too strong a discipline based on the facts in this case. But this is not the first incident of abuse of which the Grievant was guilty. Indeed, she had been suspended without pay for three days for abuse about two months before. Indeed, she was on a special program to re-orientate her, including instruction of patient abuse. Indeed, said program required that she always work with another employee. And even though she had been suspended for three days about two months before, and even though she was being re-orientated with instruction on patient abuse and even though she was working with another employee, the Grievant committed another incident of abuse. For these reasons, I determine that the offense committed is serious enough to justify discharge.

Yet the Union has raised some valid concerns about the manner in which the investigation of this case was handled. Two aspects raised by the Union are of major concern to this Arbitrator. First, the charges against the Grievant were not as specific as they could. It is imperative that the employee be put on notice as to exactly why the Employer is taking the action it is taking. It is for this reason that I focus only on the charge for which the Employer presented an eye witness. In this case, the Grievant was not prejudiced since the Union was free at hearing to seek a continuance if the Employer's case had in any way surprised the Union. This Arbitrator would have granted such a continuance in this situation. Second, the Employer never asked the Grievant for her account of what happened. In some cases arbitrators have reversed employer's disciplinary decisions based on nothing more than this. This Arbitrator considered doing just that. I have grappled with this for some time and I have determined that the Grievant has not shown any prejudice in this instance. Therefore, I will not overturn this discharge based upon this defect in the Employer's investigation. The Employer should be forewarned, however, that how it disciplines its employees is as important a component of just case as why it disciplines and what discipline it imposes.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator issues the following

AWARD

1. The discharge of the Grievant was for just cause.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 20th day of December, 1991.

By _____ James W. Engmann,
Arbitrator