BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, AFL-CIO	Case 13 No. 46431 A-4849
and	
HEARTHSIDE REHABILITATION CENTER	

Appearances:

Mr. Thadd M. Hryniewiecki, Representative, appearing on behalf of the Union.

Mr. C. William Isaacson, Corporation Labor Counsel, appearing on behalf of the Employer.

ARBITRATION AWARD

Service Employees International Union, Local 150, AFL-CIO, hereinafter referred to as the Union, and Hearthside Rehabilitation Center, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final, conclusive and 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 4, 1992. The hearing was not transcribed and the parties orally argued their respective positions.

BACKGROUND

The grievant was hired by the Employer as a Resident Aide on May 21, 1991. On August 26, 1991, the grievant was working on the Northwest wing. Four aides were assigned to that wing including the grievant, as well as Jacqueline Wakefield and Delbert Jordan. At approximately 5:20 p.m., the aides were serving the residents dinner and were passing trays. The grievant was taking trays from the cart and handing them to the aides to serve to the residents. Jacqueline Wakefield asked the grievant that instead of just handing out the trays, why the grievant could not help pass the trays instead. The grievant then stated that it was not anything for the grievant to kick her (Wakefield's) ass. Delbert Jordan was nearby and heard and understood the statement and told the grievant that he would not tolerate this on the wing. The Employer after conducting an investigation and taking statements from the employes, discharged the grievant on August 30, 1991.

ISSUE:

The parties stipulated to the following:

> Was there just cause for the discharge of the grievant? If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE XI - DISCHARGE

> Section 11.1 - The Employer may discharge or suspend an employee for just cause, but in respect to discharge, shall give warning of the complaint against such employee to the employee, in writing, and a copy of the same to the Union, except that no warning notice needs to be given to an employee if the cause of such discharge is verbal or physical abuse of residents or staff (or failure to report such witnessed abuse); discourtesy; neglect of duty; destruction, abuse or theft of facility, resident or employee property; dishonesty affecting the facility; intoxication on the premises or on-premise possession of intoxicating beverages; persistent garnishments; unethical conduct; falsification and/or breach of confidentiality regarding employee data or other records; conduct adversely affecting the health and welfare of residents; punching a time card for another employee; violation of the Resident Bill of Rights; conviction of a crime or misdemeanor; or failing to report unavailability for work at least one (1) hour before starting time.

EMPLOYER'S POSITION

The Employer contends that this is a simple case. It maintains that the grievant threatened to kick the ass of another aide. It submits that this was a threat of physical violence to a fellow staff member. The Employer claims that there was no provocation for the grievant's threat and it was directed toward Jackie Wakefield. The Employer points out that the verbal threat of physical violence toward another employe is a terminable offense. It argues that there is no mitigation in this case and the grievance must be denied.

UNION'S POSITION

The Union does not deny that the grievant used profanity to a co-worker but asserts that mere cussing or the use of obscene or vulgar language does not provide just cause for discharge. It argues that although the grievant used profane language, she was provoked by similar language from Jacqueline Wakefield. It insists that the language used here is rampant in the work place and is a form of expression. It notes that there was no physical altercation and the statement was not a threat and the grievant did not mean it as a

physical threat. The Union argues that the Employer was arbitrary and capricious in discharging the grievant. It asks that the grievant be reinstated and made whole for the loss of wages and benefits.

DISCUSSION

It is undisputed in this case that the grievant made a statement that it was nothing to her to kick the ass of a fellow employe. There were different versions of what was said in that Wakefield testified that the grievant told her she would "kick your ass." Delbert Jordan testified that the grievant stated that "kicking a white person's ass meant nothing to her". Finally, the grievant testified that she stated that it didn't mean anything to her to kick a whore's ass. The grievant's written statement made on August 26, 1991 states: "Because it ain't nothing for me to kick a hoe ass." 1/ It is clear that the grievant used coarse, obscene and vulgar language.

The grievant has asserted that she was provoked into making this statement. Both Wakefield and Jordan testified there was no provocation and the grievant's own statement of August 26, 1991, contains no reference to the alleged provocation. The undersigned does not credit the grievant's testimony that Wakefield used vulgar language which provoked the statement by the grievant and it is concluded that the grievant made the statement without any provocation.

The more troubling aspect of this case is whether the grievant's statement constituted a threat of physical violence or whether this was simply a form of expression which did not constitute a threat. The grievant testified that she didn't intend to actually kick Wakefield's ass nor was her statement even meant that she would "get her" and was not a direct threat. Wakefield did take it as a threat.

A review of what occurred is that Wakefield was passing out trays to residents and she questioned why the grievant was simply handing trays to her as opposed to passing them to residents. Basically the grievant questioned why Wakefield was asking and then came the statement "Because it ain't nothing for me to kick a hoe ass." In that context, the grievant was telling Wakefield not to question what the grievant was doing because the grievant had no qualms about engaging in physical activity. This is intimidation and a threat. This threat constituted verbal abuse of a fellow employe. Article XI, Section 11.1 provides that the employer can discharge an employe for just cause. It further provides that a discharge cannot take place without a written warning having been given to the employe first except for verbal abuse of staff. Although no written warning need be given before discharge in this case, the Employer is still required to have just cause to discharge the employe. Just cause requires that the punishment fit the crime. In this case there was no evidence that the grievant had raised her voice or made any gestures or actions that would indicate she intended to carry out the physical action threatened. In the absence of evidence that the grievant was actually menacing Wakefield it must be concluded that the grievant did not actually intend to take physical action. Normally, the discipline imposed by an employer will not be set aside unless it has abused its discretion by imposing an unreasonable or excessive penalty. The undersigned finds that the penalty imposed here was excessive.

The grievant's statement contained very derogatory words and could even be labelled "fighting words" and this is unacceptable in the Employer's

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setting. Even if made in jest, referring to a fellow employe as a whore and threatening physical harm is improper in the work place. The grievant's past disciplinary record indicates a verbal warning and four written warnings for being out of uniform, contributing to an unsanitary condition, tardiness and absenteeism. The grievant had not received any suspension or discipline for any prior verbal abuse of a fellow employe. While the grievant's conduct is unacceptable, and her past disciplinary record is not exemplary and she has been employed for only a short period of time, it falls short of providing just cause for discharge. Rather, the undersigned finds that the appropriate penalty for the grievant's conduct is a thirty (30) day suspension.

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

AWARD

There was not just cause for the grievant's discharge. The grievant's discharge shall be reduced to a thirty (30) day suspension. The grievant shall be reinstated and made whole except for the 30 day suspension and less any interim earnings.

Dated at Madison, Wisconsin this 28th day of February, 1992.

By Lionel L. Crowley
Lionel L. Crowley, Arbitrator