

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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MANITOWOC COUNTY PARKLAWN HOME : Case 1  
EMPLOYEES, LOCAL 913, AFSCME, AFL-CIO : No. 47784  
 : A-4957  
and :  
 :  
MANITOWOC HEALTH CARE SERVICES, INC. :  
 :  
- - - - -

Appearances:

Mr. Michael J. Wilson, Representative-at-Large, Wisconsin Council 40,  
Mr. Robert S. Luce, Attorney at Law, on behalf of Manitowoc Health Care

AFSCME  
Service

ARBITRATION AWARD

Manitowoc County Park Lawn Home Employees, Local 913, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission designate a member of its staff to arbitrate in a dispute between the Union and Manitowoc Health Care Services, Inc., hereinafter the Employer, in conformance with the grievance and arbitration procedures contained in the parties' Memorandum of Agreement concerning arbitration of this dispute and the parties' labor agreement. The Employer subsequently concurred in the request and David E. Shaw, a member of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on November 19, 1992 in Manitowoc, Wisconsin. There was no stenographic transcript made of the hearing. The parties submitted post-hearing briefs in the matter by December 8, 1992. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated at hearing that the issue to be decided is as follows:

Was there just cause for the discharge of the Grievant,  
Karen Ruelle? If not, what is the appropriate remedy?

CONTRACT PROVISIONS

The parties' 1991-1992 Agreement contains the following relevant provision:

ARTICLE 13 - DISCIPLINE AND DISCHARGE

A) Just Cause: No employee will be disciplined or discharged without just cause. When an employee is discharged, he or she may request and shall receive from the Employer, in writing, the reason for discharge.

. . . .

F) Offenses Which May Result In Immediate Discharge:

. . .

13. Physical or mental abuse or damage or injury of any resident;

#### BACKGROUND

The Employer owns and operates Park Lawn Care Center, a nursing home located in Manitowoc, Wisconsin. 1/ The Union is the exclusive bargaining representative of the bargaining unit of non-professional employees at Park Lawn, including the Nursing Assistants. The Grievant, Karen Ruelle, had been employed at Park Lawn as a Nursing Assistant from April 10, 1981 to the time of her discharge on April 10, 1992.

Sometime in late 1991 a resident at Park Lawn, "M", went to the Director of Nursing (D.O.N.), Gerri Dunne, and complained about the Grievant and asked that the Grievant no longer care for her. Dunne talked to "M", and the Grievant together, and "M" denied that anything in particular was wrong. Dunne directed the Grievant not to provide care for "M" after that. The Grievant did not care for "M" after that meeting other than to bring in her food tray, and when "M" objected, the Grievant no longer did that.

On the afternoon of April 2, 1992, "M" came to Dunne's office. Dunne was not there, but the Assistant D.O.N., Brenda Bartels, was in the office and "M" complained about the Grievant and another Nursing Assistant. Bartels reported the matter to the Social Worker at Park Lawn, Cindy Puissant, who in turn, notified the Administrator, Cindy Cooper. Cooper and Puissant then interviewed "M". After "M" told them her complaint, they had her statement typed, and on April 3rd, "M" read it and signed. "M"'s statement reads as follows:

I, Mildred Baumann, reported to Administrator and Social Worker, on 4-2-1992 the following concerns regarding my care: 1. N.A., Doris, would not acknowledge me when I was talking to her and when I requested she fix the foot board on my bed she refused, stating, "I'm not a maintenance man, I don't fix beds"; 2. N.A., Karen, called me a "bitch" after I made a mess in my bed and then washed me with cold water and when I asked her not to use cold water she again called me a "bitch".

|                           |                  |
|---------------------------|------------------|
| Mildred Baumann /s/       | 4/3/92           |
| Resident Signature        | Date             |
| Cindy Puissant, R. N. /s/ | Cindy Cooper /s/ |
| Witness                   | Witness          |

Also on April 3rd, Ruelle was brought in before Cooper, Puissant, and Dunne and given a "Disciplinary Warning Notice" and told she was being suspended. Cooper told Ruelle she would investigate the matter further and would let Ruelle know the outcome on April 10th. Ruelle was permitted to read the warning notice and write her response to the allegations. The warning notice stated under "Remarks":

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1/ The Employer purchased Park Lawn and began operating it in July of 1986.

**REMARKS:** At 2:30 p.m. 4/2/92, Resident M. Baumann came into nsg. office. States I have several complaints about 2 N.A.'s. I don't want that bull Karen taking care of me anymore. She is rough and always rushed. She called me a bitch to my face because I wanted some things done. She took care of me last month. I told Mrs. Dunn yesterday that I don't want her in my room anymore. She brings my tray into me and tries to be nice to me but I don't want to talk to her. I won't allow her to take care of me anymore. B. Baltes, A.D.O.N.

Ruelle indicated on the warning notice that she disagreed with the statement and wrote the following statement in response:

I don't let anybody call me a bitch. I don't even use this word. This problem was at least 3 months or better - never went back in room for any care since then.

On April 6, 1992, the suspension was extended to April 13, pending further investigation of the matter. Cooper contacted the Bureau of Quality Compliance, Division of Health, State Department of Health and Social Services on April 6 and reported the matter. Cooper was told to further investigate the matter and that BQC would also be investigating the matter. Cooper and Puissant interviewed "M" two more times and "M" gave the same account as on April 2nd each time. On April 10, 1992, the Grievant was informed that she was being terminated on that date for patient abuse.

An investigator from BQC also interviewed "M" and other residents on that wing and received the same account from "M". The investigator was reportedly told by another resident that Ruelle had also washed him with cold water. That investigation was conducted on May 13, 1992. Cooper subsequently received the following letter dated May 15, 1992 from BQC:

Dear Cindy:

As you know, your self-report relating to resident abuse was investigated on 5/13/92 by Health Facility Surveyors-Registered Nurse and Social Worker.

The investigation consisted of a review of resident rights, complaints, resident interviews, review of the Nurse Assistant personnel file, the resident record and the facilities report of their own investigation.

As we discussed, the initial comments from the resident should probably have been pursued; however, when specific complaints were made the facility did investigate and take appropriate action. Therefore, no violations are being cited.

Sincerely,

LaVern Woodford /s/  
LaVern Woodford  
Field Operations Manager

## BUREAU OF QUALITY COMPLIANCE

Ruelle grieved her discharge and the parties, being unable to resolve their dispute, proceeded to arbitration of the grievance before the undersigned.

### POSITIONS OF THE PARTIES

#### Employer

The Employer takes the position that it had just cause to terminate the Grievant for verbal and physical abuse of a resident. The resident reported the matter to four different employees of Park Lawn and gave the same account to the investigator from the State. It is a violation of Department of Health and Social Services (DHSS) regulations for an employee to verbally or physically abuse a resident and allegations of abuse must be reported to DHSS. The Employer reported the matter and DHSS subsequently also investigated the complaint and "M" gave the same account. DHSS commended the Employer for promptly investigating the matter and taking appropriate action. The State's Unemployment Compensation Commission likewise concluded Ruelle was discharged for abuse to a patient. Thus, the Employer reasonably found that Ruelle verbally and physically abused the resident. Hence, it had just cause to terminate Ruelle under Article 13, of the Agreement.

#### Union

The Union first asserts that Ruelle has been subjected to double jeopardy in this matter. "M" initially complained several months before and the D.O.N. investigated the matter and directed the Grievant to no longer provide care for "M". To subsequently act upon the same complaint several months later is "undue delay" and discipline was previously determined, i.e., there was no disciplinary action taken.

Next, the Union asserts that the Employer has the burden of proving that the abuse happened. Under any quantum of proof utilized, the Employer has not met its burden in this case. Neither the resident, nor the D.O.N., testified in support of the allegations, while the Grievant credibly testified she did not do what she was alleged to have done.

Lastly, the Union asserts that Ruelle had an excellent work record with no prior discipline. Further, Cooper testified that the charges were uncharacteristic of Ruelle.

As a remedy, the Union requests that Ruelle be reinstated with full back pay, with a deduction of any unemployment compensation received, and her personnel file cleansed.

### DISCUSSION

This case involves an allegation of verbal and physical patient abuse to a particular resident, "M". The difficulty in resolving this case arises not from whether patient abuse should result in immediate discharge, for the parties have agreed in Article 13, Section F, 13, that it should. Rather, the difficulty arises in this case from the fact that there were no other witnesses to the alleged abuse besides "M" and the Grievant. This being a discharge case, the Employer has the burden of proving that Ruelle engaged in the alleged abuse.

The evidence offered by the Employer in this case is the statement signed by "M", Bartel's summary of what "M" told her on April 2nd (as stated on the

Disciplinary Warning Notice given to Ruelle on April 3rd), and Cooper's testimony as to what "M" told her on several occasions during her investigation of the matter after April 2nd. "M", herself, did not testify. The Grievant, Ruelle, did testify and stated she never intentionally washed "M" with cold water and never called her "bitch". She also testified she never had a verbal quarrel with "M".

Beyond the fact that the Employer has not presented any direct evidence to support the allegation of abuse, there is the timing of "M"'s complaint of April 2nd. Supposedly, this is the same matter that caused "M" to go to Dunne several months prior and request that Ruelle not care for her any longer. According to Cooper's and Ruelle's testimony, Dunne questioned "M" at that time as to what was the matter and "M" had indicated there was not a specific problem. Cooper explained "M"'s failure to say anything to Dunne at the time as a reluctance based upon "M"'s being afraid to complain about Ruelle, since Ruelle was taking care of her at that time. However, Cooper also testified that "M" is lucid and "very able" to complain, and that it is not unusual to receive complaints from her. Cooper further testified that she did not recall whether she had asked "M" why she had not said anything about the matter when she had first gone to Dunne. On the other hand, Ruelle denied she engaged in the alleged misconduct, and Cooper conceded on cross-examination that the allegations are uncharacteristic of Ruelle's work record. With regard to Ruelle's work record, it is noted that she has no record of prior discipline.

While the Employer is placed in a very difficult position when faced with a patient's claim of abuse where there are no other witnesses, it must nevertheless meet its burden of establishing that the employee committed the alleged abuse. Based upon the foregoing, it is concluded the Employer did not meet its burden in this case. 2/ Accordingly, it is concluded that the Employer did not have just cause to discharge Karen Ruelle.

Based upon the above and foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

#### AWARD

The grievance is sustained. The Employer is directed to offer the Grievant, Karen Ruelle, immediate reinstatement as a Nursing Assistant and to make her whole under the labor agreement for all lost wages and benefits from the date of her suspension without pay to her date of reinstatement or the date of the offer of reinstatement if she declines the offer. Pursuant to the Union's request, the Employer is also directed to deduct from the awarded backpay any unemployment compensation benefits received by Ruelle so as to restore her unemployment compensation credits. Also, mention of this matter is to be removed from Ruelle's personnel file.

Dated at Madison, Wisconsin this 1st day of February, 1993.

By David E. Shaw /s/  
David E. Shaw, Arbitrator

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2/ It is noted in passing that, contrary to the Employer's claim, Ruelle was not found to have engaged in patient abuse by the Unemployment Compensation tribunal. (Exhibit No. 5).

