

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 2
 MANITOWOC COUNTY PARKLAWN HOME : No. 47785
 EMPLOYEES, LOCAL 913, AFSCME, AFL-CIO : MA-4958
 :
 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 16, 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,
 Doris Murter? If not, what is the appropriate remedy?

CONTRACT PROVISIONS

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

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.
- B) Union Representation: Employees shall be entitled to Union representation regarding any interview which might reasonably lead to discipline.

The Union is responsible to inform its members that employees may request Union representation when possible disciplinary matters are being investigated.

- C) Offenses: The following system of warnings and consequences for violations of facility rules, safety requirements, and residents' rights may, but not necessarily, occur, depending upon the seriousness of the violation:

- First Offense - Verbal/written warning
- Second Offense - Written warning
- Third Offense - Written warning and two (2) days suspension without pay
- Fourth Offense - Discharge

The warning notice herein provided shall not remain in effect for a period of more than one (1) year from date of said warning notice.

- D) Warning Notices: Warning notices include, in writing, the date the warning is being given, the name of the employee, the date and nature of the offense, the signature of the supervisors giving the warning and the signature of the employee to whom the warning is given. The employee's signature shall acknowledge receipt and shall not be interpreted as an admission or agreement with the discipline.

When an employee fails to report to work as scheduled and fails to furnish the Employer with a justifiable excuse within twenty-four (24) hours, the employee is conclusively presumed to have voluntarily quit and his or her employment terminated.

No warning notice need be given for violation of blatant offenses such as those listed as "Offenses Which May Result in Immediate Discharge" in ARTICLE 13, F, or which cause the facility to receive a violation from the Division of Health under any of its regulations.

Employees may be immediately discharged for such violations. Violations of Division of

Health regulations shall be interpreted to mean regulations the employee has been advised of, trained to prevent, and which the employee is guilty of violating.

- E) General Facility Rules of Conduct: These rules have been established for the residents' and employees' benefit and protection. They are not intended to restrict or impose on the privileges of anyone; they are installed to insure the rights and safety of all.

. . .

5. Perform all duties assigned to the employee (gross negligence can be cause for immediate discharge), or for which the employee is responsible or which are covered in the job description.

. . .

- 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. The Union is the exclusive bargaining representative of the bargaining unit of non-professional employees at Park Lawn, including Nursing Assistants. The Grievant, Doris Murter, had been employed as a Nursing Assistant at Park Lawn for approximately 3 1/2 years at the time of her discharge.

On July 25, 1991, Murter received a "Disciplinary Warning Notice" for "unsatisfactory work". The notice indicated that it was a second written warning and under "Remarks" it was stated:

"Assigned to resident room 235. Was found at 12:45p sitting in bed, brkfst bib on, not cleaned, not shaved, artificial eye not in."

Murter's statement on the notice in response was as follows:

"He was washed and shaved and his gown was changed. Refused to have eye put it (sic) in."

On April 2, 1992, at approximately 2:30 p.m., a resident, "M", went to the Nursing Office to complain to the Director of Nursing, Gerri Dunne, about two Nursing Assistants, one of them being Murter. Dunne was not there, but the Assistant Director of Nursing, Brenda Bartels, was in the office, and "M" made her complaints known to Bartels. The complaint as to Murter was in regard to care provided to "M" the previous two days and involved not talking to "M", refusing to fix the footboard on her bed, and not washing her properly. Bartels reported the complaint to the Social Worker at Park Lawn, Cindy

Puissant, who in turn notified the Administrator, Cynthia Cooper. Cooper and Puissant then interviewed "M" who repeated what she had told Bartels.

On April 3rd, Murter and Bartels were on the elevator along with two residents. Murter and Bartels stood facing the elevator doors and the residents stood behind them, also facing the doors. When the elevator arrived on their floor, Bartels made a statement to the effect, "Here is our haven." Murter then stated: "More like our dungeon." Bartels did not say anything to Murter about the comment, but thereafter reported the comment to Cooper and described the reaction of one of the residents as a pathetic look.

Subsequently on April 3rd, Murter was called in before Cooper, Puissant, Dunne and Bartels and given a "Disciplinary Warning Notice", which indicated she was being automatically terminated for "unsatisfactory work", and for verbal and physical abuse, based upon "M"'s complaint of April 2nd and the comment Murter had made on the elevator that morning. The notice also indicated that Murter had received both a written and verbal warning on April 3rd, 1991, and a second written warning on April 12, 1991 prior to this "final" warning. 1/ Under "Remarks", the notice stated:

REMARKS: On 4/2/92 at 2:34pm, resident "M". . .came into nsg. office. States I have several complaints about 2 NA's. That Doris Ann, she took care of me Tues. & Wed. & I don't want her anymore. She doesn't talk to me when she's there. I asked her how the weather was, Doris said, "Don't ask me, I don't have time to look out the window, I have too many people to get up." Also, "M". . .asked Doris to move footboard on bed around so it was on correctly & she (Doris) replied, "Do I look like a Maintenance Man" and proceeded to make the bed. "M". . .had to go out into the hall & ask Bob Hill to fix footboard on bed. Feels care is not adequate (rushes through bath, does not wash my hair, just rinses them.) Requests that she not care for her anymore. B. Bartels, R.N., A.D.O.N. /s/

4/92 (After) breakfast, Doris was transporting residents back from the small dining room, 2 residents were on the elevator (with) her & myself. Doors of elevator opened on 2nd floor, I said, "Here is our haven." Doris said, "More like our dungeon." One resident turned around & looked at Doris. B. Bartels /s/

Murter was asked if she had a response to the allegations, but she chose not to make any statement at the time. Murter was terminated effective April 3, 1992, and she thereafter grieved her termination. The parties, being unable to resolve their dispute, proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Employer

The Employer takes the position that it had just cause to discharge Murter under Article 13 of the Agreement, based upon its findings of verbal

1/ There was no evidence presented as to such prior warnings and there was no record of them in Murter's personnel file.

abuse of residents and physical abuse of a resident by failing to comply with the resident's care plan. In support of its position, the Employer cites the April 3rd incident on the elevator and the complaints of "M" reported to management on April 2nd. Also cited is Dunne's testimony that Murter had received two prior Disciplinary Warning Notices for unsatisfactory work as well as numerous verbal warnings regarding the quality of her work.

The Employer asserts that Nursing Assistants are expected to make reasonable adjustments to residents' beds as a part of resident care. Here, Murter refused "M"'s request to adjust the footboard on her bed. Similarly, rushing "M" through her bath and not washing her hair violates "M"'s health care plan. The Employer asserts that "M" gave the same account to Cooper and Puissant as she gave to Bartels. Failure to follow the resident's care plan constitutes physical abuse.

The Employer also contends that the Unemployment Compensation Division confirmed Murter's verbal abuse against residents and her failure to comply with "M"'s care plan, after prior warnings, and concluded that Murter was discharged for misconduct connected with her employment.

Union

The Union contends that the Employer did not have just cause to discharge the Grievant. In support of its contention, the Union first asserts that there were insufficient previous warnings prior to discharge. There was only one prior discipline in Murter's personnel file, the July 25, 1991 warning, and no other warnings as required by Article 13, Sections C and D, of the Agreement. The termination notice does not refer to the July 25th warning, and only refers to warnings of which there is no record. While Dunne testified that Murter was "counseled" previously concerning unsatisfactory job performance, there is nothing documenting any discipline beyond the July 25th warning. The counseling cannot now be considered to have been discipline, when Murter was not given notice that it was discipline at the time.

Second, the Union asserts that there is no evidence that Murter abused "M". Murter testified she did not refuse to talk to "M" when caring for her, did not say to "M", "Don't ask me, I don't have time to look out the window, I have too many people to get up," did not rush "M" through her bath and only rinse, rather than wash, "M"'s hair. There is no direct testimony to corroborate "M"'s allegations and no supervisor noticed any inadequacy with "M"'s care, appearance or demeanor. Cooper testified that "M" was a capable and available witness and Murter had a right to confront her accuser.

With regard to the matter of the footboard for "M"'s bed, Murter conceded that she did not adjust it as "M" requested. She explained that she had tried to fix it once before unsuccessfully and, based upon that, she decided a maintenance person should be called. There was no need to fix the footboard immediately, since "M" would not be in bed based upon the activity schedule, and after returning to the floor from meal time, Murter was told by "M" that it was fixed. Failure to fix the footboard immediately, as "M" demanded, was a reasonable judgment by Murter based upon what has priority and her inability to fix it. Regardless of whether Murter should have been able to fix the footboard, failure to do so did not constitute abuse of "M".

As to the elevator incident, the Union notes that the party who reported it, Bartels, did not testify. Further, nothing was said to Murter at the time, nor was there any attempt to comfort the residents as a result of the comment. Rather, Bartels laughed at the comment, a comment other employees had also made. Murter's comment was directed to Bartels and was not intended to be harmful or offensive. While the comment might be inappropriate and cause for

counselling, or at most, a disciplinary warning, it does not qualify as "abuse" under Article 13, Sec. F, as cause for immediate discharge.

As a remedy, the Union requests that Murter be reinstated with back pay and make whole relief, and that her work record be adjusted accordingly.

DISCUSSION

This case involves allegations of verbal and physical abuse of residents, as well as alleged unsatisfactory work performance. This being a discharge case, the Employer has the burden of establishing that the alleged misconduct took place. If the Employer is able to establish that the Grievant is guilty of abuse of a resident, then the discharge stands under Article 13, Section F, subsection 13, of the Agreement, which provides that physical or mental abuse of a resident may result in immediate discharge.

The bulk of the Employer's allegations are based upon "M"'s complaint of April 2, 1992, that she reported to Bartels and later repeated to Puissant and Cooper. As in the case involving the other Nursing Assistant about which "M" complained on April 2nd, the Employer chose not to have "M" testify in support of the allegations. Murter testified, and except for the matter of the footboard, she denied "M"'s allegations regarding what Murter said to her and not washing her hair. While the evidence indicates that Murter has been disciplined once and verbally counseled on several occasions for unsatisfactory work, there is no other corroborating evidence in this case as to the allegations by "M". There were no reports by others as to "M"'s appearance that would indicate her hair was not being washed, i.e., that it was greasy looking or had an odor about it. Cooper testified she did not check "M"'s chart to see if washing hair was checked after she had heard "M"'s complaint.

Given Murter's credible testimony denying she made the remarks "M" alleged she made, "M"'s failure to testify, making her unavailable for cross-examination as to her allegations, Cooper's failure to investigate the allegations beyond taking "M"'s statement, and the lack of evidence corroborating the allegations, the undersigned is not convinced that Murter is guilty of the alleged statements and a failure to follow "M"'s program of care.

As to the matter of the footboard to "M"'s bed, Murter conceded she did not fix it when asked by "M". Murter denies saying to "M", "Do I look like a maintenance man?" and then ignoring her ("M"). Murter credibly testified that she told "M" she was not a maintenance man and could not fix things, but that she would find someone to fix it. Murter further testified that it was approximately 7:30 a.m. when "M" asked her to fix the footboard and that "M" would not be back in her bed until 1:00 p.m., so Murter did not immediately find someone to fix the footboard, but instead continued getting the other residents up for breakfast. When Murter returned after breakfast, she saw "M" in the hallway, and "M" told her she had already had someone fix it. Murter testified that she did not try to fix "M"'s footboard herself because she had tried unsuccessfully to fix it before this.

Assuming arguendo that Murter should have known how to fix the footboard, her failure to fix it, or to find someone else to do it immediately, does not rise to the level of abuse under the instant circumstances. Refusing to do what a resident wants, when a resident wants, does not necessarily constitute abuse; rather, the refusal must be viewed in the context of the circumstances in which it occurred. "M" was not in the bed at the time and not fixing the footboard immediately did not endanger "M"'s wellbeing.

With regard to the statement in the elevator, Murter does not deny making the statement "More like our dungeon", in response to Bartel's statement, "Here

is our haven." Again, we have only Murter giving direct testimony as to what happened, since Bartels did not testify. Murter's unrebutted testimony was that Bartels laughed in response to the statement, and made no comment to her about it, nor did she (Bartels) make any attempt to comfort the residents. While the comment was wholly inappropriate, especially within hearing of the residents, it does not rise to the level of what the Arbitrator would consider abuse. Murter testified that her comment was directed to Bartels and not to the residents, and Bartels' statement describing the incident states only that "One resident turned around and looked at Doris," and does not indicate that the resident needed comforting or appeared upset due to Murter's remark.

Cooper testified that the decision to discharge Murter was based upon the July 25, 1991 write up, "M"'s complaints of April 2, 1992 and Murter's statement in the elevator on April 3, 1992. The April 3, 1992 Disciplinary Warning Notice Murter received indicates she was terminated for "unsatisfactory work" and physical and verbal abuse. Based upon the above, the undersigned has concluded that the Employer failed to establish that Murter engaged in physical or verbal abuse of residents. At most, the Employer has established that Murter failed to replace "M"'s footboard when asked and that she made an inappropriate comment on the elevator with residents present. While there were references to other prior discipline, the only prior discipline in evidence was the July 25, 1991 written warning Murter received for unsatisfactory work. The parties' Agreement at Article 13, Section A, requires "just cause" for discipline or discharge, and absent offenses resulting in immediate discharge, Article 13, Section C, provides for a system of progressive discipline. Although Section C does not appear to require that progressive discipline be followed in every situation, the undersigned does not find the circumstances in this case to warrant skipping the steps in that procedure so as to go from a written warning to discharge. Therefore, it is concluded that the Employer did not have just cause to discharge Murter.

On the basis of the above and foregoing, the evidence and the arguments of the parties, the undersigned makes the following

AWARD

The grievance is sustained. Therefore, the Employer is directed to immediately offer the Grievant, Doris Murter, reinstatement to her former position as a Nursing Assistant, to make her whole under the Agreement for all lost wages and benefits and to delete any reference to the discharge from Murter's personnel record.

Dated at Madison, Wisconsin this 8th day of March, 1993.

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