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 18<br>No. 47718<br>A-4948<br>(Discharge of Patti Port)<br><br>Case 19<br>No. 47719<br>A-4949<br>(Discharge of Irma Aranda) |

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.

Mr. John W. Martin, Director of Labor Relations, Hillhaven Corporation, 1476 Kenwood Drive, Menasha, WI 54952-1140 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 Patti Port and Irma Aranda. The undersigned was so designated. A hearing was held on November 5, 1992 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 November 13, 1992. The parties submitted post-hearing briefs which were exchanged through the undersigned on December 25, 1992. The Employer submitted exceptions to the Union's brief, which were ruled upon on January 5, 1993, 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:

"Were the grievants discharged properly? If not, what is the appropriate remedy?" 1/

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1/ The Union addressed the question of the arbitrator's remedial authority in its brief. The Employer objected, arguing that this expanded the scope of the dispute beyond the stipulated issues. The undersigned addressed this disagreement in ruling dated January 5, 1993:

> . . .
> Enclosed with Mr. Robbins' copy of this letter is a copy of the "Reply Brief" submitted by Mr. Martin. While Mr. Martin characterizes this as a "reply brief", it is clear from the record and my correspondence of December 25th that there was no provision for reply briefs:
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> > "No provision has been made for reply briefs. It is my practice to allow one week for review of briefs and the submission of exceptions. I will close the record on January 4, 1993." [12/25/92 letter exchanging briefs]
>
> Notwithstanding this, the substance of Mr. Martin's letter is clearly an exception to the contents of Mr. Robbins' brief. Specifically, Mr. Martin takes exception to the Union's discussion of the arbitrator's remedial authority as being outside the scope of the stipulated issues.

The stipulated issues are:

> "Were the grievants discharged properly? If not, what is the appropriate remedy?" [Transcript, page 6]

The parties have stipulated that the arbitrator should determine "the appropriate remedy." The arbitrator's authority to fashion a remedy at all is part and parcel of determining the appropriate remedy. Any remedy which is beyond the arbitrator's authority is by definition an inappropriate remedy. A remedy which requires the Employer to commit an illegal act is obviously an inappropriate remedy. Thus the question of whether the Employer is barred from reinstating

PERTINENT CONTRACT PROVISIONS

ARTICLE 1 -- RECOGNITION

. . .

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.

. . .

. . .

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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(Footnote 1 continued on next page)

(Footnote 1 continued…)

these employees or taking other actions to make them whole is within the scope of the stipulated issues. In arriving at this conclusion, I am mindful of the factthat the parties have not submitted the issue of substantive arbitrability to the arbitrator, and have expressly reserved the right to litigate that question in the courts. [Transcript, pages 8-13; Employer Exhibit 1]. I do not purport to have the authority to make a binding or conclusive determination of the substantive arbitrability question. The issue of DHSS administrative rules is relevant only to the extent that the arbitrator must consider their potential impact in fashioning a remedy, in the event that the record fails to establish just cause for these discharges.

This ruling will be incorporated in the Award in this matter, and the question will be more fully discussed therein if I reach the issue of remedy. . . .

. . .

ARTICLE 14 -- GRIEVANCE PROCEDURE

. . .

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.

. . .

. . .

ARTICLE 18 -- GENERAL PROVISIONS

. . .

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.

. . .

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 as patient care assistants (hereinafter referred to as nurses' aides). The grievants, Patti Port and Irma Aranda, were employed as nurses' aides until their discharge on June 15, 1992.

One of the patients on the Cedar wing of the Employer's facility is a 77 year old woman, Mrs. B----. Mrs. B---- is confined to a wheelchair, suffering the effects of a stroke, diabetes, arthritis and some bone weakness. She has no mental disability, other than occasional forgetfulness and tendency to cry very easily. Mrs. B---- suffers from stress incontinence, which causes her to need frequent toileting. Because of her physical limitations, she needs help in using the toilet. Her patient care plan calls for toileting with the assistance of a nurse's aide every two hours.

On Sunday, June 14, 1992, a pull aide (a nurses' aide temporarily assigned from another wing when a wing is understaffed) was assigned to work on Cedar wing. At about 1:30 p.m., Mrs. B---- rang for assistance in going to the toilet. The aide told her he was helping another resident, but would be back shortly to help her. When he did not return, Mrs. B---- called her daughter to complain that she was not being assisted. She was in the habit of doing this when she had to wait to be toileted. At approximately 2:10 p.m., Janelle Goodrich, the staff RN, received a call from Mrs. B----'s son or daughter, informing her that Mrs. B---- was crying because she had been waiting too long to go to the bathroom. Goodrich went to the nurse's station and saw that Mrs. B----'s call light was on. She spotted the grievants outside, and asked them to take Mrs. B---- to the bathroom. Goodrich found the grievants outside in the courtyard, taking a break. She asked them to see to Mrs. B----, and they went into her room. The grievants left work at 2:15 p.m.

At about 2:30, Goodrich received another call, this time from Mrs. B----'s son, stating that he was fed up with the problems with his mother's toileting, and was going to complain to the administration about it. She told him she would inform her supervisor about his concerns.

The next day, Debra Ritter, a social worker at the facility, got a telephone call from Ms. B----'s son, complaining about an abusive situation involving his mother. He said that he felt his mother had been threatened by the two aides that had toileted her the preceding afternoon. Ritter informed Diana Schwingle, the Associate Director of Nursing, about the call. Schwingle brought Mrs. B---- to the office of Diane Gronseth, the other Associate Director of Nursing, and the two nurses asked her about the complaint.

Mrs. B---- said that she had put her light on for assistance and that a man had come in and said he would come back to help her. After a long time had passed, she called her daughter to complain. After a time, the grievants came into her room. They were angry with her, and and said "Why did you call your daughter up?" They helped her onto the toilet, but were rough with her, and her glasses fell off. She also said that Aranda had, on previous occasions, made her take her soiled diapers off by herself. Mrs. B---- was upset, and was crying while she related her story to Schwingle and Gronseth.

Schwingle called the grievants in, and asked them about the incident. Both denied having treated Mrs. B---- roughly, or having yelled at her for calling her daughter. She had each of the

grievants separately write out a statement of what had happened in Mrs. B----'s room. Aranda's statement was:

> It was around 1:45 me and Patty Port were on break. Janelle the nurse went and got us to take to bathroom, because family had called.
>
> We went in the room and she was crying and upset. Me and Patty Port asked her were was Oscar she said that he told her he was going to come back and came back. We put her on the toilet asked her to help us and was very upset. She finished going to the bathroom. Me and Patty Port put her back on the toilet and she was still crying. We told her not to cry no more that it was alright she stop crying and we left the room.

Port's statement was:

> I Patti Port was ask to take Mrs. B---- to the bathroom. When I got to her room she was crying I ask her why she was and she said I have to go to the bathroom. I ask her where was her aid she said that he was going to right back and he never did. So we took her to the bathroom. We put the gait belt around her and we ask her to put her hands on the railing to help her up her glasses slip off to her nose. We sat her down and help her pull down the rest of her pants and her a clean att. and when she was finish she said she was done. We sat her back in her wheelchair and left her room.

Schwingle also took a statement from Goodrich about her recollection of the day's events and her opinion of the two aides involved. She presented the evidence, together with her notes of these various interviews, to Andrea Ludington, the Administrator of Mt. Carmel, and Mrs. Glocka, the Director of Nursing. Ludington reviewed the evidence and met with the grievants and their Union representative. She concluded that the rough handling bordered on physical abuse, while the apparent anger of the aides with Mrs. B---- for having complained about her care was an affront to the resident's dignity and amounted to verbal abuse. She terminated both employees.

The instant grievances were thereafter filed. They were not resolved in the lower stages of the grievance procedure and were referred to arbitration. A hearing was held in November of 1992, at which time the above-recited facts were introduced into evidence. In addition, the resident testified regarding the incident. Her testimony was as follows:

> Q Do you recognize --
>
> A Yes, I do.
>
> Q Do you know who they are? Do you know their names?

A I don't know the other girl's name, but I call her Spanish girl. The other one is Patti.

Q And Irma, Irma Aranda?

A Uh-huh, Irma.

Q Do you recall an incident involving these two people when you were being toileted?

A Yes. They pushed me against the wall. My glasses fell down--

Q Mrs. B----, could you speak a little louder and slow down a little bit?

A Okay. I didn't notice that my glasses fell down, but Patti noticed them. She picked them up for me. That's all I remember, you know.

Q Did they toilet you roughly?

A Yes, they did.

MR. ROBBINS: Objection; leading the witness.

THE ARBITRATOR: You are leading her.

MR. MARTIN: I understand, but under the circumstances I wonder if there might be some--

THE ARBITRATOR: Well, certainly with respect to, you know, some background and foundation; but that's a pretty central question.

MR. MARTIN: Okay.

BY MR. MARTIN:

Q So your glasses were knocked down?

A Uh-huh.

Q And they knocked you up against the wall?

MR. ROBBINS: Objection; leading the witness in a very poor way.

THE ARBITRATOR: Well, I actually believe that she testified that she was pushed up against the wall.

BY MR. MARTIN:

Q Had you had a problem prior to that, Mrs. B----?

A No.

Q No?

A No.

Q Had you called your daughter?

A I called my daughter right away.

Q And do you know what your daughter did?

A She called them up and told them I got to go potty.

Q And what happened?

A And they were angry that I called my sister up.

Q And what happened then?

A Well, they put me on the toilet; but they were rough.

Q Did they use a gate belt?

A Yes, they did.

Q And then what happened?

A Nothing. They put me on, and I made potty; and they picked me up, then put me -- Nothing happened.

Q Did they say anything else to you?

A No. I can't recall anything what they said to me.

Q Did they make you change your own diaper?

MR. ROBBINS: Objection; leading the witness.

THE WITNESS: No. They changed it for me.

BY MR. MARTIN:

Q Were you crying?

A Yes, I was.

Q Were you upset?

A Was upset, very upset.

Q Did they hurt you?

A No, they didn't hurt me.

Q Do you know how long you had to wait to be toileted?

A Oh, about a couple of hours before they took me.

MR. MARTIN: I have no further questions.

THE ARBITRATOR: Cross-examination.

BY MR. ROBBINS:

Q Mrs. B----, you'd known Big Patti and the Spanish girl for a long time, since you'd been here, correct?

A Yes.

Q And they would talk with you during the day when they were doing their work?

A Yes, they did.

Q Big Patti and Spanish girl were kind of friends with you?

A They were.

Q And you were upset that day because you had a potty problem, and you had to wait a long time with no one coming to take you to the toilet; isn't that right?

A That's right.

Q And when they came in to your room, you were kind of upset and crying, correct?

A Because she told me she's going to come back right away, and she didn't come back.

Q Well, the aide before earlier had said they'd come back right away; but they didn't come back; isn't that right?

A No. That's right.

Q And that got you -- I understand; and when they were putting you on the toilet, did your glasses start to -- Mine, sometimes they slide down my nose like this. Did your start to slide down your nose?

A Yes.

Q And then Big Patti saw them slide down your nose. She caught it and put them back up?

A Yes, she did.

MR. ROBBINS: I don't have any further questions of you. Thank you very much, Mrs. B----.

THE ARBITRATOR: Any redirect?

MR. MARTIN: No. I have no further questions.

(Transcript, pages 87-91)

Additional facts, as necessary, will be set forth below.

## THE POSITIONS OF THE PARTIES

### The Position of the Employer

The Employer takes the position that it had just cause for discharge, and that the grievances should be denied. Initially, the Employer notes the prior ruling of the arbitrator that

a discharge for patient abuse requires "clear and convincing" evidence of guilt because of the serious impact it has on the employee's future employment prospects. 2/ Without asking that the standard be changed, the Employer asks that the arbitrator also acknowledge the substantial public policy favoring the right of nursing home residents to be free from abusive treatment. The strong regulations recently adopted by the State Department of Health and Social Services' Bureau of Quality Compliance (BQC) require that a facility consider disputed facts in the light least favorable to the alleged abuser when reporting cases of abuse, and bar facilities from employing any aide or assistant found guilty of abusive behavior. This, the Employer argues, demonstrates the need to weigh the resident's rights in the balance when considering a case of discipline for patient abuse.

In this case, Mrs. B---- asserted that the grievants pushed her against the wall, knocked her glasses off, and toileted her roughly. Her story was perfectly consistent throughout the investigation by facility supervisors. This resident, the Employer notes, has no history of hostility towards the grievants, nor of making accusations of abuse.

The grievants have denied any abuse, but the Employer argues that their veracity is questionable. They admitted having the resident change her own diaper in violation of facility policies. Furthermore, both failed to work their scheduled hours on the day in question, and switched around their lunch breaks without proper authorization. These instances show that the grievants took little note of proper procedures and policies in their daily conduct, and casts doubts on their overall credibility.

As noted at footnote 1, supra, the Employer questions whether the arbitrator has the authority to order any remedy in this case even if he determined that just cause did not exist for the discharges. Given the BQC ban on employing abusers, and the Department's reservation of the right to make that determination, the Employer believes that any remedial order entered by an arbitrator would be superseded by the BQC decision. In the event of a conflict between the two, the arbitrator's award would be void as against public policy.

For all of the foregoing reasons, the Employer asks that the discharges be sustained.

The Position of the Union

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2/ "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." Mt. Carmel, Case #15, No. 45255, A-4754 (1991) at page 15.

The Union takes the position that the discharges are wholly unjustified, and that the grievants should be reinstated with full back pay. Neither of these grievants has ever had any accusation of mistreatment levelled against them, and both have been rated "above average" for courtesy to residents in their performance evaluations. Both have also always had good relationships with Mrs. B----. There is absolutely noting in their history as nurses' aides to suggest that they would engage in this behavior.

The Employer's claim that the grievant's were angry with Mrs. B---- for getting them in trouble by calling her daughter is unsupportable. Neither was assigned to assist Mrs. B---- on the day in question, and their assistance to her was outside of their regular duties. They could not have been blamed for any deficiencies in her care up to the point that they were asked to assist her, and they willingly gave the assistance when asked.

Mrs. B----'s initial statements form the sole basis of this discipline. However, Mrs. B---- completely contradicted her previous testimony when she appeared at the hearing in this matter. Far from the abusiveness alleged, Mrs. B---- testified that the grievants followed proper procedures in toileting her, changed her diaper for her, helped her with her glasses when they slipped off, and did nothing to hurt her.

The Union dismisses the Employer's attempts to attack the grievants' credibility by pointing to minor work rule violations such as not punching out for lunch and leaving early. The former was a common practice, and the latter was excusable for Ms. Port, who had reported early, and irrelevant as regards Ms. Aranda, since it had no bearing on the allegations against her. Based on the evidence at the hearing, the Union argues that there can be absolutely no finding of cause for discipline.

Turning to the Employer's claim that the arbitrator lacks remedial authority because of the BQC regulations, the Union argues that the matter is governed by the collective bargaining agreement, and that nothing in the law or the contract prohibits the arbitrator from fashioning a remedy. If it should develop that there is a conflict between the arbitrator's award and some other legal obligation of the Employer, that conflict can be resolved through the courts. At this point, there is no conflict, and no basis on which the contract's just cause and arbitration provisions may be ignored.

For all of the foregoing reasons, the Union asks that the grievant's be reinstated and made whole for their losses.

DISCUSSION

The questions in this case are whether the Employer had just cause to discharge the

grievants for resident abuse, 3/ and if not, what the appropriate remedy might be. Each is addressed in turn.

Just Cause for Discharge

The parties acknowledge that the law of the contract calls for proof of guilt by clear and convincing evidence in resident abuse cases. However, the Employer has argued that the arbitrator must also weigh the interests of the resident in arriving at his Award. I do not believe that it is necessary to modify the analysis in this case to accommodate the residents' interests, since they are indistinguishable from the interests of the Employer.

The Employer has formulated internal rules to insure a safe and friendly environment for its residents. The Employer is also subject to state and federal regulations designed to insure such an environment. The Employer's interest in enforcing these rules is co-extensive with the residents' interests in being free from physical and verbal abuse. The residents are dependent upon the staff for their well-being, and are a vulnerable population. The Employer is appropriately vigilant in protecting the residents. That having been said, however, neither the Employer nor the residents has any legitimate interest in having employees discharged unjustly. The goal of ridding the facility of abusive staff members should not obscure the interest of the Employer and the residents in retaining good staff members, and it cannot obliterate the staff's interest in preserving their good names and careers. The application of a clear and convincing standard of evidence in resident abuse cases protects all of these interests.

The allegations in this case are of physical abuse, springing from the claim that the grievants toileted Mrs. B---- roughly, and verbal abuse, in that they expressed anger with her for calling her daughter. As in most resident abuse discharge cases, there are no witnesses other than the resident and the grievants, and there is no evidence of any importance other than the statements of the parties involved. The resident has no history of making these types of complaints, and the employees have good work histories as regard resident care.

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3/ The grievances also raised an issue as to payment for a lunch hour the grievants allegedly did not receive on June 14th. That issue was not litigated, and is not considered in this decision.

The testimony of Mrs. B---- is the sole direct evidence in support of the Employer's case, and it is frankly quite weak. 4/ Her description of the incident on direct examination included (apparently for the first time 5/) being pushed against a wall while they were toileting her, with her glasses being knocked off. She also stated that the grievants did not hurt her. She testified that they were angry with her for calling her sister (sic), but said nothing about any specific statement or other expression of this anger. On cross-examination, she stated that her glasses had slipped down her nose, and that Port noticed it and pushed them back up for her. She acknowledged being very upset over having had to wait to go to the toilet. The sole allegations surviving her testimony are that the grievant's toileted her roughly and pushed her against the wall. These assertions were simply made by the witness, without any development of surrounding details or circumstances. 6/

The grievants both testified that Mrs. B---- was very upset when they came to toilet her, and that she refused to help them get her onto the toilet. Given the stiffness of her lower body, and the fact that she was essentially a dead weight, they had much more difficulty in transferring her onto the toilet than usual, and had to use more strength in transferring her than usual, including lifting her under her arms rather than relying solely on the gait belt. This may be consistent with the claim of rough toileting, given Mrs. B----'s state of mind after having to sit in a wet diaper waiting for care. Both grievants denied having pushed her into a wall during the toileting.

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4/ In making the discharge decision, the Administrator considered additional assertions by Mrs. B---- that the grievants had failed to use a gait belt to transfer her to the toilet in violation of facility policies, and the suggestion that she may have been forced to change her own Attend (an adult diaper). This evidence came into the record by way of written summaries, which were admitted for the purpose of showing a thorough investigation rather than for the truth of the matters asserted. Mrs. B--- testified at the hearing that the grievants had used a gait belt, and had changed her diaper for her. While the Employer relied on these claims in good faith, they can be given no weight in arriving at the decision in this case given the resident's testimony.

5/ None of the narrative statements taken during the investigation makes mention of this detail, nor did any other witness mention the resident having been knocked up against a wall.

6/ The arbitrator recognizes the difficulty of conducting a direct examination with an emotional and vulnerable elderly resident. The Employer's sensitivity to the resident's discomfort at testifying was evident at the hearing. However, this resident was the only Employer's witness with direct knowledge of the events, and her brief testimony did little to develop the record of what occurred on June 14th.

Mrs. B----'s testimony at the hearing clearly came as a surprise to the Employer. However, even the earlier version of events left Ludington with the opinion that the alleged conduct "bordered" on physical abuse. 7/ Given the complete lack of detail in Mrs. B----'s version of events on direct examination, her refinement of what happened to her glasses on cross-examination, and the absence of any evidence concerning a manifestation of anger by the two grievants, it is very nearly impossible to conclude that physical and verbal abuse took place on June 14th, much less to conclude that it has been proven to the level of clear and convincing evidence. 8/ Accordingly, I conclude that the evidence is not sufficient to sustain these discharges In light of this conclusion, the sole remaining question is that of appropriate remedy.

The Appropriate Remedy

The general remedy when just cause is found lacking in a discharge case is to order that the grievants be made whole, and reinstated to their previous positions. The Employer asserts that the arbitrator has no remedial authority because the State of Wisconsin has established its own system for reviewing patient abuse cases, and a finding against the grievants in such a proceeding would

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7/ Ludington's testimony was, in pertinent part:

> Q In your opinion, did the conduct that was presented to you amount to physical abuse and verbal abuse?
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> A I felt it was a little bit of both. The rough handling as far as how she was put on the toilet, enough that she felt it was rough handling, I felt that was bordering on physical abuse.
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> And the verbal abuse, I almost felt in this case, was more an issue of dignity or her right to appropriate care. You know, she felt that the aides in question were angry with her. (Transcript, Page 133)

8/ The Employer has argued that the credibility of the grievants should be reduced because they left work early without proper authorization on June 14th, and because they took their lunch later than scheduled, and without punching out. The evidence shows some conflict over whether the grievants were in fact violating facility policy through these actions, and even if they were, the connection between these unrelated transgressions and the grievants' credibility as witnesses is far from self-evident. In any event, it should be clear from the body of this Award that the evidence adduced during the Employer's case in chief is so vague that, standing alone, it would not provide clear and convincing evidence of resident abuse.

be noted on the Nurse Aide Registry, thus disqualifying them from working in any capacity in any nursing home for the rest of their lives. 9/ In the Employer's view, an arbitrator's reinstatement order in a resident abuse case would be contrary to law and public policy, and thus void.

The Employer's claim that the arbitrator lacks remedial authority assumes that any remedy must conflict with Bureau of Quality Compliance rules. This theory ignores three facts. The first is that, as of the date of the hearing in this matter, there was no evidence that the BQC had commenced any proceedings involving these grievants, much less entered any notations of abuse for inclusion on the Registry. Thus, on the record of this case, there is no impediment to a remedial order for these grievants.

The second fact overlooked by the Employer's argument is that the BQC procedures can only initiate or confirm the disqualification of an aide from nursing home employment. In the event that the BQC hearing determines that abuse did not occur, the hearing examiner has no power to order reinstatement, backpay or any other remedy. In other words, the BQC only has the power to find an employee guilty. A finding of innocence by BQC has no effect. The Employer's argument presupposes that the accused employee will be found guilty of abuse by BQC, and ignores the need of innocent employees to be afforded relief in some forum. The sole concern of the BQC procedure is to prevent the employment of adjudicated abusers in the nursing home industry. It does not concern itself with the contractual rights of accused workers vis-a-vis their employers. Given the lack of any meaningful remedy for a wrongly accused nurse's aide, and the completely different purpose of the hearing procedure, the BQC rules cannot be said to supplant the arbitration step of the contract as the means for resolving resident abuse cases.

Finally, the Employer's argument flows from the assumption that it is necessarily impossible to reconcile a remedial order from an arbitrator with a disqualification from future employment by BQC. Granting that the normal remedy when just cause is found lacking is reinstatement as an employee, there are other remedies available to employees in arbitration. There is no direct conflict, for example, between an adverse finding by BQC and an arbitrator's order of backpay for the period between the discharge and the BQC finding. Likewise, other more creative measures may be encompassed within the arbitrator's authority to make an employee whole, without running afoul of any government imposed ban on re-employment.

The Employer's arguments incorrectly assume some conflict between the remedial authority of the arbitrator and the hearing procedures of the Bureau of Quality Compliance. As the foregoing discussion makes clear, no such conflict is shown on the specific facts of this case, and no such conflict is inherent where both the grievance procedure and the BQC procedures are allowed to take their course. For these reasons, I have concluded that there is no basis on which

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9/ See Wis. Admin. Code, §HSS 129.11, which I have taken arbitral notice of and have incorporated herein by reference.

to deny these grievants the relief customarily granted to similarly situated employees in other industries. Accordingly, I have entered the following

## AWARD

The grievants, Irma Aranda and Patti Port, were not properly discharged. The appropriate remedy is to order the Employer to immediately reinstate them to their former positions, and to make them whole for their losses by paying them for lost pay and benefits, less any interim earnings which they would not have received but for their discharges.

The arbitrator will retain jurisdiction over this matter for a period of four months from the date of this Award, solely for the purpose of resolving any disputes over the scope and the application of the remedy ordered herein.

Signed this 23rd day of March, 1993 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator