

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :

of a Dispute Between :

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LOCAL 1392, AFSCME, AFL-CIO : Case 131

: No. 48730

and : MA-7691

:

KENOSHA COUNTY :

:

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40,
AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. Frank Volpintesta, Corporation Counsel, Kenosha County,
appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear and decide the grievance of Sylvia Roper. A hearing was held on June 2, 1993, in Kenosha, Wisconsin, where the parties were given the opportunity to present their evidence and arguments. The County presented oral argument in lieu of a brief, the Union filed a brief on June 11, 1993, the Arbitrator gave the County up to June 28, 1993, to file a reply brief and closed the record at that time.

ISSUE:

The parties stipulated that the following issue is to be decided by the Arbitrator:

Was the Grievant, Sylvia Roper, terminated for just cause? If not, what is the appropriate remedy?

BACKGROUND:

The Union and the County are parties to a 1992-1994 collective bargaining agreement which, among other things, allows the County to discharge or discipline for proper cause. The Grievant, Sylvia Roper, was employed as a certified nursing assistant at the Brookside Care Center in Kenosha from September 5, 1989 to October 26, 1992, when she was discharged on charges of abusing a resident, Mr. X. 1/

1/ The parties asked that residents' names be omitted in this

Award.

The Grievant was assigned to give baths on a second shift from 1:00 p.m. to 9:30 p.m. on October 12, 1992. 2/ She gave Mr. X a bath about 7:15 that evening. Mr. X walked to the tub room by himself. The Grievant was shaving him during his bath sometime between 7:15 and 7:30 p.m., when he was cut on his upper lip with a razor. The Grievant stated that he hit her hand, and was being a little combative, although he was usually not combative. When the Grievant saw blood coming from the cut, she called for help. Instead of using the call light in the bath room, the Grievant heard a nurse in the hall with a treatment cart. The Grievant called for the nurse, who was Cora Pecze, an LPN working the second shift.

The Grievant was concerned because Mr. X was bleeding heavily. Pecze wiped the cut with alcohol and left the Grievant with two more alcohol wipes. Pecze asked Mr. X how the cut had happened, and he did not answer her. Pecze found Mr. X to be quiet but not confused or disoriented, and found the Grievant to be concerned about the cut. Pecze offered to put a bandage on the cut, but the Grievant said no. Mr. X did not complain and did not appear to be in pain. Pecze did not see any bruises or signs of redness or puffiness on his face or chest.

Pecze left the room, and the Grievant finished bathing Mr. X and got him dressed. Mr. X left the room on his own to return to his room which was only about two doors down the hallway. The Grievant estimated that Mr. X left the bath room about 7:35 or 7:40 p.m., and she did not see him again that night.

Later that evening between 8:00 and 8:45 p.m., Pecze and Lou Riley went into Mr. X's room to give his roommate, Mr. Y, some medication. Mr. X's bed was closer to the door, and Pecze had to pass by him at the foot of the bed in order to get to the other side of the room to attend to Mr. Y. No one turned on the overhead light, because Mr. Y does not like the light on. Mr. Y prefers to keep the curtain between them drawn most of the time, and the curtain was drawn. There was light coming through the striped curtain from Mr. Y's light, and Mr. Y had his television on, which created a little more light. As Pecze passed by Mr. X, she glanced at him as a matter of habit. She only noticed that he was lying down and his eyes were closed. The light was poor, and Pecze did not notice anything else. Pecze testified that if Mr. X's eye were red or puffy at that time, she does not think she would have been able to see it, given the lighting. Riley, an aide, felt the bed of Mr. X to see if it were wet, as Mr. X is sometimes incontinent. The bed was not wet.

2/ All dates will be for the year 1992 unless otherwise stated.

Pecze reported the incident about the small cut on Mr. X's upper lip to a nurse before leaving. The registered nurse working the second shift, Amma Abraham, was aware of the cut before she ended her shift at 11:15 p.m. on October 12th. She was not aware of any other problem with Mr. X. She had passed Mr. X's room earlier in the evening and only noticed that Mr. X was in bed. She makes rounds about 10:00 o'clock every night.

Two certified nursing assistants, Katharine Belongia and Linda Wellman, were working the third shift over the evening of October 12th and 13th. They discovered that something was wrong when they checked on Mr. X while doing their first rounds sometime after 11:00 p.m. on October 12th. Belongia and Wellman estimated that it was close to 11:30 or 11:45 by the time they got to Mr. X's room, but it may have been later, given the nursing supervisor's report. They turned on the light and although Mr. X was asleep, they saw that he had a black eye, or at least, the beginnings of a major bruise over his right eye. They woke him up and asked him what happened, but he did not say anything. He did not appear to be in pain.

Wellman testified that when she and Belongia first saw the eye bruise, it was not as pronounced a bruise as seen later and as shown by a photograph taken on October 15th. Wellman described it as the beginning of a bruise.

Belongia immediately called the Nursing Supervisor, Margaret Priddis. Priddis was on the first floor and testified that she went up immediately because Belongia sounded very concerned and told her, "You've got to come and see this." She stated that she saw Mr. X at 12:20 a.m., which is verified by her signed statement of the incident, and which would be between 35 to 50 minutes later than Belongia and Wellman estimated that they saw Mr. X.

Priddis examined Mr. X and saw a large bruised area on his eye and two bruises on his chest. She asked him what happened, and he said, "The nurse hit me." He said his eye was foggy but that it did not hurt. He did not identify the nurse. According to Priddis, he was quiet, not in pain, and did not appear to be confused or frightened.

Belongia and Wellman checked on Mr. X during their second rounds after 3:00 a.m. on the morning of October 13th and noticed a bruise in the rib cage area, which they had not seen during the first check when they noticed the eye injury. Mr. X did not respond to any questions asked by Belongia and Wellman. They called Priddis again to report the chest bruises, and Priddis told them she already knew about that.

Priddis reported the incident to the Director of Nursing,

Geraldine Kapplehoff, at 5:30 a.m. on October 13th. Kapplehoff came in at 8:00 a.m. on the 13th and examined Mr. X and talked to him. Mr. X would not respond to Kapplehoff verbally in any way. Kapplehoff was not surprised by his lack of response, since she had been there only 10 months. While examining him, Kapplehoff looked around the room to see whether he could have hit his head of something. She saw no bruises on his nose or forehead, no breaks in the skin.

Joan Ruffolo, a social worker at Brookside, talked to Mr. X on October 13th. She asked him how he got the bruises, and he replied, "I don't remember." The staff called a friend of Mr. X, an outside contact person for the institution, who came in. The friend, called Mr. Z here, reported back to Ruffolo after talking to Mr. X. Ruffolo called Kapplehoff in to hear what Mr. Z reported, and the three of them sat down together. Mr. Z reported to Ruffolo and Kapplehoff that Mr. X said he had been struck by an attendant, and that the attendant was a colored or black female. Mr. X did not give a name to Mr. Z, and Mr. Z never asked for a name. Mr. Z also reported to Ruffolo that Mr. X did not want "the colored or black" to take care of him, that he does not trust them.

By the afternoon of October 13th, Kapplehoff was interviewing second shift staff members who worked on the second shift on October 12th. Kapplehoff talked with Riley and put her on administrative leave because Riley was the only black aide assigned that night. Kapplehoff had forgotten that baths were done at night. Riley had seen Mr. X on the night of October 12th, but only to make a quick hand check of his bed to see if the bed were wet.

Nurse Abraham saw Mr. X about 4:00 p.m. on October 13th and asked him how he got bruised. He told Abraham, "Sylvia hit me last night." He did not say why or where it had happened. Abraham did not report it to the administration until questioned about it some time later, but she had asked the Grievant about it. The Grievant told Abraham that she did not hit Mr. X, and Abraham believed the Grievant.

Bernice Wikstrom is the Administrator of Brookside Care Center. She first became aware of the problem with Mr. X on October 13th, when Kapplehoff called her at home. She came to Mr. X's room in the morning on October 14th and asked him what happened. He told Wikstrom, "Sylvia hit me." Wikstrom did not believe it was the Grievant, and he repeated that the Grievant hit him during a bath.

Wikstrom had a more detailed interview with Mr. X the next day, October 15th, in the presence of Ruffolo and Kapplehoff.

Wikstrom testified that Mr. X again told her that the Grievant hit him. Mr. X also said he knew the Grievant's name and that he read her name tag. Wikstrom asked him to read her name tag, and Mr. X could read it and said that she was Administrator Wikstrom. She asked him what color the Grievant's name tag was. He said it was black, and it is black. The Grievant testified that she had not worn her name tag for months, and that she did not wear it unless someone told her to do so. Wikstrom asked Mr. X why the Grievant would hit him, and Mr. X told her that the Grievant must have been mad at him, and that she had never hit him before.

Wikstrom talked to all black aides assigned to that shift, but none of them had contact with Mr. X except Riley, who did the bed check, and the Grievant. Wikstrom did not want to believe it was the Grievant and considered the possibility that his roommate, Mr. Y, had hit him.

On October 16th, Wikstrom reported the incident to the Bureau of Quality Compliance in the Department of Health and Social Services in the following terms:

On 10-13-92 at 12:20 a.m. Mr. _____ was found to have a bruise circling his right eye and minimal bruising on his upper chest. Upon questioning he told the R.N., "the nurse hit me". He gave her no further information. This was reported to the Director of Nursing at 5:30 a.m. on 10-13-92 and to the physician and to Mr. _____'s contact person during the day. Mr. _____ gave no other information to the social worker or Director of Nursing who talked to him during the day of 10-13-92. At 4:00 p.m. his contact person (a friend) came to visit, and the friend reported that Mr. _____ told him a back attendant hit him 2 to 3 times. The CNA who was assigned to Mr. _____ on the p.m. shift 10-12-92 was questioned, and denied any knowledge of anything but was sent home on administrative leave pending further investigation. The CNA who had given him his tub bath on the evening of 10-12 was also questioned by the D O N. She said Mr. _____ had ben resistive during his bath but nothing unusual, that he had knocked the razor out of her hand and in so doing he got a razor nick by his nose which she called the LPN to look at. The LPN was questioned and verified that she had looked at the nose cut while Mr. _____ was still in the bath tub (about 7:20 p.m.), noted it was minimal and noted no other marks

on his face or body.

On the morning of 10-14-92 I interviewed Mr. _____ in the presence of the day shift R.N. supervisor. In response to questions he told me the nurse named Sylvia hit me during my bath; when asked if he knew why she hit him and what did she hit him with he gave no answer. In response to this question "did you bump something?" he said he slipped on the floor.

The roommate of Mr. _____, who is alert and oriented was interviewed by me. He told me he is positive nothing happened in the room because he hears everything. (He does keep the curtain drawn between the beds at all times). He said he heard the CNA come in for "last rounds", she was only there a minute or two, did not turn on the light, and he asked her to close the door when she left. He denied any knowledge of how the injury might have happened but said it must have happened in the bath because nothing happened in the room.

Based on this information, the CNA who had been assigned to Mr. _____ on 10-12 was allowed to return to work on 10-14-92. The 2 other CNA's assigned to that wing on the p.m. shift of 10-12 were questioned and denied even going in the room of Mr. _____ that shift. Neither the P.M. supervisor or the charge nurse on the floor knew of anything unusual on 10-12. There was no black staff on duty on third shift that night.

I further questioned Sylvia Roper CNA, the aide who had given Mr. _____ his bath on 10-12 regarding what had happened. I did this on 10-14. She continued to deny that anything unusual had happened. At this time I was speculating that other staff might have asked Mr. _____ if Sylvia did it, thus planting the idea, because Sylvia seemed credible and because the LPN who had checked him during his bath saw nothing amiss.

On the morning of 10-15-92 I again interviewed Mr. _____ in the presence of his social worker

and the D O N. He again repeated the same facts and in response to the question of how he knew her name was Sylvia he said he read her name tag.

Based on this information Sylvia Roper was placed on administrative leave on 10-15-92, pending a pre-disciplinary hearing on 10-21-92 at which I will recommend termination. Sylvia Roper has been employed at Brookside Care Center since 9-5-89 and has no record of abuse.

The extent of Mr. _____'s injuries is a bruised area surrounding the right eye and very light colored streaked bruising on his upper chest. The x-ray of the ocular orbit was negative for fracture and vital signs and neuro checks have been normal. He has had no prior incidents/injuries.

The Kenosha County Sheriff's Department has been advised of this incident and has investigated. 3/ (Rest of document omitted.)

On October 19th, Ruffolo talked to Mr. X. She told him that there were rumors that his roommate had hit him. Mr. X said no, but told Ruffolo that Mr. Y hollers at him. He named the Grievant as his assailant. Ruffolo called Mr. X's friend, Mr. Z, on October 21st, and asked him if Mr. X had given Mr. Z a name of the person who hit him. Mr. Z said no, just that it was a black female. October 19th was the first time Mr. X named anyone to Ruffolo.

A pre-disciplinary hearing was on October 21st, and the Grievant had Union representation available. When Wikstrom interviewed the Grievant, she asked her for any way it could have happened. The Grievant said that Mr. X did not slip or fall and there was no way it could have happened in her presence. The Grievant said that she did not hit him and that she had no idea how it happened. Wikstrom, Kapplehoff, the Grievant, and the Local Union President Helen Kaquatoch went to Mr. X's room, and Mr. X did not identify the Grievant as his assailant at that time. Kaquatoch stated that he only mumbled, "I don't know," and did not appear to recognize the Grievant. Wikstrom decided to discharge the Grievant, because she could find no other way this

3/ No criminal charges were brought.

kind of injury could have happened, and because of Mr. X's statements identifying the Grievant, which never deviated.

The Grievant had no prior discipline in her record except something related to attendance. The Grievant worked at a hospital in Chicago for two years. She has never been accused of abuse before.

Mr. X was 89 years old at this time in October, and 90 by the time of the arbitration hearing. He had been a resident since 1979. He was a fairly ordinary patient, resistant at times to being dressed or cared for, but no more than other residents. Priddis described him as sometimes ornery, sometimes confused, sometimes alert, with a tendency to mix up times and places, which is common in older people. She does not think he recognizes her because she does not see him on a daily basis, but she thinks she would recognize someone if he had daily contact with that person. The Grievant saw Mr. X only twice a month.

Abraham has more contact with Mr. X than the Grievant or Priddis, and knows him as a quiet patient, but resistant to care.

During October, Mr. X was on antidepressant medication, but Abraham does not think that medication would affect his ability to perceive his world around him. Although she sees him regularly, he has never called her by her name, and she does not know if he knows her name. She believes he knows that she is a nurse. She has never known him to hit anyone or cause problems in the past. Abraham testified that Mr. X's condition at the time of the arbitration hearing was better than last October. Although he did not appear confused in October, she did not know if he could identify people last October, and that he never talked much.

During the hearing in this matter, Mr. X talked to the Arbitrator in the presence of the Grievant, Corporation Counsel Frank Volpintesta, and Union Representative John Maglio. Mr. X had difficulty hearing and understanding questions asked of him. His speech was incoherent at times, and his statements inconsistent. He repeated several times that he never knew he had a black eye until they told him, that no one hit him, that he bumped his head against something, that he got his head pushed when coming out of the bath tub, that the girl pushed him, that she did not push him on purpose, and that no one had been mean to him there. He was asked if he recognized the Grievant, and after a long pause, he said "Sylvia."

Mr. Y was also 90 by the time of the hearing. Although he and Mr. X were roommates for about a year and a half, Mr. X was moved to another room during 1993, possibly after Mr. Y kicked Mr. X's bed. Mr. Y likes his share of the room and a piece of the other person's space too, or at least about three-quarters of the room, according to Wikstrom. He is alert with good hearing. He

testified that he did not see Mr. X when Mr. X returned from his bath on October 12th, and that Mr. X did not say a word about being hit. Mr. Y testified that he has seen Mr. X hit himself and hit the employees, and that Mr. X lies quite a bit. When asked about how Mr. X would hit himself, Mr. Y replied that Mr. X would take a swing at a girl and miss and hit himself, that he would hit his chest. When questioned what lies Mr. X told, Mr. Y replied that Mr. X will say that he does not have to use the toilet but then messes his bed.

Mr. Y does not like Mr. X, and described Mr. X as a man who minds everyone else's business. Mr. Y swore at him and said they got along fine, like cats and dogs. Mr. Y denied hitting him or kicking him and stated that he did not know how Mr. X got a black eye.

On January 17, 1993, Linda Ingram, a CNA, was dressing Mr. X. Ingram reported an incident to the Assistant Director of Nurses, Donna Pontillo. Ingram's document relates that while she was dressing Mr. X, Mr. Y came and stood next to Mr. X and told him to behave. Ingram stated that Mr. Y was moving his hand back and forth near Mr. X's hip area, and that she saw that Mr. Y had an open safety pin in his hand. Ingram asked Mr. Y what he was doing, and he said that this is what he did when he wanted Mr. X to behave. Pontillo examined Mr. X to make sure he had no injuries.

Mr. Y denied at the hearing that he ever had a pin in his hand or that he said anything like that, although he also said that he probably said something about making Mr. X behave. Mr. X was given two chances to change rooms in case he wanted to get away from Mr. Y, one of them after the January 17th incident described above. He declined both opportunities but he was moved into another room sometime after January of 1993.

Priddis testified that an older person is likely to show signs of a bruise within a relatively short period of time after receiving an injury. If an older person bangs anything, a bruise is likely to show up within at least two to three hours. Priddis noted that in the first couple of hours, an eye injury would not be as extensive as that shown by the photograph of Mr. X taken on October 15th. Over a longer period of time, the injury becomes more pronounced and looks worse as the blood diffuses. Although people differ in the extent of bruising, older people bruise easily because the skin tissue is thin and the blood diffuses quickly. Priddis has seen many bruises on residents before, mostly from accidental bumps against doors or banging against something in the hallway. Priddis stated that the bruise on Mr. X's eye was consistent with being hit by someone, but it could have been from a fall.

Kapplehoff testified that an older person is likely to show

some signs of redness or puffiness almost immediately after an injury such as received by Mr. X. She stated that the redness would start to show up right away, and within two hours, there would be puffiness.

Wikstrom noted that when elderly people fall, they usually break a hip or have some serious bone injury. X-rays were taken on Mr. X, and there were no fractures.

The Grievant left Mr. X alone in the tub for only two or three seconds while she called for Pecze's assistance, and she does not think that he injured himself in the tub. He was strapped in the tub in a chair, with straps going around his waist and chest, like a seat belt. The strap was not tight but did have a buckle with a snap, and the buckle could possibly bruise someone.

The State has regulations dealing with abuse of residents, and institutions are required to report allegations of abuse. Representatives from the State had been at Brookside three times at the time of the arbitration hearing to investigate the allegation in this case. The investigation by the Department of Health and Social Services had not been concluded when the arbitration hearing in the matter took place.

THE PARTIES' POSITIONS:

The County:

The County points out that in the criminal arena, the standard of proof is beyond a reasonable doubt, and a criminally charged defendant gets the benefit of any such doubt. However, in the civil forum, the standard of proof is considerably less, whether it is the preponderance of the evidence or a clear and convincing standard. In such a forum, where doubt exists, it does not have to be resolved in favor of a grievant.

The County based its decisions on the facts it had in hand. There were three sets of bruises, one very obvious one, the black eye which caused some vision blurring and discomfort. The question is, how did those bruises get there? In attempting to conduct a fair investigation, the County looked at all possible scenarios, such as a possible accident or fall. But the County found that the evidence fell against the possibility of an accidental fall. If Mr. X had fallen, there would have been different types of injuries and bruises. A black eye is not symptomatic with a fall. The County sees a similarity with child abuse cases, where the explanation given does not fit the

evidence. In this case, the physical evidence does not support an explanation of an accidental fall.

Another possibility or speculation was that the roommate of Mr. X, Mr. Y, hit Mr. X. Mr. Y is an opinionated and independent person who likes his own space and tries to protect employees. However, Mr. Y never hit Mr. X and would not have the physical ability to throw the kind of punch that caused the black eye of Mr. X. Furthermore, Mr. X was offered two chances to change rooms and get away from Mr. Y, but he declined both times. If he were being hurt by Mr. Y, he would have changed rooms.

There was other speculation, that Ms. Riley had done it. The County notes that Mr. X identified the Grievant, not Riley. Mr. X even identified the Grievant when he saw her at the arbitration hearing when she was not wearing her name tag. At that hearing, he said he was pushed but not on purpose.

When the County looked at all the facts, the most important ones were that Mr. X identified the Grievant as the one who hit him at the time of the incident. That's the main evidence available. In a case like this, the victim is like a child, where the victim is unable to coherently explain his predicament or defend his well being. Through the process of elimination, the County determined that the Grievant was the person most likely to have caused the trauma to his eye. There was no other proof that would clearly explain what happened to Mr. X.

The County urges the Arbitrator to balance the Grievant's livelihood against the residents' well being, safety and welfare. It is a matter of common knowledge that patient abuse happens everywhere. In this situation, the scale should be tipped to weigh in favor of patients or residents.

The Union:

The Union notes that the burden of proof rests with the employer in a discharge case, and argues that the testimony of the witnesses casts a strong reasonable doubt as to the guilt of the Grievant.

First, the Union points out that Mr. X did not name the Grievant as the cause of his injury when Belongia and Wellman discovered it. Priddis examined him nearly five hours after his last contact with the Grievant, and she stated that injuries in older individuals appear in a relatively short period of time. Mr. X did not identify the Grievant as his assailant to Priddis, nor did he indicate that his assailant was black. Priddis testified that his injuries could have been the result of a fall.

Mr. X did not name the Grievant when Kapplehoff questioned him, and the Union notes that Kapplehoff testified that signs of redness or puffiness would show up almost immediately on a person of his age.

The Union finds it significant that Pecze saw nothing amiss when she entered his room and glanced toward Mr. X on her way to Mr. Y sometime between 8:00 and 8:45 p.m. the night in question. The bed light from his roommate's side casts a subdued light in the entire room, and a degree of light comes in from the hallway.

Pecze noticed that Mr. X's eyes were closed but she saw no signs of redness, puffiness or bruises on his body. This contact with Mr. X came between 30 minutes and an hour and a half after Mr. X's last contact with the Grievant, and Pecze looked directly at the area in question -- his eyes.

Further, the Union notes that Mr. X did not name the Grievant to Ruffolo, the social worker, until she had spoken to him about his bruises at least three times. The Union agrees with Administrator Wikstrom's statement to the Bureau of Quality Compliance that it was more than difficult to get information from Mr. X concerning the bruises.

During the arbitration hearing, the responses of Mr. X were incoherent. He stated that he did not know if he were pushed in the tub room, and the tub room was the only place he had contact with the Grievant. If he cannot remember where anything happened, how can the Grievant stand accused? Further questioning of Mr. X showed that he appeared very confused. He showed no sign of fear at seeing the Grievant, and he recognized her but did not state that she hit him. He said he did not even realize he had a black eye until he was told. At the pre-disciplinary hearing held on October 21st, Mr. X did not name the Grievant as his assailant, and when asked how he got his bruises, he said he did not know.

The Union argues that strong consideration must be given to the possibility that the Grievant's name could have been mentioned during interviews and planted in his head. For obvious reasons, the Union does not advocate patient abuse, but the facts must be discerned. The Union states that there are several other possibilities. It is possible that Mr. X fell, that his injuries were self-inflicted, that he was the victim of an unintended accident which could have been caused by any number of people. However, the Union contends that the preponderance of the evidence does not indicate that he was abused by the Grievant.

The Union asks that the Grievant be reinstated to her job with no loss of seniority and with back pay for lost wages and benefits, and that the matter be expunged from her personnel file.

DISCUSSION:

The County correctly points out that it does not have to prove its case beyond a reasonable doubt, as it would if this were a criminal action. However, it is certainly appropriate to apply a clear and convincing standard of proof in a discharge case where it is alleged that the Grievant physically abused a resident. The Grievant's reputation and future career are at stake. To its credit, the County has tried to conduct a fair investigation, but the facts are difficult to discern, and the evidence has many inconsistencies. There is a lack of either direct or circumstantial evidence.

The Arbitrator accepts the County's basic premise that is more likely that Mr. X was hit in the eye by a person than that he fell and injured himself. The testimony indicates that his bruises are more consistent with being struck than with having fallen. It does not necessarily follow that the Grievant was the person who hit him.

Certain facts and assumptions are inconsistent with each other. It is inconsistent that the Grievant would show concern over a minor razor nick given to Mr. X when he knocked her hand while she was shaving him and then turn around and hit him. The Grievant's concern for Mr. X's bleeding from the razor nick is a fact verified by Pecze. The County can only assume that sometime during or after the bath, the Grievant hit Mr. X.

It is inconsistent that Wellman reported that she and Belongia were seeing the beginnings of a bruise around midnight and that the Grievant's last contact with Mr. X was four hours earlier, if one were to accept the assumption that the Grievant hit Mr. X sometime during or after his bath. While the Grievant worked until 9:30 p.m. on the evening of October 12th, it is most unlikely that she would have had any contact with Mr. X after he left the tub room. She was assigned to give baths. It is hardly likely that she would have gone to his room before she left work and hit him in the eye. One must assume that if she ever hit him at all, it was most likely during his bath time, some time between 7:15 and 7:40 p.m. on October 12th.

The evidence regarding the extent of Mr. X's bruises found late in the evening of October 12th or early in the morning on October 13th is not dispositive. Wellman testified that she observed the beginning of a major bruise around 11:30 p.m. on October 12th. Belongia did not testify as to the extent or newness of the bruise, just that she saw that he had a black eye when she turned the light on and reported it immediately. Belongia called the bruise to the eye prominent. Wellman

testified that it was not as pronounced as when a photograph of the black eye was made on October 15th.

Within minutes of Belongia's call, Priddis arrived, although there is some discrepancy about the timing here. Wellman and Belongia thought it could have been around 11:30 or 11:45 when they got to Mr. X's room, but Priddis stated that she responded immediately to Belongia's call and that she saw Mr. X at 12:20 a.m. Priddis was on the first floor, and Mr. X's room was on the second floor. The elevator at Brookside is slow but not that slow. Priddis noted the time on her report as 12:20 a.m., and is it more likely than not that Priddis's account of the time is more accurate. This timing places Mr. X even farther away from contact with the Grievant.

The Union raises the likelihood of Mr. X being injured after his contact with the Grievant during his bath. Priddis testified that bruises on elderly people tend to show up quickly, at least within a couple of hours of the receipt of them. Kapplehoff testified that some signs of redness and puffiness would show up almost immediately when a major trauma is inflicted. People differ in the manner in which they exhibit bruises. At any rate, the extent of the injury was not fully developed by the time it was first discovered, but bruises such as black eyes look worse as time goes on.

The Union notes that Pecze did not see any signs of injury when she saw Mr. X some time between 8:00 and 8:45 p.m. on October 12th, possibly an hour after his last contact with the Grievant. While Pecze could see that his eyes were closed, the light was poor, and she was not certain that she would have been able to see redness if there had been some signs of redness at that time. Riley, the aide who checked his bed to see if it was wet, did not testify. Pecze was only glancing at Mr. X as a matter of habit when entering a room -- she was headed toward Mr. Y to give him some medication. It is uncertain whether Mr. X was asleep at this time or not.

All in all, it is very difficult to establish the time Mr. X received his injury. As noted from the discussion above, there is some evidence that tends to show that it is more likely than not that he was hit or injured after his last known contact with the Grievant, but it is not outside the realm of possibility that the injury could have been received earlier, given the lack of contact with him until around midnight.

Also troubling is the fact that Mr. X was not able to name his assailant until several hours after the staff discovered his injury. Belongia and Wellman were the first to ask him what

happened, and he said nothing. By the time that Priddis arrived a few minutes later, he told her that the nurse hit him. Kapplehoff was the next person to question him the following morning, on October 13th, and he would not respond to her at all. Ruffolo saw him some time on October 13th and when she asked him how he got bruise, he told her he did not remember. According to Ruffolo, later that afternoon Mr. X told his friend, Mr. Z, that a black attendant or black female hit him, and said that he did not want "the colored or black" to take care of him, that he did not trust them. The first time that Mr. X named the Grievant was about 4:00 p.m. on October 13th, when Nurse Abraham asked him what happened, and he told her that "Sylvia hit me last night." He did not say why or where it happened. Administrator Wikstrom next asked him on October 14th what happened, and he said, "Sylvia hit me." He said that she hit him during his bath. The next day, Wikstrom interviewed him again, and he again stated that the Grievant hit him. Mr. X also told Wikstrom that he slipped on the floor. Ruffolo talked with Mr. X again on October 19th, and he told her then that the Grievant hit him, which was the first time he named anyone to Ruffolo despite her earlier questioning of him. On October 21st, a pre-disciplinary hearing was held, and Wikstrom, Kapplehoff, Union President Helen Kaquatoch and the Grievant went to Mr. X's room, where he failed to identify the Grievant as his assailant and said he did not know how he got his black eye. On June 2, 1993, during the arbitration hearing, Mr. X did not identify the Grievant as his assailant, although he remembered her name when asked who she was.

Notably, Mr. X has never been able to identify the Grievant when she is present, and has only done so irregularly to others and inconsistently to some, such as Ruffolo. This leads to a discussion regarding the competence of Mr. X to testify.

There is no clear evidence as to the mental competence or capacity of Mr. X at the time of the injury. Abraham testified that he was on anti-depressant medication at that time, but that she thought he could perceive his world around him. However, she also testified that his condition at the time of the arbitration hearing was better than it was the previous October, and that he was less alert in October of 1992. Wellman did not know if he was coherent or confused on October 12th. Priddis stated that his condition changes, that sometimes he is confused, sometimes he can be alert, and that he mixes up times and places, which is common with older people. The evidence shows that he was not capable of remembering or relating how he was injured right after the injury.

The Arbitrator found that at the time of the arbitration hearing, Mr. X lacked certain basic testimonial attributes -- such as perception, memory and communication. Attorney Volpintesta and Union Representative Maglio carefully avoided asking any leading

questions and were consequently unable to glean much information at all. Mr. X lacked the mental capacity to remember or describe how he was injured. His statements, when they could be unraveled, were inconsistent. He said many times that he never knew that he had a black eye until they told him. He said he bumped his head against something, that he got his head pushed when coming out of the bath tub, that the girl pushed him, that she did not push him on purpose, and that no one had been mean to him. Mr. X showed confusion about simple questions and did not fully grasp them. His answers were often incoherent. His answers at the time of the arbitration hearing do not match up with his statements last October.

One would ordinarily assume that statements made contemporaneously are more reliable than those made at a later date. However, the statements made by Mr. X regarding the Grievant were neither contemporaneous nor consistent. His first comments to those questioning him were noncommittal or unresponsive, and many hours elapsed before he came up with a name. His story became more embellished as time went on. The first response was that a nurse hit him. Then he did not remember. Then a black nurse. Then Sylvia. Then Sylvia hit him in the bath. These kinds of statements -- not quite so contemporaneous and gathering detail as time progresses -- are not very reliable.

It is more likely than not that Mr. X lacked the mental capacity to testify with clarity as to how he was injured or hit, both at the time of the injury as well as at the time of the arbitration hearing in the matter. Furthermore, the Arbitrator has no way of knowing whether he was asked and responded to leading questions during questioning by others. Even the County would have no knowledge of the type of questioning that occurred from his friend Mr. Z that led to certain allegations, such as naming a black nurse. Even Wikstrom was concerned that questions from the staff might have had the effect of planting the Grievant's name in Mr. X's mind, as she noted in her report to the Bureau of Quality Compliance.

Another fact -- the Grievant has no record of abuse and her reputation with others working at the institution is such that both Wikstrom and Abraham found it unbelievable that the Grievant would hit Mr. X. This does not square with the allegation that she hit him. In fact, Abraham was the first person to hear the Grievant's name given by Mr. X at about 4:00 p.m. on October 13th, and she found it so preposterous that she did not report it to the administration. Wikstrom herself did not believe it to be true initially, although she eventually concluded that she had to discharge the Grievant because there was no other logical explanation for the injury and the Grievant was the only one that

Mr. X named.

However, the naming of the Grievant has some other discrepancies, in addition to the timing of the naming of her as noted above. Mr. X told Administrator Wikstrom that he knew the Grievant's name because he had read her name tag. Mr. X correctly identified the color of the name tag as being black, and he can read and was able to read Wikstrom's tag. But the Grievant testified that she had not worn a name tag for a long time, at least for a couple of months before the incident. Again, those facts are inconsistent.

It is even more curious that Mr. X could identify the Grievant at the arbitration hearing, months after she had left the facility. Priddis thought that he probably would not recognize Priddis because she did not see him on a daily basis, and she speculated that he could recognize someone if he had daily contact with that person. The Grievant saw Mr. X only twice a month. Nurse Abraham sees him regularly and does not know if he knows her name. Mr. X has never called Abraham by her name. She believes that he knows that she is a nurse. She did not know whether he had the capacity in October of 1992 to identify people. Wellman thinks he recognizes her as a care giver. Many of these people have known Mr. X for more than a decade and have not heard him say their names. Despite the fact that Mr. X has never used the name of those who care for him on a daily or regular basis and despite the lapse of more than eight months time, Mr. X said "Sylvia" when asked if he remembered the Grievant while being questioned at the arbitration hearing. He did not identify her as someone who hit him, and in fact, had said just before identifying her, that no one there had ever been mean to him. Did Mr. X remember her name because she was someone who had been kind to him? Or mean to him? Or because she is an attractive young woman? Or does he have the capacity to identify many people and chooses not to call them by their names? If Mr. X could recognize the Grievant after several months, why could he not identify her immediately to

Priddis? Why has he not identified her as his assailant in her presence? These questions cannot be answered, and those last two questions are particularly important.

Thirteen people testified at the arbitration hearing, and all were credible except for Mr. Y, the former roommate of Mr. X, and Mr. X who lacked the mental competence to testify as noted above.

Mr. Y accused Mr. X of lying quite a bit, but when asked for an example of a lie that was told by Mr. X, Mr. Y only mentioned that Mr. X would tell the staff that he did not have to go to the bathroom and then "he'd crap in the bed." Mr. Y could not recall

any other "lies" told by Mr. X. That example sounds more like Mr. X had errors in judgment of his own capabilities than the intentional lie or deceit implied by Mr. Y.

When questioned about the incident that Ingram reported, where Mr. Y allegedly held an open safety pin in his hand near Mr. X and stated that this is how he makes him behave, Mr. Y denied any knowledge about a safety pin. He said he did not know Ingram, but then recalled when Mr. X was "misbehaving" while Ingram tried to dress him. He said he did not recall her asking him, "Why are you by his hip?" However, he testified that he probably said something like that which Ingram reported to Pontillo, that "this is what I do when I want him to behave." Mr. Y then added that no one can set Mr. X straight, that he did not have a pin in his hand, and never said anything like that. If Mr. Y had nothing in his hand, what did he mean when he told Ingram that this is how he makes Mr. X behave?

Some of the staff have had their suspicions about Mr. Y's involvement in Mr. X's injury, and Mr. Y would have had a better opportunity and motive than the Grievant (the opportunity being the time with Mr. X from after his bath all evening, and the motive being Mr. Y's obvious dislike of Mr. X). But then another inconsistency appears -- if Mr. Y had either hit Mr. X or threatened him with an open safety pin, why would Mr. X refuse to change rooms when given the opportunity to get away from Mr. Y?

It is not necessary to determine who in fact hit Mr. X in order to sustain the grievance. It is necessary for the County to show in a clear and convincing manner that the Grievant hit Mr. X in order to deny the grievance. The County cannot do this on this record, with its inconsistencies and conflicting evidence, as well as a lack of direct evidence or even strong circumstantial evidence. The County's case rests on the scattered and inconsistent statements of an elderly person, who unfortunately is incompetent to understand or relate what happened to him. The Grievant has no past history of abuse, no propensity toward violence, and there are no other circumstances that reasonably lead one to find that the Grievant was the culprit. Therefore, the County fails to prove in a clear and convincing manner that the Grievant hit Mr. X.

As hideous as it is, patient abuse does occur. Patients also falsely accuse staff of abuse, and such accusations are equally hideous for the reputations of the staff as well as their future careers. Before upholding a discharge based on the charge of patient abuse which would have the effect of destroying a person's name, reputation, and career to ever work in similar institutions, the Arbitrator requires that there be enough evidence to demonstrate with a reasonable degree of certainty that the Grievant abused the patient in the first place. In this case, the Arbitrator is far from convinced that the Grievant hit Mr. X. The likelihood that the Grievant actually hit Mr. X is not as great as the likelihood that Mr. X mixed up the story somehow, given the facts and record in this case.

Accordingly, the grievance will be sustained and the County will be ordered to reinstate Grievant and make her whole for all monetary losses. The Union has requested that the personnel records be expunged. Such a request is normally honored where a discharge has been found not to be for proper cause. However, in this case, another state agency was still investigating the incident at the time of the arbitration hearing. I find it more appropriate to order that a copy of this Award be placed in the Grievant's personnel file.

AWARD

The grievance is sustained.

The County is ordered to immediately reinstate Sylvia Roper to her former position or substantially equivalent position and to make her whole by paying her a sum of money, including all benefits, that she otherwise would have earned from the time of her termination to the present, less any amount of money she has earned elsewhere. A copy of this Arbitration Award is to be placed in the Grievant's personnel file.

The Arbitrator will retain jurisdiction over this matter until November 30, 1993, solely for the purpose of resolving any disputes over the scope and the application of the remedy ordered.

Signed this _____ day of July, 1993, at Elkhorn, Wisconsin.

By Karen Mawhinney /s/
Karen Mawhinney, Arbitrator