

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

SKAALEN SUNSET HOME, INC.

and

DISTRICT 1199/UNITED PROFESSIONALS  
FOR QUALITY HEALTH CARE and NUHHCE

Case 44  
No. 49484  
A-5089  
(Discharge of Virginia  
Adamson)

Appearances:

District 1199W / United Professionals for Quality Health Care, 734 North 26th Street, Milwaukee, WI 53233 by Mr. John Grove, Organizer, appearing on behalf of the Union.

Axley Brynelson, Attorneys at Law, 2 East Mifflin Street, Madison, WI 53707 by Mr. Sabin Peterson, appearing on behalf of Skaalen Sunset Home.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, District 1199W/United Professional for Quality Health Care (hereinafter referred to as the Union) and the Skaalen Sunset Home, Inc. (hereinafter referred to as the Employer or the Home) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the discharge of Virginia Adamson. The undersigned was so designated. A hearing was held on September 17, 1993 in Stoughton, 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. No stenographic record was made of the hearing, and the parties agreed to submit the case on closing arguments. The record was closed at the conclusion of the hearing.

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:

"Was the grievant discharged for just cause? If not, what is the appropriate

remedy?"

PERTINENT CONTRACT PROVISIONS

ARTICLE XV  
Discharge and Discipline

Section 1. The Home may discharge, suspend or otherwise discipline for cause any employee who has satisfied his/her probationary period, subject to the grievance procedure. Normally such discipline shall include the sequence of verbal warning, written warning, suspension and termination. If the Home decides to suspend an employee, such suspension shall commence as soon as reasonably possible following the decision to suspend, and the term of the suspension shall, to the extent that scheduling will reasonably permit, be served as one continuous time period.

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ARTICLE XX  
General

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Section 8. In prescribing and enforcing reasonable work rules and regulations, the Home agrees that all such rules and regulations shall be interpreted and applied uniformly but the application of discipline for violation shall be based upon the circumstances of each case.

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BACKGROUND FACTS

Undisputed Facts

The Employer operates a geriatric care facility in Stoughton, Wisconsin. The Union represents certain of the non-professional employees at the facility, including personnel employed as certified nursing assistants (CNA). The grievant, Virginia Adamson, was employed as a CNA at the Home from November of 1992 through her discharge on April 1, 1993.

In March of 1993, the grievant was working the PM shift from 2:45 to 11:15 p.m. On March 30th, she began serving as an orientator to Dorine Emmens, a new CNA who had just begun work the day before. As orientator, she was to provide guidance to the new employee in proper procedures and familiarize her with the routine of the Home and the techniques used in the CNA's job. At about 7:00 p.m. the next night, March 31st, Emmens approached Grace Decker, the LPN on her floor. She said that she wanted to have a different orientator. When Decker asked why, she said that the grievant had engaged in several inappropriate actions and that she

didn't want to work with her. She explained to Decker that the grievant had, on the previous evening, been checking a patient named [G] for incontinence at about 10:00 p.m. Emmens had gone to the patient's room to ask the grievant a question and while entering heard the grievant say "Dammit, [G]" in an exasperated tone of voice. She noted that [G] had urinated on the bed. She asked her question of the grievant and left the room.

Emmens further related that on the night of the 31st, she and the grievant had been assisting patients dining in the solarium. The grievant tried to persuade one patient that it was time to go to bed, and the patient said that she did not want to go to bed. She then spoke with another patient, who did want to go to her room. As the grievant began wheeling the second patient out of the room, she stopped by Emmens and said "I couldn't get her to go to bed, but I got this one to and she's more psycho than this one." This comment was made in a normal tone, audible to the ten or twelve residents present in the solarium.

Decker called Patricia Skubis, the RN who was the House Charge Nurse on the shift. Skubis had her bring Emmens down to the nursing office, and Emmens repeated the story to Skubis. Skubis called Ginny Noice, the Assistant Director of Nursing and asked for guidance. Noice told her to send the grievant home and have her call Kathleen Horton, the Personnel Director, in the morning. Skubis went up to Unit Six and took the grievant aside. She told her she was being sent home for using inappropriate language, and discussed the details of the accusations with her. The grievant made no specific denial, but indicated that the problem centered on her having chipped a tooth.

The next morning, the grievant met with Mary Anderson, a consultant who was the Acting Director of Nursing. Anderson suggested that the grievant have a Union Delegate in attendance as well. Anderson discussed the allegations with her, and told her she was being terminated. The instant grievance was thereafter filed. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

### Disputed Facts

There are very substantial points of dispute in the testimony presented at the hearing. The central dispute is between the testimony of Emmens, who accused the grievant of having said "Dammit [G]" and using the term "psycho" in the presence of patients, and the testimony of the grievant, who denied the incidents and provided a distinctly different version of events. There is also a dispute between the testimony of the grievant and Mary Anderson over what was discussed in the termination meeting. Anderson said there was a good deal of discussion of the swearing incident and very little discussion about the "psycho" comments, while the grievant said that the emphasis was just the opposite. These disputes are more specifically discussed below:

1. The Testimony of Mary Anderson

Anderson testified that she called the grievant on the morning of April 1st, and had her come in. She asked the grievant if she wanted a Union representative, and had one come in. She laid out the allegations, focusing on the swearing at [G]. This was of greater concern to her because the Home had recently been cited by a state surveyor for a similar incident, and had since done a great deal of in-service training on patient dignity issues. The grievant did not deny the incident, instead acknowledging that she might have made a mistake. Anderson had already filled out a "Report of Disciplinary Action" detailing the allegations, and added "Termination of employment effective immediately" to the end of it at the end of the meeting with the grievant.

2. The Testimony of Dorine Emmens

Emmens testified as described in the first portion of the "Background" section, accusing the grievant of swearing at [G] and calling two residents "psycho". She indicated that she did not report the swearing incident on the 30th because she could understand how someone might slip in a frustrating situation, but realized after the reference to residents as psychos that this was part of a pattern. She had been trained that it was her duty to report such behavior, and did so after the second incident. She stated that she had not had any problems working with the grievant.

3. The Testimony of the Grievant

The grievant categorically denied engaging in the conduct ascribed to her by Emmens, describing it as completely inappropriate and inconsistent with her training. She indicated that there was a reference to "psychotic" in the solarium, although this occurred on the 30th and not on the 31st, and in a completely different context. While the two of them were stacking trays, a resident in a nearby room started loudly calling out "Who's there" and "Come in", when there was no one at her door. This resident had had an episode several weeks before during which she had been crying out, thrashing and struggling with the staff to the point that four staff members had to restrain her while medication was administered. Her comment to Emmens was "I hope we don't have to do what we did a few weeks ago when she was acting psychotic. She's acting pretty psychotic tonight." She then explained the previous incident to Dorine.

The grievant testified that Emmens' version of events in the solarium was not logical, since if a patient did not want to go to bed, it was not a big deal. Other patients would want to go to bed, and by the time they were taken to their rooms, those who originally declined would usually have changed their minds.

There was an incident of swearing, although not at a patient and not on the 30th. On the 31st, the grievant took [G] to be weighed. She put her pen in her mouth, and while assisting [G] back into her chair, bit down too hard on her pen and broke off a tooth. The grievant had lost all of her teeth in a traffic accident, and had been fitted with dentures glued to a plate in her mouth. This was not known to the other people in the facility and was a source of some embarrassment to her. While she was wheeling [G] back to her room, she heard a resident's call signal and noticed a light on over a door some ways behind her. She stuck her head in the room to see what the problem was, but the resident could not recall why she had pressed the call light. As the grievant walked back to [G's] wheelchair, Emmens approached to ask a question. They met about 5' to 7' from [G's] chair. The grievant was very self-conscious about her tooth and pretended to be itching her nose in order to cover her mouth. Emmens noticed the missing tooth and laughed. She said "What happened to you?" and followed it by saying "You look like a Beverly Hillbilly." This irritated the grievant, who leaned forward and said softly "You know what you are? You're an asshole." Dorine made a disapproving noise and walked away.

The grievant then took [G] into her room and put her to bed. This took between 10 and 15 minutes. When she came out of the room, Patricia Skubis and Grace Decker were waiting for her. They told her she was being sent home for swearing. She didn't say much in response because she was upset and embarrassed about her tooth which Skubis noticed and mentioned.

The next morning she met with Anderson. They discussed the "psycho" allegation in detail, and she told Anderson what had really happened. They did not discuss the swearing much at all, although the grievant may have acknowledged having sworn. She thought Anderson was talking about her having called Emmens an "asshole". She did not mention her tooth because she had already been to a dentist and had it fixed. She didn't think Anderson would believe her, and Anderson had already made out the termination notice in advance anyway.

The grievant noted that Emmens had resented her attempts to supervise her work, because Emmens was cocky and thought she already could work without supervision. She had the sense that Emmens wanted to be assigned to a different orientator, who would give her more independence. Other than that, she had no problems with Emmens during the two nights they worked together, and does not know why Emmens would make these thing up about her.

The discrepancies in the testimony are discussed in Section V, Discussion, below.

#### POSITIONS OF THE PARTIES

### Position of the Employer

The Employer takes the position that it had just cause for discharge, and that the grievance should be denied. There is a clear standard in this workplace prohibiting abusive behavior towards residents, including that which offends their dignity or privacy. The grievant had been trained in these standards and was well aware of them. In two similar cases -- one in which an employee feeding a patient said "eat this shit" and another in which an employee berated a patient for being incontinent -- employees had been discharged, and thus the Home is within its rights in responding to this case with discharge. While the Union points to a case in which two employees shouting at one another in the kitchen area yielded only a one day suspension, the record is not clear on what the actual facts of that case were, and the conduct was not directed at any patient. The more relevant cases support discharge for this conduct. These residents, the Employer argues, have made their contributions to society and deserve to be treated with respect rather than called names by the employees. This is, the Employer asserts, a very serious matter calling for discharge rather than some lesser form of discipline.

This is a credibility case, and if the grievant's story cannot be credited, the discharge should be sustained. The grievant and the Union delegate both testified that the conduct attributed to the grievant was in violation of the Resident's Bill of Rights, as well as the policies of the Home. It would constitute an affront to the dignity of patients and be ample grounds for serious discipline.

The grievant's story is completely at odds with the evidence. The Employer notes that Emmens was on her third day of work when she made this report, and had absolutely no motive to lie. She and the grievant had no history of bad blood between them. She was a motivated, excited new employee, who was called upon to do a very difficult thing in turning in her mentor. It just does not make sense that she would make these accusations if they were not true. Further, the Employer notes that if she wanted to get the grievant for some reason she would not have testified that she was never called an "asshole". It seems more logical that she would have included this accusation along with the others if she was trying to get the grievant in trouble. The grievant, by contrast, had every reason to lie in order to get her job back. Thus the grievant should be discredited and the discharge sustained.

### Position of the Union

The Union takes the position that the discharge is wholly unjustified, and that the grievant should be reinstated with full back pay. The grievant should be credited over Emmens since her actions in Emmens' version of events makes no sense. The grievant was a good enough CNA to be assigned to orient a new employees, even though she herself had only been on the job for four months or so. She worked in a nursing home where incontinence was a daily fact of life. If she was going to get so upset about it that she would swear at a patient, that tendency would have

shown itself at some earlier point. The Union notes that Emmens was not happy about being supervised by the grievant, and had a motive to lie because of this unhappiness and because of the confrontation in which the grievant called her an "asshole".

The Union also argues that, even if the grievant engaged in the conduct asserted by Emmens, discharge is not an appropriate response. Calling residents names and treating them disrespectfully is obviously not acceptable behavior. It calls for discipline. But people can make mistakes and neither the contract nor the state and federal regulations governing patient care dictate discharge as a response to all instances of bad behavior. The contract contemplates corrective discipline, and there is a prior case in which two employees engaged in a screaming match within earshot of residents, with one using profanity. That employee was given a one day suspension, despite the very offensive nature of the confrontation. The Home must be consistent in its disciplinary policies, and under any version of events the grievant has not shown herself to be incorrigible. Thus, even if some measure of discipline was appropriate, the Employer should be compelled to employ corrective discipline and allow the grievant another chance.

## DISCUSSION

There is a clear standard in this facility, in the law and in the industry prohibiting verbally abusive behavior toward residents of nursing homes. They are a vulnerable population, in many cases beset with infirmities that make them wholly dependent upon the homes and the staff for their daily care. Infirmity and dependency will inevitably heighten a person's sensitivity to real or perceived affronts to their dignity, and both parties to this proceeding recognize that this demands a larger measure of restraint and empathy of resident care personnel than would be expected in some other class of workers. An employee who fails to meet this expectation is subject to discipline. The issues in this case are, first, whether the grievant engaged in verbally abusive conduct and, if so, whether discharge was the proper response, and finally, if the answer to either of the first two questions is "no", what the appropriate remedy would be.

### The Grievant's Conduct

The conflict in the testimony cannot be reconciled without concluding that someone is lying about the events of March 30 - April 1st. The central issue in this case is whether the grievant is lying or, instead, Emmens and, perhaps, Skubis and Anderson are lying.

The grievant has a more obvious reason to lie than Emmens. If she engaged in the conduct alleged, she knows that the Home will discharge her. Further, there is a stigma attached to the type of behavior alleged. The simple fact of this motive, standing alone, is of little value in resolving the credibility issue, since a falsely accused employee has concerns identical to a guilty employee. Here, however, there are also some internal inconsistencies in the grievant's story and in her behavior that make it difficult to credit her version of events.



In order for the grievant's version to be accepted, one has to make certain assumptions about Emmens that do not appear realistic. The grievant claims that she and Emmens had a confrontation in a hallway during which she called Emmens an "asshole". Ten to fifteen minutes later, she was met by Skubis, who was sending her home based upon Emmens' allegations. It is uncontroverted in the record that Emmens went first to Grace Decker and told her the story. The two of them then met with Skubis, and told her the story. Skubis called Noice for advice, and was told to send the grievant home. If Emmens was motivated to cause trouble for the grievant by their confrontation in the hall, she had to instantly decide to make up a very involved lie about the grievant, for some reason deliberately reverse the dates on which the similar but innocent comments were made, distort those comments into something inappropriate, and rush to tell this story to Decker. Even assuming that her conversation with Decker, their walk to the Skubis's office, her conversation with Skubis, Skubis's conversation with Noice, and Skubis and Decker's walk up to Unit 6 could all have been accomplished in the 10 to 15 minutes while the grievant was preparing [G] for bed, there was absolutely no time for Emmens to pause and think up this story.

In addition to immediately concocting a convoluted lie, Emmens had to rely on the grievant to respond in such a way as to indicate guilt. This is the only way in which the story was a safe one to tell, since there were supposedly other people present during each incident. [G] would presumably know whether she had been sworn at the night before and could deny the story if asked. The 10 to 12 residents in the solarium that evening were all supposedly within earshot during the "psycho" comment, and could have denied hearing it. Assuming that Emmens is cunning enough to make up this story on the spur of the moment, she must also have understood she was taking a big risk of the grievant denying it and inviting further investigation. It is hard to believe that she could have anticipated that the grievant would be so embarrassed about losing her tooth that she would decline to defend herself to Skubis. It is even more difficult to understand how Skubis could recall discussing the specific allegations with the grievant, while the grievant was so confused that she thought Skubis was talking about her having called Emmens an "asshole". Unless Skubis is also lying, the grievant must have known she was being accused of two rather serious violations, yet have chosen to leave without responding in any meaningful way.

The next morning, the grievant met with Anderson. Anderson claims that the grievant admitted possibly making a mistake by swearing, and that they did not really discuss the "psycho" comments to any extent. The grievant has a different recollection. She claims to have told Anderson all about the discussion of psychotic behavior, explaining away that allegation. She did not discuss the swearing incident, because her tooth was already fixed so she thought Anderson wouldn't believe her. She also thought there was no point, because Anderson had already made out a discipline form and she saw it on her desk. If she was not motivated to discuss the swearing incident because she thought Anderson had pre-judged her guilt, it is hard to understand why she went into great detail on the "psycho" comments. If she had just been at the dentist having the tooth fixed, it would seem a rather obvious step to offer to call the dentist's office to confirm the story, or to have Skubis confirm it, since under everyone's version she knew there was something

wrong with the grievant's tooth. The missing tooth and the exchange of insults with Emmens were the core of her defense, and she simply made no mention of them to Anderson, who was preparing to fire her.

If, in fact, Emmens made her whole story up, she must have acted on the spur of the moment, taking a huge risk for a probationary employee on her third day in order to even up scores over a fairly insignificant dispute. Then the grievant must have acted in an almost totally irrational way, declining to defend herself to Skubis. The next day, the grievant must have chosen to defend herself against half of the accusation to Anderson, leaving the other half un rebutted for no good reason, and Anderson must then have decided to lie about what was said during a meeting into which she had insisted the grievant bring a Union delegate. Throughout, the grievant must have misinterpreted the clear allegations of swearing at a patient to mean swearing at Emmens, since she acknowledged having cursed.

Too many people have to be lying for no reason if the grievant is to be believed. Anderson has no motive for distorting the meeting to eliminate the grievant's elaborate defense of the "psycho" comments, especially since the Union delegate was present. Skubis had no reason to lie about discussing the allegations in detail with the grievant. Yet unless these two are lying, the grievant must have stood passively by while damaging and, under her version, demonstrably untrue allegations were made about her.

Most importantly, Emmens' motive for initiating this entire affair is completely obscure. Even crediting the grievant's claim that Emmens disliked close supervision, she would have to be very nearly psychotic herself to make these accusations in hopes of getting a different orientator when she had only a week and a half of orientation remaining. Likewise, if Emmens was responding to having been called an "asshole", she had to have taken a very big risk for a very small reason. Emmens must be wholly vindictive, enormously cunning and incredibly lucky to have successfully invented this story and passed it off without being fired herself. This string of lies by people with no motives or only slight motives is simply too difficult to accept.

On the basis of the foregoing analysis, I have concluded that the grievant's version of events cannot be credited, and that she did, in fact, engage in the conduct alleged by Emmens. All parties to this dispute, including the grievant herself, acknowledged that this behavior constituted a form of verbal abuse, and violated the rules protecting resident dignity. The remaining question is whether the Home had the right to discharge her for this offense.

### The Appropriate Penalty

The Union argues that, even if the grievant was guilty of the conduct alleged, the penalty of discharge is too severe. The Union notes that the contract contemplates corrective discipline, and asserts that the grievant's behavior, while inappropriate, was not so severe as to indicate an employee beyond rehabilitation.

While the Employer has the right in the first instance to determine the severity of a penalty, it is commonly accepted that an arbitrator has the inherent authority to modify the penalty if circumstances warrant and the contract does not forbid such modifications. 1/ A decision to modify the penalty is not an act of leniency, since leniency is within the province of an employer. Instead it turns on mitigating factors and such fundamental notions of fairness as equality of treatment and proportionality. 2/

The mere fact that an arbitrator may reduce penalties does not lead to the conclusion that he should automatically do so. An arbitrator is not free to substitute his judgment for the Employer's simply because he would have made a somewhat different decision had it originally been his to make. There is a range of permissible discipline in nearly every case, and the fact that an employer has reached the margin does not strip it of its discretion. Absent evidence of a violation of established disciplinary norms (as in a claim of disparate treatment), or the presence of factors traditionally considered to mitigate a penalty, the discipline imposed may be reduced only where it is grossly out of proportion to the grievant's offense.

The contract calls for progressive discipline as the normal response to misconduct. The grievant here was fired, and there is no evidence of prior discipline. However, it is generally accepted that some conduct will justify discharge for a first offense. In the nursing home industry, any physical abuse and serious cases of verbal abuse usually fall into this category. A review of the prior disciplinary record in this work place confirms that discharge has been used before for serious verbal abuse.

The parties introduced evidence of three other discipline cases. In one case, an employee was feeding a resident a spoonful of food and said "eat this shit". In another, an employee berated a resident for being incontinent, telling the resident within earshot of a family member and other patients that the resident knew better, and should ring the bell for toileting. Both of these employees were fired. In a third case, there was an argument between two employees in the kitchen, within the hearing of residents in the adjacent dining room. One employee reportedly used profanity towards the other. That employee received a one day unpaid suspension. Notwithstanding the impassioned argument of the Union to the contrary, this case seems much more in line with the first two cases than with the third. As in those cases, the abusive comments

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1/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Fairweather, Practice and Procedure in Arbitration, 2nd Ed. (BNA 1983), at pages 501-503; Elkouri, How Arbitration Works, 4th Ed. (BNA, 1985), hereinafter cited as "Elkouri", at pages 667-688; Hill & Sinicropi, Remedies in Arbitration, (BNA 1981), Chapter 4, pages 97-105.

2/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Elkouri, at pages 669-670.

here were directed at residents rather than other staffers. While I agree that the "Dammit [G]" incident might have been an unintended slip, the reference to two residents as "psychos" in front of them and other residents strikes me as callous, flippant and insensitive. It indicates a complete disregard for resident dignity. The fact that the comment was made to Emmens instead of directly to the residents does nothing to mitigate the severity of the offense. Indeed, speaking about the patients as if they were not even there is more disrespectful than if the comments were addressed to them.

Since the only other cases in which verbal abuse was directed at patients both resulted in discharge, I cannot find that the grievant here has been the victim of inconsistent application of disciplinary policies or disparate treatment.

Other traditional factors in mitigating a penalty are the personal characteristics of the grievant, in particular her length of service and work history. These offer no basis for reducing the penalty in this case, since the grievant has been with the Home for only four months. Although her work history was apparently good enough for her to be assigned to the role of orientator for a new employee, four months of good service does little to balance out conduct of this nature. This is not a long service employee who made one mistake. The grievant is a short term employee who engaged in an egregious violation of the rules, and compounded her error by accusing other employees of lying.

The final factor in judging whether a penalty is appropriate is whether it is grossly out of proportion to the offense committed. As discussed above, discharge is not an uncommon response to verbal abuse of residents. The Home has an important stake in providing a friendly and supportive environment, both because of government regulations and because it is the core of its business. Referring to residents as "psycho" in their presence is a very serious attack on both the dignity of the residents and the business interests of the employer. While lesser measures of discipline could have been employed, I cannot conclude that discharge is so grossly out of proportion to the offense that it should be set aside in favor of a lesser penalty.

On the basis of the foregoing, and the record as a whole, I have made the following

#### AWARD

The grievant was discharged for just cause. The grievance is denied.

Signed this 20th day of September, 1993 at Racine, Wisconsin:

By Daniel Nielsen /s/  
Daniel Nielsen, Arbitrator