BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
DODGE COUNTY HEALTH FACILITIES EMPLOYEES, LOCAL 1576, AFSCME, AFL-CIO	Case 185 No. 50239 MA-8187
and	
DODGE COUNTY	

Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh, appearing on behalf of the County.

ARBITRATION AWARD

Dodge County Health Facilities Employees, Local 1576, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Dodge County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Juneau, Wisconsin, on February 25, 1994. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on May 3, 1994.

BACKGROUND:

The grievant had been employed by the County since March 2, 1981, as a Program Assistant in the County's Community Health Care Center. By a letter of September 27, 1993, the grievant was discharged for resident abuse. The incident giving rise to the termination occurred on September 6, 1993, and involved a developmentally disabled resident, MS. On September 6, 1993, the grievant was working the second shift from 2:00 p.m. to 10:30 p.m. on wing 3A which cared for developmentally disabled residents. Lisa Clark, another Program Assistant, was also working the same shift on wing 3A, and had been employed since March 12, 1993. Clark was responsible for the care of MS. At sometime between 5:45 p.m. and 6:00 p.m. on September 6, 1993, Clark went to take MS to his room to change his clothing because he was full of urine and BM. The grievant had agreed to assist Clark in changing MS's clothes. MS does not have the use of his legs and was brought to his room in his wheelchair. Clark began to remove MS's shirt and MS began swinging his arms. The grievant held MS's hands down on the wheelchair arms so he wouldn't hit anyone. MS then began spitting and according to Clark, she said that they should leave MS alone until he calmed down. MS is known to be verbally and physically aggressive and his care plan provides when he has an "episode" that he be left alone in his room with his tape player put on and he be checked every five minutes and he usually calms down in 10 to 15 minutes. The grievant denied that Clark said this. Clark and the grievant removed MS from his wheelchair and put him onto his bed and put the side rail to the half rail position, i.e. the rail was up at the head of the bed and down at the end of the bed. Clark moved down the right side of the bed and proceeded to take MS's pants off to change him, at

which point MS became agitated again. Clark testified that the grievant bent MS's arm over the railing approximately seven inches, which she considered a severe bend. MS began to spit and the grievant put his hand over MS's mouth and when his hand met the resident's mouth, Clark testified, it popped. Clark again stated they should leave and come back later and that the grievant moved his hand from MS's mouth to his throat and continued to bend the arm over the bed rail.

Melissa Harmsen, a Program Assistant, with a date of hire of November 22, 1992, was also working the 2:00 p.m. to 10:30 p.m. shift on September 6, 1993. She was in a small bathroom on the floor with a resident and heard a commotion and went into MS's room. She observed the grievant and Clark trying to get or keep MS in bed. Harmsen went around to the left side of the bed and helped keep MS in bed. She observed the grievant bend MS's arm over the side rail and testified ". . . you could like see the bone like it was going to pop out of the socket if it would have been pushed hard enough." She also testified that the grievant put his hand over MS's mouth. The grievant denied bending MS's arm over the side rail or ever putting his hand over MS's mouth or touching his throat.

Clark and Harmsen said they all should leave the room and MS would calm down. They put up the side rails and left. Both Clark and Harmsen observed that the grievant was quite red in the face and Clark asked if he was okay to which the grievant said no and went off to toilet another resident. Clark and Harmsen testified that the grievant later called them to hallway 3 and apologized for what had happened.

Neither Clark nor Harmsen reported this incident immediately but after hearing that there were rumors of what had occurred, Harmsen and Clark submitted written reports on September 19 and 20, 1993, respectively. They indicated that they delayed reporting this incident because they were surprised that it happened and were afraid of the grievant. Both were reprimanded for failure to timely report the incident.

The County investigated the matter and noted that the grievant had received a written reprimand on April 27, 1993, for failure to follow a resident's care plan. The County determined that the grievant was not in control of himself and had abused MS on September 6, 1993, as reported by Clark and Harmsen and that the appropriate penalty was discharge.

ISSUE:

The parties stipulated to the following:

> Did the County have just cause to terminate Norman LaCrosse?
>
> If not, what should the appropriate remedy be?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE III
MANAGEMENT RIGHTS

> Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of their work and all other matters pertaining to the management

and operation of the Facilities including the hiring, promotion, transferring, demoting, suspending, or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provision of this section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

. . .

ARTICLE XVII
DISCIPLINARY PROCEDURE

17.1 The following disciplinary procedure is intended as a legitimate management device to inform Employees of work habits, etc. which are not consistent with the aims of the Employer's public function and thereby to correct those deficiencies:

A. For the first offense, the Employee may receive an oral written warning, not to be placed into any personal (sic) file.

B. For the second offense, the Employee may receive a written warning to be placed into the personnel file.

C. For the third offense, the Employee may be subject to disciplinary action.

D. For the fourth offense, the Employee may be subject to further disciplinary action, including discharge.

17.2 The above sequence of disciplinary action shall not apply in cases which Management feels are just cause for suspension or immediate discharge.

17.3 A disciplined Employee may appeal a demotion, suspension, discharge or written reprimand taken by the Employer beginning with the third step of the grievance procedure except that oral/written warnings shall begin with the first step of the grievance.

. . .

17.5 **Community Health Center Employees:** Any disciplinary action sustained in the grievance procedure, or not contested, shall be considered a valid action. All documentation of such action will be removed from the Employee's personnel file at the end of a six (6) month

period and will no longer be considered valid, with the exception of those actions relating to resident care. These shall be retained in the Employee's personnel file for a period of nine (9) months and will then no longer be considered valid.

. . .

DODGE COUNTY HEALTH FACILITIES

Policy and Procedure Regarding:

ABUSE OF RESIDENTS

STATE AND FEDERAL REGULATIONS

1. The HSS 132.13 (1) definition of Resident abuse is:

> "Any single or repeated act of force, violence, harassment, deprivation, neglect or mental pressure which reasonably could cause physical pain or injury or mental anguish and fear."

2. Federal Register 483.13 Resident behavior and facility practices

A. Restraints. The resident has the right to be free from any physical or chemical restrains imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms.

B. Abuse. The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

C. Staff treatment of residents. The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

POLICY

1. On the basis of these regulations, Dodge County Health Facilities further defines Resident abuse as including, but not limited to:

   1) Any single physical act causing any kind of Resident injury or unnecessary pain or discomfort.
   2) Any single physical act causing any kind of Resident fear, anxiety, or other mental anguish.
   3) Any single threatening gesture or other mannerism causing any kind of Resident fear, anxiety, or other mental anguish.
   4) Any single, threatening, demeaning, judgmental or similar verbal statement causing any kind of Resident fear, anxiety or other mental anguish.
   5) Any tone of voice or loudness causing any kind of Resident fear, anxiety or other mental anguish.
   6) Any single act of neglect or deprivation which results in or could have resulted in any kind of Resident physical pain or injury or fear, anxiety or other mental anguish.
   7) Any single act of taking resident's belongings without their permission.

2. Any abuse of any Resident of Dodge County Health Facilities by any Employee is totally incompatible with the philosophy, mission, goals and interest of our organization. Such abuse violates basic Resident rights and expectations, State law and regulations, and professional codes of conduct expected from long-term care personnel.

3. In addition to the immediate impact of an abusive act, the long-term consequences of abuse for Residents, such as anxiety and fear, are of an equally serious nature. There may be both

short-term and long-term negative consequences for other Residents as well.

4. The consequences of an abusive act can be serious for Employees as well, since Resident abuse may be prosecuted under Wisconsin State Statutes, Chapter 940.29, (1981 c. 20) as a Class E Felony, i.e., punishable by up to two years in prison, a fine of up to $10,000, or both, as well as affecting any license or certification held.

5. Dodge County Health Facilities recognizes that both the needs of individual Residents and the circumstances under which proper care must be provided can be very complex and extremely demanding on staff. Nevertheless, no form of abuse, however mild, unintentional or well-motivated will be tolerated.

6. An Employee charged with abuse is considered innocent until proven guilty. Any reported cases of abuse will be investigated according to existing policies and procedures, and if proven, will result in disciplinary action commensurate with the degree of seriousness of the offense, including suspension or discharge.

7. Any failure of any Employee to report any abuse of any Resident by any other Employee is similarly considered grounds for disciplinary action and similar penalties may apply.

COUNTY'S POSITION:

The County contends that it had just cause to discharge the grievant. It submits that the seven test questions identified by Arbitrator Daugherty in Enterprise Wire Co., 46 LA 359 (1966) are as follows:

1. Was the Employee forewarned of the consequences of his actions?

2. Was the Company's rule which was violated reasonably related to the orderly, efficient, and safe operation of the Company's business and the performance that the Company might properly expect of the employee?

3. Did the Company, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate a rule?

4. Was the Company's investigation conducted fairly and objectively?

5. Was there substantial evidence or proof that the employee was guilty of violating a rule as charged?

6. Has the Company applied its rules and penalties in an even handed and non-discriminatory manner to all its employees?

7. Was the degree of discipline administered by the Company reasonably related to the seriousness of the employee's proven offense and the record of the employee in his service with the Company?

It states that "yes" answers to these questions establishes that the County had just cause for the discharge and its decision was not arbitrary, capricious or unreasonable.

As to question 1, the County submits that the grievant was fully aware of the resident abuse policy and resident Bill of Rights as he received annual training on these subjects and less than five months earlier, he received specific one-on-one counseling as a result of disciplinary action. It claims that the grievant knew MS's care plan and the consequences of a violation of the resident abuse policy.

As to question 2, the County maintains that the resident abuse policy is reasonably related to the orderly, efficient and safe operation of the County's business as the care and safety of the helpless, frail and elderly is the very essence of the County's mission. It notes that resident abuse can be a crime and the agreement provides that employes be aware of the statutory provisions of Secs. 50.09 and 940.24, Stats. The County asserts that it has the right to expect that its employes will not abuse residents under its care.

The County claims that questions 3, 4 and 5 must be answered in the affirmative. It contends that it conducted a fair, objective and thorough investigation and concluded the grievant did in fact violate the rules. It argues that the evidence shows that the grievant's testimony should be given no weight. It asserts that if the grievant is believed, both Clark and Harmsen would have had to imagined or fabricated the entire episode. It asserts that where the accused's version differs sharply from the accusers', less weight is given the accused's testimony because of the incentive the accused has to gain in the case. It submits that Clark's and Harmsen's version is consistent and there is no motive to question their veracity. Additionally, the County claims the grievant's testimony is not even remotely believable.

As to question 6, the County points out that it has discharged employes for resident abuse in the past and the grievant was not treated in a discriminatory manner.

As to question 7, the County asserts that the penalty imposed reasonably relates to the seriousness of the offense and the grievant's work record. It notes that less than five months earlier he had been disciplined for ignoring a resident's care plan. It insists that the grievant has problems with his temper and the evidence establishes that he physically abused MS on September 6, 1993, one of the most serious offenses that can be committed. The County submits that the proper care of helpless individuals is not only a legal obligation but also a great moral responsibility and the mere risk of patient abuse cannot be tolerated. The County is charged with a unique obligation to serve its residents in a safe and dignified manner and discharge is appropriate for an employe who abuses its residents. It concludes that the behavior of the grievant cannot be tolerated and it asks that the grievance be denied.

UNION'S POSITION:

The Union contends that the grievant did not twist and bend MS's arm, strike him in the mouth, place his hand over his mouth or on his throat. It submits that Harmsen's testimony was inconsistent and flip-flopped each time she was questioned about when she entered the room. It asserts that Clark and Harmsen did not immediately report the incident, even though the County's policy requires the immediate reporting of all incidents. It points out that 13 and 14 days went by before Harmsen and Clark, respectively, made their reports. The Union claims that it is remarkable that neither Clark nor Harmsen had spoken to each other about the incident because both were disturbed by it and both testified they were fearful of the grievant. The delay in filing the reports, according to the Union, suggests that their allegations were exaggerated or were in response to rumors and were made to protect themselves. It argues that their statements are not sufficient to impugn an employe with a record like that of the grievant.

The Union also alleges that Clark and Harmsen did not put down the correct date of the alleged incident until the grievant pointed out the correct date. The Union maintains that the assertion that Clark and Harmsen were afraid of the grievant is incredible given his past record, the testimony of fellow employes and his demeanor. It submits that their fear is pure fantasy and not reasonable and such imaginings call into question their credibility.

The Union notes that the grievant's more than twelve years of employment, as evidenced by his performance evaluations, demonstrate that he was very friendly, related well with staff and patients and always gave good patient care. It also notes the high opinion of several witnesses who testified to his rapport with residents, his dedication to his job and his character in general. It insists that it would have been extremely out of character for the grievant to have behaved as Clark and Harmsen have testified. The Union contends that the failure to promptly report the incident, the evidence that they may have been pressured by rumor and the inconsistencies and imaginings make their

testimony unbelievable. It cites two arbitration cases in support of its position that Clark and Harmsen, both short-time employes, should not be credited over a long-term employe, who had witnesses who testified to his good character.

The Union further points out that there was no evidence of any harm to MS, no scratches, bruises or some evidence of what occurred.

The Union claims that the burden of proof in this case should be the "clear and convincing evidence" standard because the misconduct would constitute battery by the alleged violent physical attacks and the grievant's career, reputation and honor are at stake.

It submits that the grievant's behavior has been exemplary in the past and the allegation that he broke out of his mold and acted in a different manner than the past thirteen years is not reasonable. The Union maintains that the grievant had no motivation and no history of behavior as asserted by his accusers and the County did not have just cause to terminate the grievant.

COUNTY'S REPLY:

The County contends that there is nothing in the record to support the Union's assertion that Clark and Harmsen imagined or fabricated the entire episode. The County maintains that the testimony of Clark and Harmsen was not inconsistent. It notes that with respect to Harmsen's testimony, the Union claimed that she testified that MS was still in his wheelchair when she entered the room; however, it notes that this is not supported by a review of Harmsen's written report or her testimony and the word "wheelchair" does not even appear on page 40 of the transcript, which was referenced in the Union's brief. It submits that while Harmsen's grammar was a bit strained, her testimony on direct and cross was perfectly consistent with the report filed on September 19, 1993. It maintains there was no flip-flop of her testimony and the Union's arguments failed to undermine her credibility.

Similarly, the County contends that the Union's allegation that Clark's testimony was inconsistent with respect to whether she had been asked about the incident prior to filing her report on the basis that the record indicates that Debbie Rosenmeier, another employe, had told Harmsen she had talked to Lisa about the incident, does not establish that Clark had been "asked" about it. Clark had testified she had "talked" about it. Additionally, the testimony of Frank, according to the County, does not establish that although Harmsen was going to talk to Clark that she actually did so. It concludes that there is nothing inconsistent about Clark's testimony.

With respect to corrections of the date of the incident, the County alleges that Clark originally wrote September 11, 1993, but corrected this after checking her calendar and Clark wrote in October 6, 1993, which she also corrected on her own. The County submits that these do not establish any inconsistency and are completely irrelevant because the testimony of Clark and Harmsen as to what occurred in the room and afterwards on September 6, 1993, are

identical. It asserts that the grievant is inconsistent because he initially stated he didn't think he put his hand over MS's mouth and later stated he didn't do it.

With respect to the delay in reporting the incident and their reluctance to do so because they feared the grievant, the County asserts this does diminish their credibility because both had heard the grievant say bad things about another employe who had reported an earlier abuse allegation. The County argues that given his temper and his actions against another employe, Clark's and Harmsen's fears were reasonable and nothing in the record establishes otherwise. It maintains that the Union makes a great leap in logic by claiming that the late reporting was exaggerated or in response to rumors because by simply denying that anything occurred, both Harmsen and Clark would have avoided discipline as they were the only witnesses, and if they said it didn't happen, who could prove otherwise. The County states that the Union's assertions are nothing but absurd speculation with no basis whatsoever in the record.

The County disputes the Union's arguments with respect to the grievant's work record, especially his character witnesses, noting that Brown has not worked with the grievant since 1987, Priewe worked the night shift with him only two or three times over two years ago and Frank could testify only that she worked with grievant off and on. It claims that the testimony fails to show recent work with the grievant, ignores the grievant's discipline in April, 1993, and most importantly, none were present in the room on September 6, 1993.

The County distinguishes the cases cited by the Union by pointing out that in Arbitrator Mueller's decision in Winnebago County, there was no dispute in the facts and he gave greater weight to the testimony of a long-term employe over new employes as to the severity of the action and not whether the actions occurred. It submits that in the instant case, there is a dispute as to what occurred and the issue is not about perceptions or judgments as to undisputed events. With respect to Arbitrator McGilligan in Manitowoc County, one witness for the employer was taking Prozac, which was felt to affect her memory and the witnesses could not pinpoint the time frame of the disputed events, factors not present in the instant case.

In conclusion, the County submits that nothing in the record supports the Union's position except the grievant's testimony which is entitled to little or no weight. It notes that the Union admits that the acts are unacceptable and the County asserts that it acted properly in discharging the grievant. With respect to the burden of proof, the County, citing Manitowoc County, supra, maintains the burden is the "preponderance of the evidence."

It requests that the grievance be denied.

UNION'S REPLY:

The Union submits that the County has the burden of proof in establishing that the grievant is guilty of the allegations made against him, and in the face of his denial, the evidence of his good work record and the testimony of co-workers, the County has failed in its burden. It claims that the County failed to take into account the grievant's twelve years of proud and loving service. The Union points out the County's Administrator, Howard, stated the grievant's work record was satisfactory, but in deciding to terminate him, he did not evaluate his past record and by not doing so, he failed to meet the "fair and objective" standard for investigating the allegation of resident abuse.

The Union argues that the County has relied on the accounts of two short-term employes who are unreasonably fearful of the grievant. It claims that nothing in the record establishes any basis for such fear and to accept this as a reason for the delay in reporting the incident is also a failure by the County to provide a fair and objective hearing to the grievant. The Union points out that the County's assertion that because the grievant was the most senior employe present and therefore should be held accountable, is self serving. It notes that the grievant was not supervising but assisting Clark. The Union alleges that the evidence establishes that the County relies on male employes to assist with aggressive residents in general and a policy that requires certain employes to assist in dangerous situations should not be used to indict an employe.

The Union claims that the County's brief was misleading in one important respect and that was the denial of unemployment compensation. It submits that the denial was a County action, taken unilaterally and not challenged by the grievant. It submits that no hearing on the merits took place and no hearing examiner's decision was entered into evidence. It asks that the grievance be sustained, the grievant reinstated and made whole.

DISCUSSION:

The Union has raised an issue with respect to the burden of proof claiming it should be the clear and convincing standard. Generally, arbitrators apply the preponderance of the evidence as the burden of proof and the mere fact that the evidence might establish a battery or a criminal offense is not sufficient to require the application of a different standard in this case. Thus, the burden of proof required is preponderance of the evidence.

With respect to unemployment compensation, the undersigned has not considered it or given it any weight and has found that it is irrelevant to this proceeding.

The main issue presented was whether the County had just cause to discharge the grievant. The first question to be determined is whether the grievant was guilty of the misconduct alleged. On September 6, 1993, the grievant is alleged to have bent MS's arm down over the side rail and to have put his hand over MS's mouth and to put his hand on MS's throat. The grievant denies that he did any of this. Two co-workers, Lisa Clark and Melissa Harmsen, testified that they observed the grievant on September 6, 1993, and that he did these things. I credit Clark and Harmsen's testimony. Their testimony was consistent with each other's and they had no reason to lie about it. There was no evidence of any prior animosity between them and the grievant, they had nothing to gain by falsely accusing the grievant and there was no reason for either or both of them to fabricate the events. The grievant offered no reason for them to make up the allegations. The Union has stated that there were inconsistencies in the record, such as Harmsen's testimony to what was occurring when she entered MS's room and the date of occurrence set out in their respective written reports. A review of the record establishes no inconsistencies that would call into question either of their credibility. The Union claims that the delay in reporting the incident allowed exaggeration or fabrication; however, this is rather speculative and the record fails to demonstrate any fabrication or exaggeration. The Union also questions the alleged reason for the delay, i.e. the fear of the grievant. Again, the record fails to establish that this reason was false. Both were disciplined for their failure to report the incident promptly and they knew they would incur discipline for failing to promptly report resident abuse. They could have avoided discipline by denying the event or down playing it as not significant or not memorable, but neither did so and both were disciplined. Their

testimony that they feared the grievant is a logical explanation for the delay. Their testimony was both direct, precise, and positive to what was observed. Thus, their testimony is credited.

The grievant has a stake in the outcome of this case and had been reprimanded about five months prior to this incident. These factors make him less credible. On the positive side, the grievant's evaluations have all been very favorable and his demeanor also was positive. The witnesses who testified on his behalf as to his character were not impressive as one witness had last worked with him in 1987 and another had worked with him on the third shift only two or three times. While evidence of his character supported the grievant, it was insufficient to overcome the eyewitness testimony of two witnesses to the incident who had nothing to gain from their testimony. Thus, the evidence establishes that the grievant was guilty of resident abuse on September 6, 1993. It appears that the grievant has developed problems with his temper recently as evidenced by this incident and the prior reprimand. Additionally, Clark and Harmsen indicated that after the incident the grievant was very red in the face and later called them and apologized to them. The grievant's loss of temper is a logical explanation of why his actions were "out of character."

The cases cited by the Union are clearly distinguishable from the instant case. In Winnebago, supra, there was no dispute as to what occurred. The only question was the judgment to be drawn from the perceptions of the various witnesses. Here, the issue is just the opposite. There is no dispute over the judgment to be drawn from the observations but the dispute is over the facts of what occurred. Thus, this case is not helpful in resolving the instant case.

In Manitowoc, supra, the observing witnesses' testimony was questionable based on one witness taking medication and a failure of all the witnesses to be able to accurately give the date of the event. Again, these factors are not at issue in this case.

The Union argued that the County relies on male employes to assist with aggressive residents and this should not be used to indict them. Here, the record fails to prove that the grievant was protecting himself from harm or others from harm or the resident from harm, and the grievant was not following the appropriate method for controlling MS. Thus, this defense is rejected.

Finally, the issue is whether discharge is appropriate for the offense. The County has established a clear policy on resident abuse and the grievant was counseled after the written reprimand about resident abuse. It appears that the grievant cannot control his temper under some circumstances, and in dealing with the County's residents, the inability to control one's temper in handling a situation could lead to serious consequences for the residents. The abuse of MS by the grievant is inimical to his duties as a Program Assistant and the basic responsibility of the County to provide proper care and treatment of the residents. The grievant has demonstrated that he should not be entrusted with the care of residents and despite the grievant's seniority and employment record, the penalty of discharge is appropriate for his conduct.

Based on the above and foregoing, the record as a whole, and the arguments of counsel, the undersigned makes and issues the following

AWARD

The County had just cause to terminate the grievant, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 28th day of June, 1994.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator