BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 2698, AFSCME, AFL-CIO	Case 170 No. 53129 MA-9245
and	
COLUMBIA COUNTY	

Appearances:

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

Mr. Donald Peterson, Corporation Counsel, Columbia County, appearing on behalf of the County.

ARBITRATION AWARD

The parties named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned arbitrator to hear the grievance of Mary Fischbeck in an expedited procedure. A hearing was held on November 3, 1995, at which time the parties presented their evidence and arguments, and the record was closed. The parties ask whether the County had just cause to terminate the Grievant, and if not, what is the appropriate remedy. The Grievant, Mary Fischbeck, was a certified nursing assistant at the County Home for more than two years, starting in the summer of 1992. She was discharged on November 18, 1994.

In August of 1994, the Grievant mentioned to other employees that one resident did a lot of hollering and ringing of his bell (or call light) in the night. Another CNA, Kathy Smiley, told the Grievant that employees give that resident a non-working call bell which has been de-activated or not hooked into the wall so that the lights and bells will not come on when the resident pushes the call light. The Grievant testified that Smiley said it was their team leader's idea to do this. Their team leader is Joannie Moll, an LPN who is a supervisor. When the Grievant mentioned the use of the de-activated light to Moll, Moll made no comment. Another LPN and team leader, Laurie McGee, saw the Grievant remove a call light from a nurses' desk and asked what she was doing. When the Grievant told her about the non-working call light, McGee said it sounded like a good idea to her, according to the Grievant.

Mary Baillies, a CNA with 18 years of experience, was working on the night shift that started on November 12 and ended in the morning of November 13, 1994. Baillies was working with the Grievant, and she saw the Grievant take a non-working call light away from the resident and put an active call light back for him. The Grievant gave the resident a non-working light while she was on break and then replaced it with a working light when she was back on duty,

according to Baillies. Baillies had never seen anyone do this before, but she had heard about it. Four days later, she reported it to Stacy Baldwin, an LPN in charge of that wing, after Baldwin asked Baillies about a call light in the drawer at the nurses' station.

The staff is aware of the importance of call lights, as residents may not be above to summon help without them. Staff identifies call cords which are not working. The Home can get cited by the State for the inability of residents to use the call system. During surveys, each resident is checked to see if he or she has a call system working. The Department of Health and Social Services (DHSS) requires homes licensed for skilled care, such as this one, to have a nurse call system in working order. The County reported the incident to the DHSS's Bureau of Quality Compliance, which conducted an investigation and found no violation of Chapter HSS 129 and no information was added to the Nurse Aide Registry.

When the Director of Nursing, Sharon Kotowski, met with the Grievant about the incident, the Grievant acknowledged that she had given the resident a non-working call light and that Kotowski knew that others had done the same thing. The Grievant did not attempt to hide her conduct from anyone. The Grievant had not given the procedure much thought at the time she did it, but once questioned by management, she quickly realized that it was the wrong thing to do. The Grievant had no prior disciplinary actions, and her evaluations ranged in comments from good to excellent.

The County argues that it has just cause to terminate a CNA who perpetrated a dangerous practice which could have dangerous consequences to residents who could not summon help. The County considers this egregious conduct, done for the benefit of the Grievant while she was on break. The County's policies were violated as well as potential regulations of DHSS. The Grievant was not told by any supervisor to use a non-working call light and was trained to do otherwise. The Grievant's conduct goes to the heart of care of elderly patients. If someone short circuits their ability to summon help, dire consequences could follow.

The Union argues that this was a regrettable offense but not a dischargeable one. It notes that the Grievant has had a clear record with positive evaluations, and that she has been forthright about her conduct. The Union contends that the Grievant's conduct was not so outrageous as to warrant a citation from DHSS. And if it were so outrageous, why would it not offend an 18-year CNA, who waited four days to report it. Employees who work with residents day in and day out are bound to make lapses of judgment. Team leaders and LPN who are supervisors knew about it and said nothing. The Union asks that the Grievant be reinstated and made whole.

DISCUSSION:

If ever a case cried out for progressive discipline, this is it. This is a Grievant who had a clean record, a modest amount of time on the job, and appeared to be going along with the crowd on the call light procedure rather than starting it herself. It does not appear that the practice was widespread but was confined to one resident. Once the Grievant thought about her conduct, she realized on her own that it was the wrong thing to do and she was honest about her conduct to management.

Giving a resident a non-working call light is clearly offensive and should not be tolerated. But a severe measure of discipline that was short of a discharge would have been more appropriate in this case, because it appears that the Grievant has every chance of correcting her behavior to conform to the Employer's expectations. A suspension would have been a severe form of discipline that would have accomplished the purpose of discipline in this case, without exacting the most severe form of punishment. After all, the Employer did not show that it similarly disciplined those who initiated the practice or those who knew about it and acquiesced in it, including team leaders or supervisors. Accordingly, I find that discharge was excessive in this case, and that a suspension of 10 working days would be a more appropriate remedy for the infraction, and that the Grievant should be reinstated with back pay and made whole.

AWARD

The Employer did not have just cause to terminate the Grievant, Mary Fischbeck. The Employer may impose a 10-day unpaid suspension without pay upon the Grievant for giving a resident a non-working call light. The Employer is ordered to immediately reinstate Mary Fischbeck to her former position or a 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 the time for the suspension, and less any amount of money she has earned elsewhere.

The Arbitrator will retain jurisdiction over this matter until January 31, 1996, solely for the purpose of resolving any disputes over the scope and application of the remedy ordered.

Signed at Elkhorn, Wisconsin, this 9th day of November, 1995.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator