

## BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 150, AFL-CIO

and

UNICARE HEALTH FACILITIES D/B/A/  
HIGHLAND TRANSITIONAL CARE

Case 1  
No. 53202  
A-5416

### Appearances:

Mr. Todd Anderson, Representative, Service Employees International Union, AFL-CIO,  
15 South Blair Street, Madison, Wisconsin 53703-2902, for the Union.

Mr. C. William Isaacson, Senior Labor Counsel, 105 West Michigan Street, Milwaukee,  
Wisconsin 53203, for the Company.

### ARBITRATION AWARD

Service Employee International Union, Local 150. AFL-CIO (the Union), and Unicare Health Facilities d/b/a Company Transitional Care (the Company), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on November 7, 1995, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Madison, Wisconsin, on February 13, 1996. No transcript was taken. At the conclusion of the hearing, the parties made oral argument.

### ISSUE

At hearing, the parties stipulated to the following statement of the issue:

*Did the Company have just cause to terminate Grievant B.W.?*

*If so, what is the appropriate remedy?*

### BACKGROUND

At the time of the events involved in this case, Grievant was a Certified Nursing Assistant. She was hired on February 22, 1995 and had no other disciplinary warnings prior to this incident.

On July 20, 1995, Grievant, who usually worked the second shift, 2:00 p.m. to 10:45 p.m., began work at 3:00 p.m. On that day, an incident occurred, the facts of which are sharply disputed and will be discussed below. The following day, she received a Disciplinary Action Report which terminated her and stated, in pertinent part:

Class III offense

#5 unauthorized giving out of confidential information  
#12 serious violation of [resident's] rights.

CNA [Certified Nursing Assistant] discussed confidential information about health/diagnosis of a [resident] in front of co-workers and other residents.

Grievant responded on the Report by writing the following:

I, [name deleted], did not discuss this matter in front of any residents. I did discuss this with an employee of the facility.

The discharge was processed through the grievance procedure, and is the subject of this Award.

#### The Company's Version of the Events of July 20, 1995

On July 20, 1995, the second floor was short-staffed. Grievant was assigned to work on that floor in lieu of her usual assignment on the first floor. At about 4:30 p.m. the Grievant happened to be on the first floor and Kathy Cron, the first floor charge nurse, told Grievant that a new patient who had AIDS 1/ had been admitted to the first floor. Grievant responded, "That's why I left my last job; they started getting those patients."

Soon thereafter, Teresa Lamb, the second floor charge nurse and Grievant's supervisor on that shift, overheard a conversation among the nurses including Grievant, about the admission of an AIDS patient. Lamb did not participate in the conversation about the particular patient but

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1/ The testimony referred to the patient variously as an "AIDS patient" as an "HIV positive patient." That distinction, significant in other contexts, is not relevant to this award.

volunteered information that when she had previously worked in a hospital setting, even the nurses caring for the patient were not told if a patient had AIDS and that was the reason why universal precautions were taken.

Between 5:00 p.m. and 5:30 p.m., Grievant was working in the second floor dining room, distributing trays for patients. While in the kitchen, Grievant said there was an AIDS patient on the first floor. Later, while at the steam table that divides the kitchen area from the dining room, Grievant told another CNA with whom she was working that there was an AIDS patient, mentioned her name, and said that is why she left her last job. Finally, in a third statement, Grievant told evening cook Mary Simon there was an AIDS patient and that is why she left her last job. In one of these comments, Grievant identified the patient by name. These remarks were overheard by Dietary Supervisor Margaret Belk who reported the incident to Ms. Lamb, who said she would take care of it. Ms. Lamb admonished Grievant for the incident and told her the supervisor would speak to her in the morning.

#### The Union's Version of the Events of July 20, 1995

Upon coming to work on July 20, 1995, Grievant stopped first on the first floor to look for a friend. She opened the door to a patient's room that she believed to be empty, in part because no patient's name was on the door. Instead of an empty room, she found a distraught, new patient, a social worker and a nurse. Grievant immediately excused herself and left. Later, the social worker reprimanded Grievant for having entered the room, and Grievant acknowledged her mistake. At 5:00 or 5:15 p.m., Grievant worked in the dining room while the residents ate. Grievant saw Margaret Belk there, but did not mention the patient with AIDS and could not have because she was unaware of the fact at that time.

Later, about 6:00 or 6:15 p.m., Grievant had to go to the first floor to get a meal ticket for herself. Still chagrined at having entered the room of the distraught patient, she asked Ms. Cron about the patient. At that time, Ms. Cron told Grievant that the patient had AIDS. Grievant responded, "I wasn't aware we took AIDS residents." Grievant then went to the basement food preparation area to pick up her employee meal. Such meals are picked up in a service area not accessible to residents, and separated from the resident's recreation lounge by heavy double doors. It was in this area, isolated from residents, that Grievant made her remarks to Margaret Belk and Mary Simon about a new patient having AIDS. At about 8:30 p.m., she was reprimanded by her charge nurse for having violated a patient's confidentiality.

#### RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

##### ARTICLE XIV - SUSPENSION, DISCHARGE, RESIGNATION

14.1 The Employer may discharge or suspend an employee for just cause. In cases of discharge due to dishonesty relevant to work,

drinking, neglect, sleeping on the job, leaving the work area without authorization, or any offense listed as a Class III in the employee handbook, the Employer reserves the right to discharge an employee without prior written warning. It is understood that the Union will be notified with the option to bargain about any change in these offenses as stated in the handbook. It is understood that the Union has not waived its rights to bargain about drug testing for those covered by this agreement.

#### RELEVANT EMPLOYEE HANDBOOK PROVISIONS

(Page 29)

**CLASS III OFFENSES:** An employee will be subject to immediate discharge for **some offenses**. Other offenses may merit discharge. Examples of these offenses include, but are not limited to:

. . .

5. Unauthorized removal of records or unauthorized giving out of confidential information.

. . .

12. Serious violation of resident's rights.

. . .

#### POSITIONS OF THE PARTIES

##### The Union

The Union asserts the Company has not met its burden or proof and has not demonstrated that Grievant discussed a patient's diagnosis in the second floor kitchen and dining area. It points to an alleged discrepancy between Ms. Belk's testimony that she overheard Grievant talking to Mary Simon, and Ms. Simon's testimony that Grievant spoke to her alone. It further points to the absence of corroborating witnesses, the other CNA's who allegedly heard Grievant.

Additionally, the Union argues that residents can properly talk to other employees regarding patients' medical conditions because all those employees are bound by a duty to keep such information confidential. It asserts the Company failed to promulgate clear rules regarding

confidentiality and points to the Company's own acts of disclosing of medical information demonstrated by its having an area of resident rooms denominated as the Alzheimer's wing. Given these facts, it concludes the Company did not have just cause to terminate Grievant.

### The Company

The Company asserts it has demonstrated that Grievant made the disputed statements in the second floor kitchen and eating area. It points to the testimony of Margaret Belk and Mary Simon and points out that Ms. Simon is a bargaining unit member and therefore her testimony against another unit member has special credibility.

The Company unequivocally rejects the theory that employees are free to discuss patients' medical conditions with other employees. It underscores its legal and ethical duty to maintain confidentiality and thereby protect residents' rights. It asserts a reinstatement of Grievant would be tantamount to a condoning of disregard for confidentiality.

## ADDITIONAL FACTS AND DISCUSSION

### Conclusions Regarding the Events of July 20, 1995

Although there are many points of conflict between the two versions of the stories, the two significant issues involve, first, the location of the conversation, whether it took place in the dining room and kitchen on the second floor, where residents are present and might overhear, or whether it took place in the service area in the basement, and, second, whether or not Grievant mentioned the resident's name.

In determining credibility, the Arbitrator is presented with a case in which cross-examination revealed no internal inconsistencies in the competing versions and no witnesses were called who might have corroborated or attacked various parts of the story. The undersigned declines to adopt a presumption that management witnesses are always more credible than a grievant. Although a grievant has a high degree of self-interest at stake in defending against discipline or termination, management witnesses may also have biases or other subtle forms of self-interests, and all witnesses may be subject to faulty perception or memory.

According to the Company's version of the facts, Grievant would have known of the new resident's diagnosis prior to her work at the 5:00 p.m. dinner in the second floor dining room, and

thus would have been able to make the alleged statements. According to the Union's version, she did not learn of the diagnosis until 6:30 p.m. and therefore could not have mentioned it in the dining room. To accept the Union's version, it is necessary to disbelieve both Kathy Cron, who testified she told Grievant when she passed through the first floor around 4:30 p.m., and Teresa Lamb who testified that she heard Grievant and other CNA's discussing the matter on the second floor, also around 4:30 p.m.

The Company's version is also supported by the testimony of the Dietary Supervisor Margaret Belk and evening cook Mary Simon. Ms. Belk's testimony was buttressed by a note she wrote that evening to the Director and Assistant Director of Nursing. The note, reproduced here in total, read:

7 20 95

Schepp or Sue

A CNA [name deleted] is telling co-workers - and once in front of residents - that there is an aid's [sic] patient on 1st. What bothers me is who is hearing this. One mistake was telling Mary in D.I. for Mary will tell others too.

I told Terry what was being said & she said she would talk to [name deleted] about the resident's rights, etc. I do not care if we do or do not have a resident with aids, [sic] but people need to watch what they are saying - to whom & where they are talking about this. They shouldn't be saying anything in the first place!! Maybe in report or in the office, but not in front of everyone else.

Margaret

P.S. Am I overreacting?

(emphasis in original)

Although some of the statements entered in the record were not written contemporaneously, and therefore have less weight, this document, written on the evening of the incident, which mentions the presence of residents, enhances the credibility of Ms. Belk's testimony that the Grievant's statement was made in the second floor dining room.

Thus, the Company presented two witnesses who testified to having heard Grievant make

the statements in the residents' dining areas and two witnesses to demonstrate that Grievant had the information prior to the 5:00 p.m. dinner hour in the resident's dining room. Although the Union's version of the events involved other potential witnesses who might have either corroborated Grievant's story or impeached the Company's witnesses, (for example, the nurse and social worker allegedly in the room that Grievant entered by mistake), the CNA allegedly discussing the matter on the third floor around 4:30 p.m., or the CNA to whom Grievant is alleged to have mentioned the matter at the steam table, no such witnesses were presented and only the Grievant testified for the Union.

Given the four witnesses whose testimony supported the Company's version of the story. and the absence of any witnesses to corroborate the Union's version of the story, I conclude that the Grievant mentioned the admission of the AIDS patient three times in the second floor dining area, twice in the kitchen and once by the steam table that divides the dining room from the kitchen area.

The use of the patient's name is another matter. The only witness who testified that Grievant used the patient's name was Ms. Belk. Even Ms. Belk, however, did not make that allegation in her statement written on the night of the incident. That written statement reflects a high level of sensitivity to the issue of confidentiality. It seems unlikely that such an emphatic statement of this violation and the need to prevent it would not also mention the use of the patient's name since that would be an even greater offense than merely mentioning the patient without a name. Ms. Cron did not testify whether or not she told Grievant the patient's name when she told Grievant that an AIDS patient had been admitted. Similarly, the second floor supervisor did not testify that Grievant demonstrated knowledge of the patient's name by using it in the discussion about the AIDS patient. With no direct evidence of Grievant being told, or having the name, the undersigned must draw an inference regarding that point. In light of the fact that Grievant was not working on, but only passing through, the first floor, the patient's floor, it is clear she would only have a few minutes when she had any chance at all of being exposed to charts or other documents showing the patient's name. Since she was not in charge of the patient's care that evening, that likelihood is further decreased. In the absence of testimony that she was directly told the name, or that she showed that knowledge, the undersigned draws the inference that she did know the patient's name on the evening in question, and therefore could not have spoken it.

For these reasons, I conclude that Ms. Belk learned of the patient's name at some time after July 20 and inadvertently inserted that knowledge into her memory of the happenings of the evening. I conclude that Grievant did not use the name of the patient that evening.

#### Conclusions Regarding the Appropriateness of the Termination

Having determined that Grievant discussed the admission of an AIDS patient to employees who were not immediate caregivers and did so in a room where other residents might have overheard, it still remains to determine whether discharge is an appropriate sanction. Under a just

cause analysis, the disciplinary action must be commensurate with the infraction and commensurate to sanctions imposed on other employees for similar offenses.

In support of its decision to terminate Grievant, the Company forcefully presents the importance of its duty to protect patients' privacy. It cites this duty under both state and Federal law. The Wisconsin Bill of Resident rights provides:

### **WISCONSIN RESIDENT BILL OF RIGHTS**

Each person residing in a Wisconsin nursing facility is accorded extensive rights, guaranteed under federal and state law.

. . .

#### **2. PRIVACY AND CONFIDENTIALITY**

- . You have the right to privacy in accommodations, medical treatment, written and telephone communication, personal care, visits and meetings of family and resident groups.

The *Federal Register* provides

(e) *Privacy and confidentiality.* The resident has the right to personal privacy and confidentiality of his or her personal and clinical records.

[1] Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups, but this does not require the facility to provide a private room for each resident.

[2] Except as provided in paragraph [3] of this section, the resident may approve or refuse the release of personal and clinical records to any individual outside the facility. 2/

[3] The resident's right to refuse the release of personal and clinical records does not apply when-

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2/ *Federal Register*, Vol. 56 No. 187, September 26, 1991, pp. 48868 and 48869.



- [i] The resident is transferred to another health care institution; . . .
- [ii] Record release is required by law

Furthermore, in the orientation of new employees, a social worker discusses the importance of respecting the confidentiality of resident's records. Finally, The Employee Handbook includes the unauthorized giving out of confidential information among the most serious offenses. 3/

Although there are these many strictures on the handling of confidential information, none of these strictures specifically prohibits the naming of a patient as an HIV positive or AIDS patient. Nevertheless any reasonable person today must be aware of the extreme sensitivity of such information and the stigma which attaches to these patients.

The exact details of Grievant's conduct and the Company's response must be measured against this backdrop. Grievant mentioned the admission of an AIDS patient to a co-worker. Although Grievant did not release this information to a member of the public, she did mention it to another employee who had no need to know the information. The undersigned rejects the Union's argument that Grievant was at liberty to discuss a resident's medical condition with another employee because all employees were bound to treat the information confidentially. There is no evidence that Company treats personal medical information in this manner. On the contrary, information is only given out to those employees who have a need to know the information. For example, if a resident needs a special diet because of a medical condition, the dietary department is told of the nature of the necessary diet, but not the medical condition. It is clear that the Grievant acted improperly when she mentioned the medical diagnosis to another employee who did not need to know of it.

At the same time that the undersigned finds the Grievant's actions to be improper, and worthy of discipline, I also find that they were not as serious as they would be if she had revealed the diagnosis directly to someone other than an employee. Although it is possible that a resident might have overheard Grievant's comment, it was spoken directly to another employee over whom the Company could exercise control and who was also bound to maintain confidentiality. At the same time that the Grievant's negligence must be condemned, it must be distinguished from directly giving information to a non-employee.

Another point that must be considered in evaluating the seriousness of Grievant's misconduct is the Company's lack of clarity regarding expected conduct in situations such as this. Actions by the first floor charge nurse, the second floor charge nurse and the Dietary Supervisor all reflect this confusion.

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3/ See above, p. 4.

Grievant first learned the information from a supervisor who gave it to her without at the same time explaining when it was proper and when it was improper to divulge it. Even if health care workers need to know the AIDS status of those patients they treat, clearly Grievant did not need to know that information on the night in question when she was assigned to the second floor. Moreover, the first floor charge nurse's disclosure was not during a routine briefing at the beginning of a shift. Rather, it had more of the flavor of informal news sharing. This informal manner of conveying sensitive information does not clearly indicate the level of confidentiality the Company apparently expected.

Again, when the second floor charge nurse overheard the CNA's discuss the patient, she did not caution them on confidentiality. This omission is more noticeable since no one on that floor on that evening would be caring for the patient. Her joining in the conversation without such a caution might further blur an employee's understanding of her duty.

If an immediate stop was to be put on such discussions, no such prohibition was reflected in the Dietary Supervisor's actions. Although she overheard Grievant improperly discuss the matter, she did not caution her subordinate, the cook, to not disclose the information. This omission occurred notwithstanding the Dietary Supervisor's estimation, as reflected in her written statement, that the cook was likely to spread the story. Thus, while the Dietary Supervisor could not have prevented the comment in the first place, she did not take the action she might have taken to prevent its further dissemination.

It is possible that the Dietary Supervisor did not take forceful action because she herself was uncertain of the guidelines. Her post-script, "P.S. Am I overreacting?" is a telling remark, reflecting that she herself did not know where the line was to be drawn. Was telling a fellow employee about the admission of an AIDS patient wrong? If a supervisor was not sure, how could an employee be expected to know?

Finally, in evaluating the appropriateness of discharge, this Arbitrator must take into consideration other discipline imposed on other employees for similar offenses. Unfortunately, the record is devoid of any such evidence. Consequently, the undersigned must resort to whatever guidance is contained in the Employee Handbook. The Handbook, cited above at page 4 states that "some offenses" in this class are subject to immediate discharge and other may (emphasis added) merit discharge. It is clear, then, that even the offenses clearly encompassed under Class III do not call for automatic discharge. Also, the phrase "unauthorized giving out (emphasis added) of confidential information" although ambiguous, seems to refer to the direct delivery of information to a non-employee rather than the discussion of patients with other employees. Thus, it appears that Grievant's offense does not fall squarely within Class III offenses and even if it did, it would not automatically call for discharge.

In summary, I find the sanction imposed by the Company must be modified for three reasons. Firstly, the Company did not take the steps that were available to it to stop discussions

among employees either when the matter was discussed on the second floor or after Grievant had talked to an employee in the kitchen whose supervisor believed to be likely to spread the information; secondly, although Grievant improperly shared information to other employees and did so where she might have been overheard by the residents, she did not divulge the information directly to a non-employee; and thirdly, the supervisor's actions indicated a Company ambivalence about the seriousness of the misconduct. For these three important reasons, I conclude that discharge is too harsh a discipline to be supported by just cause.

Grievant's actions were nevertheless improper and require sanction. Consequently, I conclude that Grievant should not be discharged, should be reinstated, but must suffer a thirty-working-day suspension.

#### AWARD

1. The Company did not have just cause to terminate Grievant B.W.
2. The Company had just cause to suspend Grievant B.W. for thirty-working days.
3. The Company shall reinstate Grievant and make her whole for all wages and benefits lost except for the thirty working day suspension.

Dated at Madison, Wisconsin, this 18th day of March, 1996.

By Jane B. Buffett /s/  
Jane B. Buffett, Arbitrator