BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between PARK VIEW REHABILITATION PAVILION AND PLEASANT ACRES EMPLOYEES UNION, LOCAL 1280, AFSCME, AFL-CIO and WINNEBAGO COUNTY	5-24-94 grievance of Sue Ingalls regarding a written warning Case 255 No. 52230 MA-8880

Appearances:

Mr. Gregory N. Spring, Staff Representative (now Research Assistant), AFSCME Council 40, 8033 Excelsior Drive (Suite B), Madison, WI 53717, appearing on behalf of the Union.

Mr. Grant P. Thomas, Assistant Corporation Counsel, 415 Jackson Street, PO Box 2808, Oshkosh, WI 54903-2808, appearing on behalf of the County.

ARBITRATION AWARD

At the joint request of the Union and Employer noted above, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as Arbitrator to hear and decide a dispute concerning the above-noted grievance, arising under the parties' 1994-96 Agreement (referred to herein as the Agreement).

Hearings were conducted at the County's Park View Health Center near Oshkosh, Wisconsin, on June 7 and October 23, 1995. The proceedings were not transcribed; however, the parties agreed that the Arbitrator could maintain a cassette tape recording of the testimony and arguments for the Arbitrator's exclusive use in award preparation.

The parties summed up their positions orally at the conclusion of the second day of hearing.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the Employer have just cause to issue a written reprimand to Sue Ingalls in May of 1994?

2. If not, what shall be the appropriate remedy?

PORTIONS OF THE AGREEMENT

ARTICLE VI

DISCIPLINARY PROCEDURES

> 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.
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> . . .
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> Any employee may be suspended, discharged, or otherwise disciplined for just cause. As a general rule, the sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, and discharge. Any written reprimand sustained in the grievance procedure or not contested within the first six (6) working days after the date of the reprimand shall be considered a valid warning. Except for patient care warnings, no valid warning shall be considered effective for longer than a twelve (12) month period.
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> The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge.
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> . . .

BACKGROUND

The County operates the Park View Health Center which provides nursing home care for residents. The Union represents a bargaining unit that includes the Nursing Assistants (NAs) employed at Park View. The Agreement noted above covers that unit and refers to those employes as "Nurse Aides."

The Grievant, Sue Ingalls, has been employed as a Park View Nursing Assistant since February of 1993. In October of 1993, Grievant received an oral warning concerning patient care. Oral warnings are not included in Park View employes' personnel files, and Grievant did not grieve the October, 1993 oral warning.

On May 25, 1994, Grievant was issued the written warning at issue in this case. That warning reads as follows:

> INFRACTIONS: Resident's Rights, Work Performance, Conduct, PVHC Rules

On May 17, 1994 you cared for [Resident] on the night shift. He later filed a formal complaint about the way you performed care for him and the way you spoke to him. His report included descriptions of the rough way you pulled his covers off, how you jerked his diaper off when you changed him and the rude manner in which you spoke to him. This kind of behavior by a Park View caregiver cannot and will not be tolerated. Because you received an oral reprimand for a similar incident on October 2, 1993, you are being given this written reprimand.

Since you have been employed at Park View you have received numerous inservices on the proper way to perform cares for residents and you should be aware by now that you should always be attempting to relieve a resident's discomfort instead of causing it. Although you stated that you know that he is often in pain, he reports that you have failed to treat him gently. You also stated that you feel that your "tone of voice probably grated on his nerves." It is your responsibility as a Nurse Aide to provide care for residents with respect and sensitivity and to always utilize appropriate verbal and nonverbal communication to provide a therapeutic environment for residents.

In the future, when you are providing care for a resident, and you become aware of your impulse to make a verbally inappropriate response, you should, after insuring the resident's safety, leave the presence of the resident. You then need to assess your ability to do one of the following things: 1) ask another staff person to perform the care, 2) collect yourself and return to the resident, or 3) reapproach the resident with another staff person present. If you have difficulty doing any of these, you should discuss the problem with the RN-Shift Coordinator.

You must always remember that you, and all of us, are here for the residents. Our mission is to care for them in a kind, sensitive, professional manner. You must learn to monitor your behavior and voice when providing cares in order to prevent incidents like the one described above in the future. If you fail to correct your behavior, and a similar situation occurs, you will receive further discipline which could be suspension without pay.

The written warning was grieved on May 25, 1994. That grievance asserted that the written reprimand violated the Agreement Preamble and Art. VI and requested that the County make grievant whole and remove any and all references to the reprimand from Grievant's file.

The formal resident grievance referred to in the written warning was dated May 18, 1994 and written by Unit Manager/RN Judy Pahlow in response to complaints expressed to her by the resident involved (referred to herein as the Resident) in her office. The form asserts a grievance against the Grievant. It states the "Date & Time of Occurrence" as "5-18-94." It goes on to read, in pertinent part, as follows:

> Describe What Happened:
>
> Asked Sue to change diaper around 3 or 4 o'clock - Sue said "I'll be back" - didn't come back states he waited and waited - she left the room. [Resident] said he waited for 1 hour. When he hollered for help, She came and said "I said I'd be back in 2 mins., hollered & yelled at him at times, she throws blankets back and tears diaper off. [Resident] is upset with her remarks and the way she says things and gets him nervous. He doesn't want her to help him anymore.
>
> Suggestions for Correcting the Problem:
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> He feels she's too rough and hollers at him.
>
> He doesn't want her to care for him anymore.

That form was signed by Pahlow with a notation that it had been written per the Resident's request.

At the arbitration hearing, the County presented testimony by Pahlow and Park View Personnel Assistant Jean Blahnik. The Union presented testimony by NA Gloria Dunlop, former NA Gary Wetzel and the Grievant. Over Union objections, the Arbitrator permitted the County to present evidence concerning statements the Resident made to Pahlow about the circumstances giving rise to his formal grievance against the Grievant, even though the County did not call the Resident as a witness.

Additional background is set forth in the summaries of the parties' positions and in the DISCUSSION which follows.

POSITION OF THE COUNTY

The County had just cause for issuance of the written warning.

The warning was issued after the Resident formally complained to Pahlow about Grievant's conduct while caring for him the night before. Pahlow testified that the Resident was coherent, logical and not overly upset or angry when he filed his grievance. Pahlow concluded that the Resident's mental capacity was not significantly diminished by the medications he was taking or otherwise and that he was able to accurately express his perceptions of the events on the night in question to her. Therefore, the Arbitrator should find that the Resident's formal grievance accurately relates the Resident's perceptions that Grievant had engaged in the misconduct for which she is cited in the written warning.

Blahnik promptly and objectively investigated the matter, discussing the Resident's concerns with Pahlow, reading relevant records, and interviewing the Grievant and others who might have information bearing on what had happened. The County did not blindly accept the Resident's complaint. On the contrary, the evidence shows that the County did not charge Grievant with aspects of the Resident's statements to Pahlow that it could not substantiate during its investigation. Based especially on Grievant's own statements when she was interviewed, the County concluded that part of the Resident's complaints against Grievant were valid.

While this is not the most serious of cases, it nonetheless has been shown to involve conduct that was not appropriate, not consistent with the Resident's care plan and not consistent with the training Grievant had received. It involved the perception on the part of the Resident that Grievant had not only provided inappropriate care but that she was also discourteous and disrespectful. While it did not amount to patient abuse and hence was not reported to the State, it nonetheless warranted the disciplinary action taken.

In so concluding, the County took into consideration the fact that Grievant had been orally warned the preceding October about similar conduct about which another resident had complained, and the fact that Grievant's County employment had begun on February 4, 1993.

The County appropriately assessed the credibility of Resident and the others whom it interviewed, including Grievant. Notably, Grievant acknowledged in her interview that her tone of voice may have grated on the Resident's nerves. She also admitted that she does not maintain the best working relationships with demanding residents. It is undisputed that the Resident was quite demanding and had high expectations regarding the treatment he should be given by his caregivers. The record also establishes that while the Resident has been cared for by a variety of male and female caregivers, and while the Resident has threatened on various occasions to report caregivers, he has only gone to the trouble of initiating this one formal grievance. Thus, the County properly viewed the Resident as other than a chronic complaint filer despite his history of verbal gripes, threats and bluster.

Grievant's position description specifically provides that, as a Nursing Assistant, Grievant was expected to be aware of the physical and mental conditions and care plans of the residents she served and to adapt the cares she provided to each of those residents. Moreover, the Nursing Assistant is expected to provide cares with the properly adjusted attitude and the necessary sensitivity regardless of what the resident does or says. The record establishes that those legitimate expectations were violated in this case as specified in the warning.

Accordingly, the discipline should be sustained and the warning should remain in Grievant's file.

POSITION OF THE UNION

The County did not have just cause for the written warning issued to the Grievant on May 25, 1994. Unlike the Grievant's earlier oral warning which did not become a part of her record, a patient care written warning would stay in Grievant's file for the duration of her employment and could become the basis for additional discipline later. Resident abuse is also a Class E felony if proven beyond a reasonable doubt in a trial. Thus, this is a serious case; one in which the County bears the burden of persuasion; and one in which the County has failed to meet that burden.

The County offered no first-hand evidence regarding Grievant's alleged misconduct, and even its hearsay was unconvincing. The record shows that the Resident was taking several medications that could affect the accuracy of his perceptions and recollections about Grievant's tone of voice and conduct. Almost all of the assertions contained in the grievance lack specificity as to whether the conduct is even alleged to have taken place on the night in question. The only specific claim is that the Resident waited an hour to get his diaper changed, but Pahlow did not credit that assertion so it was not among the conduct cited in the warning. The claims that Grievant hollered and yelled at times and threw his blanket back, etc., are not at all clear as to when that conduct is alleged to have taken place. Because the County did not call the Resident as a witness, the Union had no opportunity to cross examine him on those matters or any others.

The testimony indicates that the Resident made at least two assertions that were blatantly incredible regarding the night in question: first Grievant's treatment of the Resident on the night in question had caused what Pahlow found was an obviously old bruise; and second, that Grievant did not respond to his need to change his diaper for an hour. The undisputed non-credibility of those assertions taints the credibility of the others.

Grievant cooperated with the County's investigation, believing she had nothing to fear by being forthright. Grievant admitted that maybe the Resident perceived Grievant's tone of voice as inappropriate. That is not an admission that her tone of voice was in any way inappropriate. Grievant's arbitration hearing testimony was similarly forthright in that regard. She also testified, however, that she did not rip off the Resident's diaper or roughly take off his blanket or speak to

him in an inappropriate manner, and that she did not intend to upset the Resident.

The time at which the Resident came forward to complain also casts doubt on the factual accuracy of any complaint he may have had about Grievant's conduct on the night in question. It is clear the Resident could have but did not complain about Grievant to the RN on duty on the night in question. Indeed, the dates on relevant documents at least suggest that he might not have formally complained until after a full day and night had passed.

Moreover, with all due respect to the Resident and the several medical problems and near constant pain he was experiencing, the evidence also shows that the Resident complained often to and about caregivers, threatened to formally complain about frivolous matters, and made it known that he wanted to have the NAs respond to him first and foremost regardless of when or why other residents called for or needed their attention. Chartings in evidence note instances in which the Resident was verbally abusive to Nursing Assistants and claimed that they were all out to get him and were always so mean. The record also establishes that there were many competing demands on Grievant's time on the night in question. The Resident may have been upset that he was not responded to as quickly as he would have preferred on the night in question and may have followed through on his many previous threats to Grievant and others that he would formally grieve if he did not get preferential responses and treatment.

The County has disciplined Grievant for the conduct which its investigation did not disprove rather than for conduct its investigation showed had occurred. However, just cause discipline cannot be based on mere conjecture about what might have happened.

Accordingly, the Arbitrator should grant the grievance and order that the warning be removed from Grievant's record.

DISCUSSION

The County has a right to expect that its Nursing Assistants will be aware of the physical and mental condition and care plan of each resident in their care, adapt their care techniques to the particular resident's needs, and demonstrate patience and understanding toward residents regardless of how the resident behaves. The County has made its expectations in those respects appropriately known to the Nursing Assistants, including the Grievant, by the terms of their detailed job description, and in the various documentation and in-service training it has provided to the employes.

Therefore, the County has correctly contended throughout the processing of this case that the Resident's allegedly unpleasant, demanding or difficult nature is not a valid defense or excuse for providing cares in other than the required kind and considerate manner. As noted in the written warning, the County's procedures clearly provide that when an employe feels angry or frustrated by an interaction with a resident, he or she should withdraw and either retry later after

calming down or take other steps as necessary to avoid being discourteous or otherwise acting inappropriately toward the resident.

The question of fact remains, however, whether Grievant's conduct in relation to the Resident on the night in question has been shown to have fallen short of those legitimately-imposed standards. The County bears the burden of persuasion on that question.

On balance, the Arbitrator finds that the County has not met that burden.

The hearsay nature of the Resident's allegations alone would not prevent this Arbitrator from concluding that the discipline imposed was for just cause. Protection of patients from improper care is too important and patient care is too often a one-on-one exercise to conclude otherwise.

However, the record evidence casts some significant doubts on the reliability of the allegations by the Resident that Grievant engaged in the misconduct for which she was warned in this case. The Resident told Pahlow that he waited an hour to have his diaper changed, but by all accounts that was a substantially inaccurate exaggeration. The Resident also claimed that he had sustained a bruise due to Grievant's rough treatment on the night in question, but Pahlow's documentation (Exhibit 12, page 1) states that Pahlow checked it and found that a "yellow old bruise" which was not from Grievant's interactions with the Resident on the night in question.

Additional questions about the reliability of the complaints the Resident brought to Pahlow about Grievant are raised by the Resident's documented history of numerous informal complaints about many staff members and the evidence that the Resident has threatened in the past to formally complain if staff members did not provide him with more favorable treatment than they gave to other residents. Especially so, given the evidence that there were many competing demands on Grievant's time on the night in question. Taken together, those elements identify a possible motivation other than misconduct on Grievant's part that might have prompted the Resident to initiate what was his first formal grievance. (Pahlow acknowledged in her testimony that NAs were not expected to respond to the Resident's call light out of order, only to respond to it in a timely fashion).

Although Grievant was cooperative and, indeed, waived Union representation during her investigatory interview, Grievant's responses during that interview were such as would prompt understandable concern/suspicion on the County's part. Nevertheless, on balance, Grievant's interview responses do not lend sufficient support to the factual assertions in the Resident's grievance to persuade the Arbitrator that Grievant engaged in the misconduct for which she was warned. When approached by Pahlow for the interview Pahlow recalls that Grievant said the inquiry must be about the Resident and that the Resident is very difficult and demanding. Pahlow testified that during the investigatory interview that she observed and Blahnik conducted, Grievant responded to the Resident's grievance by stating that the Resident "may have found my tone of voice grating." Blahnik testified that Grievant did not deny the Resident's charges in a clear cut

way; that Grievant admitted that her tone of voice may have been harsh and may have grated on Resident's nerves; and that Grievant variously described the Resident as demanding, difficult and frustrating to care for and to try to satisfy. In that regard, Blahnik recalled that Grievant stated that the Resident "wants what he wants when he wants it."

Those interview responses did not, however, amount to an admission that Grievant had engaged in any of the misconduct cited in the warning. In her sworn first-hand arbitration testimony, Grievant squarely denied that she engaged in any of the misconduct cited in the warning and stated that she was not aware on the night in question that she was speaking to the Resident in a tone of voice that was grating on him. The Grievant did admit in her testimony that it would be fair to say that she did not have the best of working relationships with the Resident; but from the record, that could fairly have been said about other NAs who cared for the Resident, as well.

Considering the record as a whole, the Arbitrator finds that while it is possible that the alleged misconduct occurred as asserted in the warning, it is just as possible that it did not. Because the County has not persuasively established that the alleged misconduct in fact took place, the Arbitrator concludes that the County has not met the burden of persuasion imposed on it by the contractual just cause standard.

Accordingly, the Arbitrator has granted the Union's request that the warning notice be removed from the Grievant's record.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the STIPULATED ISSUE noted above that

> 1. The Employer did not have just cause to issue a written reprimand to Sue Ingalls in May of 1994.
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> 2. By way of remedy, Winnebago County, its officers and agents, shall immediately remove the written reprimand issued to Sue Ingalls in May of 1994 from her record.

Dated at Shorewood, Wisconsin this 3rd day of June, 1996.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator