

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES  
INTERNATIONAL UNION, AFL-CIO, CLC

and

VENCOR, INC. (MOUNT CARMEL HEALTH  
AND REHABILITATION CENTER)

Case 27  
No. 53211  
A-5417

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. Matthew R. Robbins, appearing on behalf of the Union.

Mr. John W. Martin, Director of Labor Relations, Vencor, Inc., appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1995-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discharge grievance of Marlene Ziemer.

The undersigned was appointed and held a hearing on February 1, 1996 in Milwaukee, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on March 27, 1996.

Stipulated Issues

1. Was the grievant discharged without just cause in violation of the labor agreement?
2. If so, what is the remedy?

Relevant Contractual Provisions

ARTICLE 8 -- DISCHARGE

8.1 The Employer may discharge or suspend an employee for just cause, but in respect to discharge shall give a warning of the complaint against such employee, except that no warning notice or progressive discipline need be given to an employee if the cause for such discharge is:

. . .

C. Abuse, neglect or misappropriation of property of a resident as defined by Wisconsin state registry.

Facts

Grievant Marlene Ziemer had been employed by Vencor's Mount Carmel Health and Rehabilitation Center, a large Milwaukee based nursing home, for seventeen years as a nursing assistant when she was discharged on or about September 15, 1995 for an incident of alleged patient abuse.

The incident occurred on the third shift, and involved a patient identified in the record as Adelia. It is undisputed that Adelia is a difficult patient to care for, as she is very elderly, confused, and prone to spitting at and sometimes physically striking staff who are trying to care for her. The care instructions for Adelia note these facts and the grievant was clearly aware of them because she had cared for this patient on many other occasions.

On the occasion in question, housekeeper Estelle Gray observed an incident which she interpreted as an act of patient abuse. Gray forthwith reported the matter to the charge nurse, and the issue was then investigated by successive levels of the Home's management. The grievant denied abusing the patient, and no other employee was present during the incident, which by all accounts lasted only a few seconds. The grievant's account and Gray's differed in substantial detail, as will be discussed below. The outcome was that the Company believed Gray's interpretation and did not believe the grievant's, and discharged the grievant for patient abuse. The grievant had two prior disciplines on her record, one of which was for failing to tie a restraint properly and the other of which concerned attendance problems. There is nothing in the record to indicate that the grievant had ever been accused of anything resembling patient abuse previously.

Pursuant to Wisconsin law, the Company reported the incident to the Bureau of Quality Compliance at the Wisconsin Department of Health and Social Services. Pursuant in turn to its responsibility, the Bureau conducted an investigation concerning the complaint, as a result of

which the grievant could have been struck from working in a nursing home anywhere. The Bureau determined that the complaint against the grievant was not substantiated by its standards. Union Business Agent Lyne Brunt testified that in the 1994 contract negotiations, in which Article 8.1C of the agreement was re-written, the Company had proposed new language for this clause. Brunt testified that the Company proposed that abuse, neglect or misappropriation of property of a resident be excluded from the contract's requirement of one warning notice prior to possible discharge, and that the Union counter-proposed that this be agreed to with the corollary "as defined by the Wisconsin State Registry." Brunt testified that the parties discussed extensively that because the Registry had come into effect during the previous contract, and was now the "ruling force" over the certified nursing assistants, the parties needed to take account of that fact. Brunt testified that discussion between the parties was to the effect that the Bureau of Quality Compliance "did an extensive investigation and that their ruling was what we would go by", and stated that the Company agreed to that language. Brunt did not go so far as to testify that the Company had explicitly agreed that its review of a potentially disciplinable incident would be governed exclusively by the Bureau's findings.

The essential part of Gray's testimony as to what she saw on the morning in question is as follows:

Q Would you tell me and tell the arbitrator what you observed that morning in room 149?

A Okay. That morning I was dusting in the hallway, and -- the resident was yelling, you know, swearing, and I went over towards the door, I didn't go all the way inside but in part of the door there, and the resident was swearing and she spit into an employee's face, and then the employee was holding her hands and spit into her face, telling her, you don't spit in my face, then she spit two more times into her face, and then I just stood there. Then the employee looked up at me and we just looked at each other for a few minutes, then I walked back out into the hallway and then she came out, and she was asking me something about a portable potty where to put it at, and I said put it wherever you want, I don't care, and then I went to the nurse's station, I told the nurse what had happened, and she told me I should go to my boss and tell her what happened and that's what I had done.

While Gray amplified this testimony and repeated it on cross-examination, her interpretation was consistent throughout.

The grievant gave substantial testimony concerning this incident, of which a representative

portion (given while re-enacting the incident with Union representative Brunt lying in a bed to substitute for the resident) is as follows:

Q After Jeff left, I would like you to tell me what you did with regard to Regina and what happened -- with regard to Adelia and what happened.

A Adelia's yelling help me, help me, I'm cold, I'm cold. I says, Adelia, I'm here to change you, I says -- and I got down like this because Adelia is hard of hearing -- I says -- and Adelia -- Adelia is already combative and striking out trying to hit.

Q What do you mean striking out? She lifted her arms up or --

A No, she was going like this. I'm cold, she's throwing -- she's yelling, I'm cold, I'm cold, and I'm trying to explain to Adelia, I'm going to change your bed, I'm going to change your bed, turn over, Adelia, turn over, I'll help you, turn over, turn over. In the meantime she's throwing back and she's hitting and -- Adelia, turn over, I'm trying to get you changed, I'm trying to take this off and she's still fighting, she kind of half-way sits up, and she spit, and I told her, Adelia, don't spit, that's not nice to spit. Come, turn over, I'm going to try and finish -- get you changed. Then taking this, putting all this on, and she's still striking out, cussing at me, and I told her, Adelia, come on, cooperate, come on, help me out, I'm going to put your Attends on, come on, Adelia, come on, and she's still striking out, come on, come on, we're almost finished. I'm cold, I'm cold, you son of a bitch, I'm cold. Put the Attends on and she's still striking out. She spit at me again, and I says, come on, I just got to put your gown on, and I put her gown on, and she started to calm down a little bit, and then I finished tying her gown and she's still yelling, I'm cold, I'm cold, I'm cold, I can't -- come on, come on, Adelia, turn over, come on, put your blankets on, get the blankets on. Calm done, (sic) Adelia, calm down, calm down. There you are, nice and dry and clean. Then she says thank you.

Q Now, at any time during this did you ever spit at Adelia?

A No, I did not spit at Adelia.

The grievant further testified that she believes that what Gray observed was the effect of her upper and lower double set of dentures, which she testified lead to a consistent difficulty she has in avoiding spraying spittle when she talks:

Q Do you wear dentures?

A Yes. Both up -- bottoms and tops.

Q Both bottoms and tops?

A Yes.

Q Okay. And do you have any problem with the dentures being loose?

A Yes, I had to -- with my bottom ones.

Q Tried to get those fixed or--

A Yes, I went to a dentist and the dentist had said I definitely have problems with them, but he could not fix them because he was not -- doesn't specialize in dentures, so he told me to go to a different dentist that specializes in dentures, but at the time I couldn't go because it cost around \$70 just for a consolation.

Q Consultation?

A (Witness nods head.)

Q Now, with regard to -- how does the dentures affect -- what effect can it have on your having saliva or spraying or drooling?

A The dentures get loose, sometimes they will stick and I have to push them back in my mouth.

Q When they're loose, what happens with regard to saliva?

- A I drool sometimes.
- Q Okay. Do you have saliva in your mouth?
- A Yes, I do.
- Q Okay. And when you have saliva in your mouth and you're talking, tell us what that causes you to do?
- A Sometimes it's hard for me to talk, and if I get saliva in my mouth, I have to swallow it because I can't spit. If I -- if I was to spit, my teeth would come out.
- Q What do you mean? Explain that to me. Instead of spraying or saliva comes out as you're talking, but you actually went and deliberately -- deliberately spit at someone like a wad, could you do that?
- A No, I can't.
- Q Why is that?
- A Because I can't -- I can't spit because if I did, my teeth would go out.
- Q Does this have any medical effects, for example, what happens if you have--
- A If I have a cold, I have to call the doctor right away and the doctor puts me on a cough syrup and he puts me on a decongestant right away because I cannot bring up the phlegm, I cannot spit.

Gray testified that she had worked for the home for five years, but had floated from one unit to another during that time and was not particularly familiar with the grievant. There is no evidence of ill feeling between Gray and the grievant prior to this incident.

Two other employes testified in support of the grievant. Maria Fuchsgruber, a licensed practical nurse who testified that she has worked in close proximity to the grievant for most of her twelve years at the home, described the grievant as very loving, caring and professional, and stated her conviction that the grievant was incapable of patient abuse. Fuchsgruber further testified

that she had a tendency to give the grievant the most difficult assignments because of her view of the grievant's handling of the residents. Kathleen Sormrude, a nursing assistant for four years at the home, testified that the grievant was an excellent aide who was very calm and thorough in her care of the residents. Sormrude added that she had observed that "a lot of spit" comes out as the grievant talks. She testified that she had often seen the grievant drool or spray, but had never seen the grievant spit by her own free will. Sormrude also supported the grievant's testimony to the effect that simply walking away from an agitated resident is not always the answer, and that a judgment call must be made in many instances as to whether to continue attempting to change the resident, the sheets, etc., otherwise the work could not be

completed. This testimony was supported (to a degree) by Company witnesses who also indicated that there is a judgment call involved as to how serious the resident's degree of agitation is and whether it justifies leaving the resident uncared for in the hope that the resident will calm down.

#### The Company's Position

The Company contends that spitting three times in a resident's face is clearly patient abuse and warrants discharge. The Company argues that the testimony of the grievant must be read in the context of her self-interest, while Gray has nothing to gain by reporting the abuse and her testimony held up through cross-examination. The Company contends that on all grounds, Gray's testimony should be preferred over Ziemer's, and that Ziemer's accounts of the incident have differed in detail. The Company notes that the grievant's dentures were not mentioned in the grievant's statement, given during the Company's investigation and written down by Sue Grabowski. The Company argues that the grievant was not a model employee, and that this should be taken into account in determining whether she is a credible witness. The Company further contends that the testimony of Lyne Brunt as to the negotiation of Article 8.1C should not be considered, because the Union introduced her testimony after agreeing to sequester witnesses, but did not sequester her. The Company further argues that the fact that the State of Wisconsin did not find the grievant guilty of abuse does not mean that abuse did not occur, and that the State has different standards for proving abuse than the Company. The Company contends that the standard applied by the Company need not be the criminal standard of proof, citing an arbitration case to that effect. The Company requests that the grievance be denied.

#### The Union's Position

The Union contends that the collective bargaining agreement provides that employees will receive a warning prior to discharge except for certain specified types of serious misconduct, one of which is resident abuse. The Union contends, however, that that exception, pursuant to Article 8.1C of the agreement, is to be defined by the State Registry, and in this instance the State Registry found no substantiation of the complaint against the grievant. The Union contends that the grievant testified that she cannot voluntarily spit at someone because her dentures would fall

out, and notes that there is testimony from the grievant and other witnesses that she can, however, involuntarily spray with spittle people to whom she is speaking. The Union notes that while the resident in question was alert at the time she was questioned by the Home in its prompt investigation of the incident, the resident did not say that the grievant had spit at her. The Union argues that even if the Employer here is not found to be required to give a warning letter for an offense of this type prior to discharge, the burden of proof should be guilt beyond a reasonable doubt, because the misconduct alleged involves moral turpitude, and would tend to have the effect of making the employe unemployable in the entire industry. The Union requests that the grievance be sustained, and the grievant made whole for all losses and reinstated to her job.

### Discussion

I do not reach all of the issues in this case, because I conclude that the most basic element which must be established here is whether Gray in fact witnessed an act which must be construed as patient abuse, and that the evidence is insufficient to support that interpretation. That being so, it is irrelevant whether the Company has agreed to be bound by the result of the Bureau of Quality Compliance investigation, or whether the discharge was just under other applicable criteria. Clearly, if the evidence will not support a claim of patient abuse, the remainder is immaterial.

In this respect I must note initially that there are minor variances from perfect consistency in both the grievant's account and Gray's. While Gray's account of this brief incident is essentially internally consistent, she describes the matter as lasting for a few seconds at one point, and later describes the grievant and she as having stared at each other for a few minutes. This is not a matter of importance, but it underscores the limitations of testimony and of witnesses' recollection in defining exactly what happened, in a manner which has been discussed by many commentators about witnesses generally. The same is true of the grievant. Her variations in testimony and in her prior statements in the Company's investigation are also not major, but are enough for the Company to have concluded that she was not credible.

But while the Company has treated the entire matter as being founded on a question of which employe is more credible, I am unpersuaded that this is in fact a question of whether someone is lying. There is significant evidence supporting the grievant's claim that she would not engage in an act of patient abuse, from other witnesses. There is significant evidence supporting the grievant's claim that she has a tendency to spray spittle while she talks, from other witnesses. The re-enactment of the incident demonstrated that in each area in which the Company has raised doubts about whether the grievant was acting properly (being within a foot or so of the grievant's face in her "personal space", bending low over the bed, and spraying spittle) there is an explanation which is consistent with an ordinary attempt to provide care for a difficult patient.

It is apparent from Fuchsgruber's testimony that the grievant was routinely given difficult patients to care for. This speaks to the likelihood that the grievant would have acted properly in a difficult situation. It also explains why the grievant, in a "judgment call" situation, might elect to



continue attempting to provide care for the resident when another aide might prefer to walk away. Sormrude's testimony that the grievant normally would walk away from an agitated patient only if she was unsuccessful at calming the patient down also supports this interpretation, as does her testimony that the grievant was successful at calming down an agitated patient the vast majority of the time. Finally, there is the fact that both of these witnesses knew the grievant better than Gray did. It is therefore significantly possible that, far from this being a straight question of whether Gray or the grievant is more credible, that Gray acted in good faith according to what she thought she saw. There appears to be a significant possibility that Gray saw the grievant talking to the resident at close quarters, while trying to hold her attention and change her linen at the same time, and that the resident was indeed both admonished not to spit at the grievant and sprayed with spittle herself. For a person not familiar with the grievant's dental problems to happen upon such an incident would make it very easy to conclude that what was being observed was an act of patient abuse. This does not prove that it was one, in light of the other facts made available during the hearing. I conclude that the chances that Gray merely happened upon an incident which looked suspicious, but which had an innocent explanation, are too great to allow a conclusion by any standard of proof that the Company has established that the grievant committed an act of patient abuse. The discipline therefore cannot be sustained.

For the foregoing reasons, and based on the record as a whole, it is my decision and

#### AWARD

1. That the Company did not have just cause to discharge the grievant.
2. That as remedy, the Company shall, forthwith upon receipt of a copy of this Award, reinstate the grievant to her former position or a substantially equivalent position, shall make her whole for losses suffered by reason of the Company's action by payment to her of a sum of money equal to wages and benefits she would have earned but for the discharge, less interim earnings, if any, and shall correct its records accordingly.
3. That the undersigned retains jurisdiction in this matter for at least sixty days, in the event of a dispute concerning the remedy.

Dated at Madison, Wisconsin this 26th day of June, 1996.

By Christopher Honeyman /s/  
Christopher Honeyman, Arbitrator