

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 150, AFL-CIO

and

UNICARE HOMES, INC. d/b/a JACKSON  
CENTER

Case 20  
No. 52557  
A-5363

Appearances:

Mr. Thadd Hryniewiecki, Business Agent, Service Employees International Union, Local 150, AFL-CIO, appearing on behalf of the Union.

Mr. William Isaacson, Legal Counsel, UniCare Homes, Inc., appearing on behalf of the Employer.

ARBITRATION AWARD

Service Employees International Union, Local 150, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. UniCare Homes, Inc. d/b/a Jackson Center, herein the Employer, concurred with said request, and the undersigned was designated as the arbitrator. Hearing was held on August 17, 1995, in Milwaukee, Wisconsin. At the conclusion of the hearing, the Employer made oral argument and by September 26, 1995, the Union submitted its post-hearing brief.

ISSUE:

Did the Employer have just cause to discharge the grievant, TW, for allegedly physically abusing resident R on February 26, 1995?

If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE XI - DISCHARGE AND DISCIPLINE

Section 1 - The Employer may discharge or suspend an employee for "just cause", but in respect to discharge, shall give warning of the complaint against such employee to the employee, in writing and a copy of the same to the Union, except that no warning notice need be given to an employee if the cause of such discharge is verbal or physical abuse of residents or staff (or failure to report such witnessed abuse); discourtesy; neglect of duty; destruction, abuse or theft of facility, resident, or employee property; dishonesty affecting the facility; intoxication on the premises or on-premise possession of intoxicating beverages; persistent garnishments; unethical conduct; falsification and/or breach of confidentiality regarding employee data or other records; conduct adversely affecting the health and welfare of residents; punching a time card for another employee; violation of the Resident Bill of Rights; conviction of a felony; failing to report unavailability for work at least one (1) hour before his/her starting time; or other breach of a handbook Class III offense. However, no action shall be taken if the employee can show to the satisfaction of the Employer that his/her failure to notify the Employer due to an illness or other emergency physically prevented him/her from doing so. The Union will be notified as soon as possible after a member is discharged.

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FACTS

The grievant, TW, was a resident aide at the UniCare Health Facility also known as Jackson Center. On March 6, 1995, he was discharged for alleged physical abuse of resident R on February 26, 1995. The grievant had been employed as a resident aide at the Jackson Rehabilitation Center approximately four years prior to his discharge. Jackson Center is home to both developmentally disabled and mentally retarded individuals. The resident who was the subject of the alleged abuse was a high functioning resident at Jackson Center.

On February 26, at approximately 3:40 p.m., resident assistants Russell and Jones were working on the third floor. At about the same time, the grievant was taking census on that floor. Resident R came to the laundry room to do his laundry. However, resident assistant Jones was helping with another resident's laundry. Resident R was not allowed into the laundry room and he

became agitated. Resident assistant Russell came to the laundry room from the nurses station and redirected resident R away. However resident R kept coming back around the corner to the laundry room where resident S was doing his laundry. R became upset with Russell, spit at her, and kicked and swore at her. At that point Russell called for help. At the same time, the grievant was coming down the hall and heard residents R and S arguing loudly. When he heard Russell call for help, he went to her assistance. The grievant grabbed resident R in an attempt to restrain him and redirect him to his room. Resident R resisted the grievant's efforts to redirect him and struggled with the grievant in an attempt to escape.

There is conflicting testimony as to exactly how the grievant physically grabbed resident R in his attempt to restrain and redirect him. Both the grievant and Russell testified that he grabbed resident R from behind in a basket hold or bear hug. The resident struggled to get away from the grievant. While struggling, R started dropping to the floor and the grievant's arms slid up around the resident until his arms were near the resident's neck. At that point the grievant and Russell testified that the grievant let go of resident R, and resident R fell onto the floor. Resident R immediately got up and spit in the face of the grievant and then ran off to his room. At that point the grievant went back and sat down at the nurses station to calm himself.

The grievant testified that resident R is more physical and violent than most of the other residents. The grievant recounted an incident when resident R was throwing brooms and chairs. The grievant stated that resident R needs to be physically restrained when he gets very agitated, as he was at the time of this incident.

Russell's testimony basically corroborated the testimony of the grievant. She testified that when the grievant came to her assistance he grabbed the resident from behind to physically restrain him. At that point, she asked the grievant if he wanted her to call the behavior staff. He stated that he did not, and then tried to take the resident to his room while he physically had hold of him. Russell said she asked the grievant again if he wanted her to call the behavior staff and he said no. It was at that time that resident R got away from the grievant and ran down the hall. She testified she did not know if the grievant went down to the floor with resident R, and didn't know if he had resident R in a choke hold. She stated that she only saw the grievant's arms around resident R. It was Russell's opinion that she did not believe that what she witnessed occurring between resident R and the grievant was resident abuse because in her opinion the grievant merely came to her assistance, restrained resident R, but not in an abusive manner.

The grievant's and Russell's testimony conflict with that of resident assistant Jones and resident R. Resident R stated to investigators that the grievant choked him while he was on the floor. Residential Living Aide Jones testified that the grievant came to redirect resident R. Although the investigator's notes of the interview with Jones indicated that she stated the grievant took resident R to the floor by grabbing his neck, Jones testified that in fact the grievant took the resident to the floor by grabbing his arm. However, she went on to state that while the resident was on the floor, the grievant put his hands on the resident's neck and shoulder area and was

shaking him. She heard the grievant say to resident R words to the affect "don't you ever do that again." It was also clear from Jones' testimony that resident R had spit in the grievant's face before he and the grievant struggled on the floor. In her statement to investigators, Jones also stated that while the grievant had resident R on the floor, Russell stated to the grievant "Stop Terry. What are you doing?"

At the conclusion of its investigation, the Employer determined that it had a substantiated case of abuse of a resident. Therefore on March 6, 1995, the Employer gave written notice to the grievant that he had committed a Class III offense under the Employer's Code of Conduct. Consequently, the Employer discharged the grievant. The Employer's Code of Conduct provides:

CLASS III OFFENSES: An employee will be subject to immediate discharge for such offenses as the following:

1. Verbal, mental, physical, or sexual abuse to any resident of the facility or fellow employee or neglect or mistreatment of any resident of the facility.

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#### POSITIONS OF THE PARTIES:

##### Employer

The Employer believes this is basically a very simple case. The grievant, TW, was accused of physically abusing a resident by choking that resident with his hands and forcing him to the floor. Two credible witnesses confirmed that. One was the resident himself who at hearing, pointed to the grievant and said "he put his hands on my throat and did it." Rosemary Jones in her testimony clearly confirmed that the incident occurred as R stated. Jones was in no way impugned as a witness. There was no reason given for why she would lie or in any way not tell the truth. There was not a bad relationship or bad feelings between her and the grievant. She was simply doing her duty. However, the grievant and Russell did have a personal relationship outside work.

Thus, the credibility conflict must be resolved by crediting the two impartial witnesses' testimony over the two witnesses who certainly have a reason to confirm and support each other. It's simply a matter of credibility. There is enough difference so that it cannot be said both versions could be right, and it was just the way they viewed the seriousness of the events. The facts are that the grievant had R on the floor, with a least one hand on his throat, one hand on his arm, and not simply standing behind him and holding him in a restraining grip.

It was also demonstrated by the grievant at hearing that there was no movement at all by the grievant and R, but according to other testimony there was at least three to five feet of movement. Again, it is simply credibility. The Employer had two credible witnesses, with no reason to lie, testifying that an employe committed an act of physical abuse. Obviously, the argument flows from there that termination for physical abuse meets any criteria of just cause. As Mr. Zoltag testified, it actually can threaten an employer's license if abuse cases are not dealt with properly, and abuse is probably the worst thing that can occur in a nursing home. It is, however, true that employes may be provoked when somebody spits in their face because that is very provocative. The fact remains, however, it is a nursing home environment and employes cannot take the law into their own hands and deal with the situation in any way they deem appropriate. That is simply something that cannot be tolerated and the idea of bringing someone back to put residents at risk again is totally unacceptable to the Employer. Therefore, the Employer believes the termination was for just cause and that the grievance should be denied.

### Union

The Employer, in its closing statement, has attempted to portray the grievant as an abusive employe by alluding to two prior allegations of resident abuse. However, in neither case was discipline imposed or charges filed because there was no evidence to substantiate those claims. Also, with respect to the charge of resident abuse, which is the subject of this arbitration case, the State of Wisconsin, Department of Health and Social Services, Bureau of Quality Compliance, after concluding its investigation found that violation of Chapter SS 129 Wisconsin Administrative Code, was not substantiated. That investigation was conducted by the agency responsible for investigating any and all abuse cases, as well as imposing sanctions on those individuals found guilty.

In this case, the principal witnesses against the grievant are the resident and fellow employe Jones. At the hearing, Jones testified that in her written statement, where she indicated that the grievant had taken the resident to the floor by his neck, was incorrect, and that the grievant took the resident to the floor by his arm. The grievant acknowledged that he put his arms around the resident to restrain him, that the resident began slipping to the floor, and his arms went up around the resident's neck. At that point, however, he released the resident who then fell to the floor. At no point did the grievant choke the resident as Jones alleged. In fact, Jones testified that she thought the grievant was shaking the resident, but when asked how many times the grievant shook the resident she was unsure. Consequently, at best, her testimony as to what happened was "fuzzy." Finally, employe Russell testified that she did not believe the grievant physically abused the resident and her testimony corroborated the testimony of the grievant concerning what exactly happened when the grievant was attempting to restrain the resident.

The burden of proof is on the Employer to prove that the grievant physically abused resident R. The Union does not believe that the Employer met its burden of proof in this case.

Therefore, it requests that the undersigned so find, sustain the grievance and reinstate the grievant to his former position and make him whole.

## DISCUSSION

The first element of the undersigned's analysis in this case is to resolve the credibility conflict posed by the testimony and written statements given to investigators by resident R and employe Jones as measured against the testimony and written statements given by the grievant and Russell. After reviewing the testimony of all of the witnesses the undersigned is persuaded that Jones' testimony is the most credible concerning the events which gave rise to the charge of resident abuse against the grievant. It is undisputed that Jones has no reason to lie concerning the events surrounding the allegations that the grievant choked R. There was no testimony or other evidence to suggest that Jones had ever had any run-ins or other reasons to lie concerning what she observed the grievant doing at the time in question. Furthermore, her testimony is corroborated by the resident who claimed the grievance choked him. While resident R had clearly diminished mental faculties, he was a high functioning resident at the Home. Furthermore, merely because the resident has diminished mental capabilities, his testimony is not per se incredible. In this case, his testimony was also corroborated by Jones, and no evidence was adduced to establish why he would lie about what occurred, or establish that he was incapable of recalling the event.

Thus, the next question is was there any evidence or testimony adduced to rebut the testimony of Jones. Aside from the grievant's testimony, the only other testimony suggesting that the grievant did not choke or otherwise physically abuse resident R was from Russell. Russell testified that she did not see the grievant place his hands on resident R's throat. Furthermore, she testified that what she witnessed, in her opinion, did not constitute resident abuse. However, Russell's testimony does not rebut Jones' testimony that Russell exclaimed to the grievant at the time of the incident, "Stop Terry. What are you doing?" Obviously, if the grievant had been doing nothing inappropriate to resident R, what explanation is there for why she made such a comment? The implication of the remark is that she was prompting the grievant to consider what he was doing to resident R. Also, Russell was the grievant's boyfriend, and notwithstanding her protestations to the contrary, the undersigned believes that she had an interest in not testifying to anything that was detrimental to the grievant's case. In light of all of the above, the undersigned cannot credit Russell's testimony over that of Jones.

The grievant, in his testimony, also denied choking resident R. However, he did testify that after resident R left the area, he went over to the nurses station, in his words, to "calm himself down." If, as the grievant would have the undersigned believe, this was not an unusual incident in the sense that he merely restrained resident R in a basket hold and R slipped to the floor, then got up, spit in his face and left, why was it necessary for him to go over to the nurses station to calm himself down? The undersigned believes that what most likely occurred was that the grievant came to the assistance of Jones and Russell to restrain and redirect resident R. As he approached resident R, resident R, who already was swearing and spitting at Russell, directed his behaviors at the grievant. He likely spit in the grievant's face at that time as the grievant was attempting to restrain him and resisted the grievant's physical intervention to redirect him. Resident R's behavior toward the grievant no doubt frustrated and angered the grievant such that the grievant

became overly physically aggressive with resident R and shook him by the neck and shoulders in a manner that would give the resident reason to believe he was being choked. Whether he choked the grievant or merely put his hands on his shoulders near his neck and physically shook him as Jones testified, either constitutes inappropriate physical abuse of a resident. Therefore, the undersigned is persuaded that the grievant did inappropriately physically abuse resident R as claimed by the Employer.

The only question that remains is whether the Employer had just cause to discharge the grievant for his inappropriate conduct. As noted earlier herein, under the Employer's Code of Conduct, physical abuse of any resident of the facility is a Class III offense, and "an employe will be subject to immediate discharge for such offenses." The Employer's regional director who oversees four residential facilities, including the Center involved herein, testified that the Company has a zero tolerance policy with respect to resident abuse. He testified that the Employer always terminates an employe found to have abused a resident.

Clearly, resident abuse is a serious matter as evidenced by the requirements that such incidents be reported to State regulators. Also, the residents are dependent upon the facility employes for their care and well being, and they and their relatives must be able to trust and rely that they will receive compassionate and proper care and treatment. Consequently, employers in order to ensure that such trust is maintained, can hold employes to a very high standard of conduct with respect to their interaction with residents. Thus, while discharge is the most severe and final step under a system of progressive discipline, it also can be imposed for a single incident of egregious misconduct, even where an employe has no prior record of discipline and may be considered to be a good employe based upon performance evaluations, etc. This Employer obviously views physical abuse of a resident, in this treatment and care setting, as an egregious offense warranting immediate discharge. Also this Employer, by virtue of its zero tolerance policy, has determined that discharge is the appropriate penalty, even where it is the first and only incident of abuse committed by an employe. Therefore, in light of all of the foregoing, the undersigned is persuaded that the Employer did have just cause to terminate the grievant in this case.

Based upon the record and the foregoing as a whole, the undersigned enters the following

AWARD

The Employer did have just cause to discharge the grievant, TW, for allegedly physically abusing resident R on February 26, 1995. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 11th day of July, 1996.

By Thomas L. Yaeger /s/



Thomas L. Yaeger, Arbitrator