

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

GENERAL TEAMSTERS UNION  
LOCAL NO. 662

and

CLAIREMONT NURSING FACILITY

Case 20  
No. 53573  
A-5438

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. Scott D. Soldon and Ms. Leeann Gruwell Anderson, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Mr. Alan Brown, Consultant, Clairemont Nursing Facility, 3320 Big Flat Road, Missoula, Montana 59801, appearing on behalf of the Employer.

ARBITRATION AWARD

General Teamsters Union Local No. 662, hereafter referred to as the Union, and Clairemont Nursing Facility, hereafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to designate a member of its staff to act as arbitrator to hear and decide a grievance. The undersigned was so designated. Hearing was held in Eau Claire, Wisconsin, on June 19, 1996. The hearing was not transcribed, and the record was closed on November 14, 1996.

ISSUE:

The parties stipulated to the following statement of the issue:

Was Linda Jensen suspended for just cause?

If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 4

MANAGEMENT RIGHTS

Except to the extent specifically abridged by specific provisions of this Agreement, the Employer reserves and retains solely and exclusively all of its common law, statutory and inherent rights to manage its own affairs as such rights existed prior to the execution of this Agreement. The sole and exclusive rights of the Employer which are not abridged by this Agreement shall include but are not limited to the following: To determine the existence or nonexistence of facts which are the basis of a management decision; to determine the services and level of services to be offered by the Employer free of liabilities of this Agreement; to establish or continue policies, practices and procedures for the conduct of the operation of the Employer and from time to time change or abolish such policies, practices and procedures; to determine and from time to time redetermine the methods of operations to be employed by its employees; to discontinue methods or operations or to discontinue their performance by the employees; to determine the number and types of employees required; to assign work to such employees in accordance with requirements determined by the Employer; to establish and change work schedules and assignments; to transfer; to promote or demote employees, or lay off, or otherwise relieve employees from lack of work or other legitimate reasons; to determine the fact of lack of work; to discipline, suspend or discharge for just cause, and otherwise take such measures as the Employer may determine to be necessary for its efficient operations.

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ARTICLE 11

DISCIPLINE AND DISCHARGE

Section 1. Basis. No employee shall be disciplined or discharged except for just cause and such discipline or discharge shall only occur within thirty (30) days of the incident or when the employer reasonably becomes aware of the incident that would give

cause for such discipline or discharge. Employees shall have the right to be represented by a Union representative in connection with any investigatory meeting with an Employer representative regarding disciplinary action.

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Section 3. Disciplinary Procedure. The progression of disciplinary action normally is 1) oral, 2) written, 3) suspension, 4) dismissal. However, this should not be interpreted that this sequence is necessary in all cases, as the degree of discipline will depend on the severity of the offense. Disciplinary actions shall be maintained in effect for twelve (12) months during which time a repetition of the same or a similarly serious offense can result in more serious disciplinary action. In all such cases the employee shall have the right to recourse to the grievance procedure. Disciplinary actions arising out of attendance, including tardiness, absenteeism and not reporting for scheduled shifts or emergency call-ins shall be handled separately from other disciplinary actions.

(NOTE: John Hartz' letter to Michael Thoms categorizing disciplinary actions dated October 10, 1991 to be null and void.)

Section 4. Notice. A suspension or discharge shall be effected in writing by the Employer, with copies delivered to the employee and the Union steward. Employees that are put on suspension will be suspended on their next consecutive scheduled week days. However, an employee may be suspended on weekend days at the Employer's discretion. Grievances protesting a suspension or discharge must be filed within seven (7) days from delivery of the written notice or the right to grieve the same shall be forfeited. Grievances filed as a result of a suspension shall commence at Step 3 of the grievance procedure and grievances filed as a result of a discharge shall commence at Step 4. By mutual agreement of the parties, Step 3 can be waived and the parties can proceed directly to arbitration.

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## ARTICLE 13

### EMPLOYEE RESPONSIBILITIES

Section 1. In General. It is understood that because the nature of the Employer's service is the providing of care for the aged and infirm,

the Employer has a right to expect that employees will be especially sensitive to the many and varied special needs of the Employer's residents and will at all times conduct themselves in a completely patient, courteous and considerate manner, consistent with maintaining the dignity and self-esteem of such

residents. Since the health and general welfare of the residents is and should be the paramount concern of all parties, it is recognized that the standards of behavior towards residents, as established by the Employer, unless shown to be unreasonable by a clear preponderance of the evidence, must be strictly adhered to. Any breach of those standards shall subject an employee to disciplinary action, up to and including discharge.

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Background:

Linda Jensen, hereafter Grievant, was hired in June of 1992 to work as a Certified Nursing Assistant (CNA). On November 30, 1995, the Employer's Director of Human Resources, Fred Poetsch, heard that a CNA had quit her employment because of harassment by another aide. Poetsch repeated what he had heard to Bonnie Ackley, the Administrator of the Clairemont Nursing Facility. Ackley was also approached by the Director of Nursing, who had received a note from Mary Jacobs, the PM supervisor.

Jacobs' note relates an encounter with Howard which occurred on November 29, 1995 at 10:30 p.m. This note states that Howard resigned by slamming down her card and equipment, exclaiming that she was done with this place and that she had never worked with such "cretins who were supposed to be giving care". Jacobs's note also reports that "Billy" had told Jacobs that he had offered Howard help because Howard had been upset at being the only aide on 100 Hall until 4:00 p.m. Jacobs' note indicates that Jacobs understood that Howard was upset about her workload, but that the "crowning blow" seemed to have been an aide "from hell" who told Howard that Howard was not taking proper care of the patients.

On November 30, 1995, Ackley met with Howard. Ackley recalls that Howard said that Howard was not returning to work because she felt intimidated, harassed, and physically afraid. At the time that Howard resigned, she had not completed the ninety day probationary period required of newly hired employees. Howard did not have any prior work experience as a CNA. During the meeting with Howard, Ackley received the following written statement:

I, Jill Howard, was assigned on November 29, 1995, to residents on

100 wing; 109-1, 109-2, 110-1, 110-2, 111-1, 111-2 & 114-1.

One resident required an hour for cares and thus I became slowed down in completing my assignment. My assignment was completed at 9:45 PM. The nurse was aware at 8:00 PM that I was becoming behind in my assignment. Herb Nielsen's cares were given at 6:45 PM to 7:15 PM. Marie's care was completed at 8:15 PM.

Marie was put to bed with an incontinent pad and a blue Chux under her.

At 10:15 PM, I was charting and I was approached by a dark haired, (shoulder length with some grey), dark skinned, brown-eyed, CNA coming on the night shift. This CNA said "Who had the 100 hall tonight?" I said, "I had part of it." The night CNA said "Herb Nielsen?" I said, "Yes". The night CNA said, in a very bitchy and demanding voice, "Come down here with me!" I followed her and when we got into the room, the night CNA pointed to Herb commanding in a condescending voice, "How could you leave this man like this?" This CNA made me feel that she was reprimanding me and demeaning me, all in an attempt to make me feel guilty.

The night CNA stated very angrily to me, "Look! He's practically off the end of the bed!", while pointing to his feet. Then, pointing to his head she said, "He's way too far down in bed! He hasn't been repositioned!" I noted that the resident had one foot of space remaining at the end of the bed and that he was curling into a fetal position, of which his nurse is aware. I had repositioned Herb, including body lift to head of bed, and had 2 pillows to support his head. He was positioned on his right side, per Nurse's Report, with a bath blanket between his legs. A pillow was placed between his knees and the bed rail. The night CNA said, "First we have to boost him up in bed!" She glared at me and said, "This is the way I do it!", when I attempted to correctly move the resident with the lift sheet. The night CNA used only the soaker pad.

The night CNA then turned to Marie and I was feeling angry vibrations. I felt like I should be going to get my Nurse Supervisor. I said, "Does Marie need anything else?" The night CNA went to Marie and whipped the covers back without speaking or introducing herself to Marie and pulled up her nightgown while disgustedly picking up the corner of the blue Chux pad under the resident. The night CNA said to me in a very angry voice, " She wet and I have to

do a full bed change!" As I approached the hall, I lost my temper and said to the night CNA, "I'm sorry, I've had a "hell" of a night, too!"

The night CNA then "stomped" down the hall, coming behind me. She then very condescendingly said to another night CNA approaching us, "Would you help me with A COMPLETE BED CHANGE!?"

This night CNA has made me feel unsafe to work here. She radiates hateful feelings and exudes an expression of authority beyond the scope of the CNA practice.

I have positively identified the CNA who confronted me by photograph.

After concluding that the Grievant was the "night CNA" referred to in Howard's written statement, Ackley asked the Grievant's supervisor to discuss the allegations with the Grievant. Understanding that the Grievant would not discuss the allegations, Ackley concluded that the allegations had not been rebutted. Following discussions with Poetsch and the Director of Nursing, in which it was determined that the alleged conduct was a repeat offense with respect to intimidation, harassment, and resident care issues, Ackley decided to suspend the Grievant and give the Grievant a warning.

On December 1, 1995, the Grievant met with Jacobs and Poetsch. The Grievant was offered, but declined, the opportunity to have Union representation. The Grievant was provided with a copy of Howard's written statement. When asked to respond to Howard's written statement, the Grievant became upset; started to cry; disagreed with Howard's characterization of the incident and stated that she was innocent. Poetsch then issued the following:

FORMAL WRITTEN LAST CHANCE WARNING

<u>LINDA JENSEN</u>	<u>NSG/NOC</u>	<u>DECEMBER 1, 1995</u>
Name	Department/Shift	Date

VIOLATION: CONDUCT/JOB PERFORMANCE

DATE OF VIOLATION: NOVEMBER 29, 1995

EMPLOYER FINDINGS:

On November 29, 1995, you were involved in an altercation with another CNA, Jill Howard. Our investigation into the facts surrounding the incident in question establish that you engaged in conduct that was unprofessional, not in the best interests of the residents, and threatening and intimidating to a fellow employee. Such actions are a violation of Employer policy and will not be tolerated. This is not your first violation of Employer policy concerning these issues. You received a formal written warning, which was upheld in the grievance procedure, for a similar offense on September 21, 1995. As a result of that warning you received a three work day suspension and were told that further actions of this nature would lead to termination.

Conduct such as you exhibited in this incident will not be tolerated in the future. You are directed, as a condition of continued employment, to perform your job duties in a professional and acceptable manner. Should you be involved in any incidents which violate Employer policy, resident safety and care, or harass or intimidate fellow employees, or take any type of retaliatory actions against Jill Howard, or any other employee, past or present, as a result of this disciplinary action, you will be immediately terminated.

CORRECTIVE ACTION TAKEN:

You are suspended for a period of 15 shifts without pay. Should you violate any terms or provision of this **FORMAL LAST CHANCE WARNING** or any other Employer policy you will be discharged immediately.

Thereafter, the Grievant filed a grievance alleging that she was suspended from work for 15 working days without just cause. The grievance requested that the Grievant be made whole for all losses and that the suspension be removed from the Grievant's record.

POSITIONS OF THE PARTIES:

Employer

The Grievant was hired in June of 1992. In July of 1992, the Grievant received a formal warning for poor work and for being rude and arrogant. The Grievant's work performance did not improve and, in September of 1995, she received a written warning and a three-day suspension. The Grievant persisted in her poor work performance and received the 15 working day suspension, which is the subject of this grievance. As the record demonstrates, the 15 working day suspension is reasonable and appropriate.

### Union

Howard's voluntary quit within two weeks of her hire is a common occurrence at the Facility. Despite the acknowledged turnover problem, the excessive number of voluntary quits and Howard's statement detailing a very difficult shift, Ackley chose to suspend Jensen for 15 working days without getting a statement from Jensen or otherwise investigating Jensen's version of events.

When Director of Human Resources Fred Poetsch informed the Grievant of the 15-day suspension on December 1, 1995, the Grievant "disagreed with the whole scenario." The Employer maintained the suspension on hearsay and rumor without considering the Grievant's claim of contrary facts.

The Employer is subject to contract language that prohibits discipline without just cause. While the allegations in this case involve alleged harassment, intimidation and causing another employe to quit, the Employer presents no competent evidence to substantiate these allegations.

The Grievant testified forthrightly and credibly at hearing as to exactly what happened. She put resident care first and simply informed Howard, a brand new CNA, that Howard had not properly cared for the patient. While the Grievant may have been a little upset at the state in which she found the patients, as well as with having to deal with the mess, she took the time to bring the improper procedure to Howard's attention and to show Howard how to provide proper care to the residents. The Grievant's conduct complies with the Employer's contract requirements, as well as with state law.

Under Article 11, Section 3, any discipline rendered against the Grievant prior to December, 1994, is irrelevant and does not support the 15-day suspension. The one incident which is within the Article 11, Section 3, twelve month window period, is immaterial to the instant discipline.

The discipline fails to meet the just cause standard. The arbitrator should sustain the grievance, remove the 15-day suspension from the Grievant's record and make the Grievant whole for all losses sustained.

### DISCUSSION:



The issue presented in this case is whether the Employer had just cause to suspend the Grievant. Inasmuch as this is a disciplinary case, the Employer has the burden of proving that the Grievant engaged in the alleged misconduct.

As set forth in the "Formal Written Last Chance Warning" of December 1, 1995, the Grievant was suspended because the Employer concluded that, on November 29, 1995, the Grievant had an altercation with another CNA, Jill Howard, in which the Grievant engaged "in conduct that was unprofessional, not in the best interests of the residents, and threatening and intimidating to a fellow employee."

The alleged altercation occurred in the presence of two patients, i.e., Mr. and Mrs. N. While it is evident that each of these patients was awake at some point during the alleged altercation, it is not evident that either patient was alert and neither patient testified at hearing.

The Employer relies upon oral and/or written statements of Howard; Mary Jacobs, a nursing supervisor; and Nurse "Billy". Howard, who voluntarily quit her employment following her work shift on November 29, 1995, did not testify at hearing. 1/ Jacobs and Nurse "Billy" were not present during the alleged altercation and neither testified at hearing.

At hearing, the Union vociferously objected to the admission of the Employer's hearsay evidence. However, the fact that evidence is hearsay does not mean that the evidence must be excluded from an arbitration hearing. The weight to be given hearsay evidence is dependent upon its reliability.

The Grievant, who testified at hearing, recalls the following: As the Grievant started her work assignment, she noticed that Mr. N. was lying on the wrong side and was too close to the bottom of the bed; because Mr. N. was a large man, the Grievant could not reposition him without assistance; the Grievant went into the hall to seek assistance; the Grievant saw Howard in the charting room; the Grievant asked Howard if Mr. N. had been her patient; when Howard said yes, the Grievant asked Howard for assistance; Howard and the Grievant went into the patient's room and repositioned Mr. N.; the Grievant asked Howard how Howard could leave Mr. N. so far down; Howard replied that she thought the position was ok; the Grievant told Howard that the Grievant could not leave a patient in that shape; Howard and the Grievant turned Mr. N. to the correct side as dictated by the turning wheel; while Mr. N. was supposed to have a lift sheet on his bed, there was no lift sheet; the Grievant repositioned Mr. N. by pulling on a diaper cloth; Mr. N. barely woke up as he was being turned; the Grievant went to Mrs. N's bed and determined that

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1/ The Employer understands that Howard was in South Dakota at the time of the grievance hearing.

she needed to be repositioned; the Grievant noticed that Mrs. N's bedding, chux, and nightgown were urine soaked; Mrs. N. woke up; the Grievant asked Howard for assistance in redoing the bed; Howard replied that she was late and was supposed to leave because it was the end of her shift; the Grievant told Howard that if she wanted to leave, then the Grievant would try to find someone else; Howard became upset and said "we worked short and I had a hell of a night"; the Grievant left the room and found another aide to help change Mrs. N's bed; and that the Grievant had no further contact with Howard. The Grievant denies that she was threatening, loud, abusive, or intimidating and asserts that she never ordered Howard down the hall and never chastised Howard for improper care.

The written statement of Nurse "Billy", indicates that, at about 10:00 p.m. on November 29, 1995, Nurse Billy answered a call from one of Howard's patients and was asked why the patient had not yet been put to bed; that Nurse "Billy" went to find Howard and observed Howard exiting another patient's room; that Howard looked upset; that Nurse "Billy" asked Howard is she was all right; and that Howard responded "I don't know if its me - maybe its just me - but I think this place schedules too many patients per aide for anyone to do a good job".

The statement of Nurse "Billy" also indicates that early in the shift, at about 3:30 p.m., Howard told Nurse "Billy" that she was all alone on the 100 Hall until 4:00 p.m. and that Howard seemed a bit stressed.

The written statements of Howard, Jacobs, and Nurse "Billy" indicate that, even before Howard encountered the Grievant, Howard was upset over her workload and concerned about her ability to do a good job. This evidence of Howard's distress calls into question Howard's ability to be an objective observer of the Grievant's conduct and suggests that Howard was likely to be unduly sensitive to comments about her patients.

As the Employer argues, on September 21, 1995, the Grievant received a three day suspension on the basis that "The administration has credible evidence, along with corroborating statements from both past and present employes, that Linda has engaged in various forms of physical and/or verbal intimidation, sexual harassment, "name calling", and acts that have eroded the dignity of several residents." The grievance on the suspension was withdrawn on September 22, 1995 and, thus, this discipline, unlike the other disciplines relied upon by the Employer, remains in effect under the twelve month window period for disciplinary actions set forth in Article 11, Section 3, of the collective bargaining agreement. However, the fact that the Grievant has previously engaged in "various forms of physical and/or verbal intimidation, sexual harassment, 'name calling', and acts that have eroded the dignity of several residents", does not provide a reasonable basis to conclude that the Grievant engaged in the alleged misconduct of November 29, 1995.

The Grievant's testimony concerning the events of November 29, 1995 is not internally inconsistent, nor is it inherently incredible. Nor is the Grievant's testimony inconsistent with any prior statements of the Grievant. 2/ As the Union argues, the Grievant's testimony at hearing is credible.

Except as corroborated by the Grievant's testimony, the statements of Howard are unsubstantiated hearsay of questionable reliability. As the Union argues, the Grievant's testimony is entitled to be given more weight than the unsubstantiated hearsay statements of Howard.

Crediting the testimony of the Grievant, the undersigned concludes that the Employer has not proven that the Grievant engaged "in conduct that was unprofessional, not in the best interests

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2/ The Grievant's testimony demonstrates that, on the night of November 30, 1995, two supervisors asked the Grievant to provide a written account of her encounter with Howard; that the Grievant told one supervisor that she was not writing anything because no one would believe her; and that the Grievant did not make any statement concerning the incident until she met with Poetsch and Jacobs, at which time she denied Howard's allegations.

of the residents, and threatening and intimidating to a fellow employee." 3/ Since the Employer has not proven that the Grievant engaged in the alleged misconduct, the Employer does not have just cause to discipline the Grievant.

AWARD

1. Linda Jensen was not suspended for just cause.
2. The Employer is directed to make Linda Jensen whole for all wages and benefits lost as a result of the unjust suspension and to remove all reference to the unjust suspension, including the "Formal Written Last Chance Warning" of December 1, 1995, from Linda Jensen's personnel file.

Dated at Madison, Wisconsin this 22nd day of May, 1997.

By Coleen A. Burns /s/  
Coleen A. Burns, Arbitrator

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3/ The record does not contradict the Grievant's assertion that Mr. N. was not positioned correctly. Thus, the Grievant's comments concerning Mr. N's. positioning may be reasonably construed to be an attempt to discover why Howard had provided care which was contrary to the Grievant's understanding of appropriate care and an affirmation that the Grievant did not have the same understanding. It is not evident that the Grievant engaged in unprofessional conduct by criticizing Howard's patient care while in the presence of a patient. Nor is it evident that the Grievant violated any standard of patient care when she repositioned Mr. N. or assessed Mrs. N's condition.

