BEFORE THE ARBITRATOR

In the Matter of an Arbitration Of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN, INC.,
PINE CREST NURSING HOME EMPLOYES ASSOCIATION LOCAL 902

and

LINCOLN COUNTY
(PINE CREST NURSING HOME)

Case 183
No. 57600
MA-10687

Appearances:

Yakes, Bauer, Kindt & Phillips, S.C., by **Atty. Andrew J. Phillips**, 141 North Sawyer Street, Oshkosh Wisconsin, for the labor organization.

Ruder, Ware & Michler, S.C., by **Atty. Dean R. Dietrich**, 500 Third Street, Wausau Wisconsin, for the municipal employer.

ARBITRATION AWARD

The Labor Association of Wisconsin, Inc., Pine Crest Nursing Home Employes Association Local 902 ("the association") and Lincoln County ("the county") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On June 3, 1999 the association made a request, in which the county concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Merrill, Wisconsin on September 8, 1999, with a stenographic transcript being available to the parties by September 17. The parties filed written arguments and reply briefs, with the record closing on November 1, 1999.

ISSUE

The parties stipulated to the following issue:

Did the employer have just cause to terminate the Grievant, John North, for playing tic-tac-toe with an ink pen on the arm of a resident in the Special Care Unit on April 13, 1999? If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

Article II - Management Rights

2.1: The management of Lincoln County and the direction of the work force is vested exclusively in the Employer, to be exercised through the department head, including, but not limited to, the right to hire, promote, demote, suspend, discipline and discharge for just cause; the right to decide job qualifications for hiring; the right to transfer or layoff because of lack of work or other legitimate reasons; to subcontract for economic reasons; to determine any type, kind and quality of service to be rendered to patients and citizenry; to determine the location, operation and type of physical structures, facilities or equipment of the departments, to plan and schedule service and work; to plan and schedule any training programs; to create, promulgate and enforce reasonable work rules; to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogatives of the Employer to operate and manage its affairs in all respects. These rights shall not be exercised in an unreasonable or arbitrary fashion. Nothing herein contained shall divest the Association or its bargaining unit members of any rights existing under Wisconsin's Municipal Employment Relations Act or other State or Federal Law.

OTHER RELEVANT PROVISIONS

PINE CREST NURSING HOME POLICY HANDBOOK
ABUSE, NEGLECT, ILL TREATMENT OF RESIDENT

Any person in charge of or employed in a nursing home who abuses, neglects, or ill treats a resident of any such facility or who knowingly permits another person to do so is guilty of a Class E Felony. Section 940.26, Wisconsin State Statutes.

It is the policy of Pine Crest to expect that all employees uphold the facility's objectives of protecting the rights of the residents and to act appropriately when caring for residents in any capacity in accordance with HSS 129, HSS 132.31 (k) -and Federal Regulations 483.13(b)(c); F Tag 223.

Abuse means any single or repeated act of force, violence, harassment, deprivation, neglect or mental pressure that could cause physical pain or injury, or mental anguish or fear and misappropriation of resident's funds and/or property. Examples of abuse include but are not limited to: hitting, pinching, grabbing, handling roughly, using restraints improperly, not meeting physical needs, not washing or bathing a resident or not providing the physical care required or requested by a Supervisor, any incident of sexual abuse, intimidation or harassment, name calling, shouting or swearing at a resident, refusing to speak to a resident, threatening a resident with retaliation, deprivation or isolation, denying participation in allowed recreational activities or socialization within or outside the nursing home or by refusing to assist a resident to attend recreational or social activities, not allowing or providing privacy of person or disclosing confidential information about a resident.

Pine Crest acknowledges that the above definition of resident abuse may differ from that described in by HSS 129 & HSS 132. Pine Crest Nursing Home's interpretation of what constitutes resident abuse and any resultant disciplinary measures will be based on our own policy.

Any allegations of -resident abuse.-will be investigated according to established policy and reported to the Division of Health as prescribed by law. Substantiated allegations of resident abuse may affect an individual's professional license and/or Registry Status and employment at Pine Crest Nursing Home.

DISCIPLINE

Whenever and wherever people work together, certain standards of reasonable conduct need to be established in order to maintain an orderly and efficient work atmosphere and to insure that residents and staff have a clean, safe and pleasant environment. Pine Crest wants to take measures that are designed to correct a problem the employee has and to make the employee aware of the importance of

adhering to our policies and procedures. In some cases, it may be necessary to dismiss an employee because of the seriousness or continuation of unacceptable conduct.

Records of disciplinary actions are kept in the employee's personnel file and remain as part of the permanent record, but will not remain in effect for more than two (2) years, unless the conduct giving rise to the reprimand or substantially similar conduct is repeated within the two (2) year period.

The following types of conduct are unacceptable in our work place. This will serve as a guideline, but is not intended to be a complete listing.

1 . Theft of employer, employee or resident property.
2. Falsifying records or information.
3. Refusal to follow the direct order of a supervisor or management.
4 Fighting, threats, intimidation or harassment of employees or residents.
5. Excessive absenteeism or tardiness.
6. Leaving the job without permission.
7. Excessive time at break periods.
8 Disclosing confidential information
9. Sleeping on the job.
10. Failure to report injury or accident immediately
11. Violation of safety rules.
12. Substandard quality and quantity of work.
13. Engaging in conduct which creates an unsafe work environment.
14. Violation of resident rights.
15. Resident Abuse.

Pine Crest's corrective action program is designed to encourage individuals to become satisfactory employees rather than punish them. Corrective action may take the form of 1) oral warning; 2) written warning; 3) suspension and/or termination.

Based on the severity of the incident, as determined by management, the oral warning and/or written warning may be bypassed and the employee may be suspended or terminated. Pine Crest reserves the right to add to, modify or eliminate any rule when circumstances require a change.

In the case of a discharge of an employee for disciplinary reasons, a copy of the disciplinary notice or a letter notifying the employee of the discharge will be mailed or presented to the employee. The original copy will be filed in the employee's personnel file.

BACKGROUND

Pine Crest Nursing Home is a residential nursing home facility which Lincoln County operates in Merrill, Wisconsin. The grievant, John North, was a maintenance employe at the facility for approximately seven and one-half years before he was terminated on April 16, 1999 for playing tic-tac-toe with an ink pen on the arm of Resident X, a 62-year-old woman suffering from Alzheimer-type dementia. This grievance is to determine whether that termination was proper under the provisions of the collective bargaining agreement requiring just cause for discipline.

North's job duties include general maintenance responsibilities, and do not include any patient care. While his personnel file includes indications his supervisors felt he could work harder and with greater focus, his work record shows no formal discipline prior to this incident.

As a new employe in 1992, North received a new employe orientation on the Resident's Bill of Rights. He also attended inservice training sessions annually except for 1997, including a 1994 inservice on treating residents with respect and dignity. In 1998, he received a copy of the facility's Employe Handbook Policy and an updated copy of the Resident's Bill of Rights and Responsibilities.

Tim Meehean has served as the Pine Crest administrator, with overall responsibility for the operation of the facility, for approximately ten years. Meehean's academic background is in accounting, and he has no formal training in health care diagnosis or treatment. Meehean and North were formerly neighbors, and it was at Meehean's suggestion that North applied for a position with the facility.

Since coming to Pine Crest in early 1998, Resident X has been a resident of the Special Care Unit, a locked and alarmed twenty-bed unit for residents who have behavioral issues, are wanderers who need special attention, residents who otherwise cannot deal in large environments, or residents who otherwise need more personalized care. Resident X can identify who she is, but not necessarily where she is or other details of her surroundings and life situation. She can identify family members, but her ability to identify facility personnel varies. She frequently interacts in a trusting and familiar way with males, whether they are in fact known to her or not. She sometimes believes she is a member of the facility staff.

On September 17, 1998, consulting physician Dr. Charles A. Garvey submitted the following evaluation of Resident X:

> At the end of my day here at Pine Crest, I had the opportunity to meet with (Resident X) for a brief consultation. She is a 62-year-old woman admitted to Pine Crest several months ago essentially due to inability to care for herself. She was known to be suffering from an Alzheimer's - type dementia, and actually came from a group home or CBRF in Michigan. According to a note from her physician there, she was suffering from an associated "mood disorder", though there are no specifies. She was admitted on Depakote 1500 mg daily and Paxil 30 mg daily. She saw Dr. Spurgeon in consultation last spring, was diagnosed with muscle contraction headaches, and was started on Nortriptyline, with follow up visits and increasing doses. In early August, the dosage of Nortriptyline was increased to 60 mg. By mid August (Resident X) was showing increasing odd and inappropriate behaviors, and the Nortriptyline was reduced again to 40 mg daily.
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> Over the course of the past month, this patient has had increasing activity during the day, often walking around between patients, as if she is waiting on them, and becoming quite irritated with redirection. She has been much more talkative with nursing staff. When she was on the higher doses of Nortriptyline, she was noted to be somewhat sedated during the day, but has shown no signs of sedation for the past month. Nursing staff are aware that she is talking much more “nonsensical" and have documented that change on the behavioral frequency chartings over this time very clearly. She continues to sleep fairly well at night.
>
> Additionally, she has a history of seizures, and has taken different kinds of anticonvulsant medications over the course of her life.
>
> MENTAL STATUS. (Resident X) is hyper-alert, chatty, and even pressured in her speech. She makes five or six different remarks before we sit down to talk. She wonders if I am from the insurance company, tells me about her seizures, talks to me about some of the other residents, and gives me bits and pieces of her life story all in fragments before I ask a question. She is absolutely unconcerned about any part of her health, from headaches to mood to seizures. At times, she seems to believe that she is part of the staff, and refers to some of the other nurses as if they are peers- at other times, she seems aware that she is a resident here. Flight of ideas is prominent. No hallucinations. Affect is very pleasant, perhaps even euphoric. I did not see evidence of irritability, but that it clearly documented in the nursing notes over the past two weeks especially on

redirection. Judgment impaired by her manic-like inflation of purpose and duty; insight into any previous history for same or similar condition is poor. Memory is poor, as she guesses that she has lived here for four or five years; she has quick responses to trivia-like answers.

DIAGNOSIS: Manic Episode; Alzheimer's - Type Dementia - presenile- mild to moderate

TREATMENT PLAN:

1. It seems most likely that the increasing doses of the Nortriptyline have triggered this type of manic episode. Accordingly, I have decided to discontinue the Nortriptyline.

2. Additionally, there are certainly no evidences of depression since she has been at Pine Crest; I will taper the Paxil and discontinue that medication over the course of the next two to three weeks.

3 . You have ordered Depakote levels monthly and we should be able to see whether the Depakote alone will provide mood stability at therapeutic blood levels; if not, additional mood stabilizing medication in the form of lithium or Carbamazepine will be added.

4. If she begins to have significant headaches without the Nortriptyline, perhaps we can consider alternative approaches to tricyclic anti-depressants between yourself and Dr. Spurgeon.

5. I have left word with the staff to call me if she begins to show any signs of depression without her anti-depressants; I frankly doubt we will see that, but it is possible.

I will check back within the next month, and am available sooner if there is urgent need. Thanks for the opportunity to see this most interesting phenomenon.

At about three o'clock in the afternoon on April 13, 1999, North was in the Special Care Unit working on a repair project when he noticed Resident X sitting by herself at a table. There were no other residents or facility personnel in the room. North had previously had friendly interactions with Resident X, whom he knew to be suffering from Alzheimer's

disease. North had on occasion visited with Resident X when he would come to the facility on Saturdays to visit his grandmother, who was also a resident of the facility. North has visited with Resident X on such occasions since his discharge.

After conversing with her, North asked if she wanted to play a game of tic-tac-toe, to which she assented. Finding no paper readily available, North drew a grid of about one inch square, in ink, on her right arm. A similar grid was drawn on North's arm. Soon realizing that Resident X did not comprehend the game, he abandoned the effort and resumed his duties.

The following morning, the nursing supervisor, Mary Stevenson, noticed the ink markings on Resident X, and inquired of her how they came to be there. Resident X did not know. Stevenson reported the matter to the Special Care Coordinator, Carla McDonald, who was at home on her day off. The next day, McDonald and a staff nurse again noted the markings, and McDonald reported the incident to Bev Busha, the facility's Director of Social Services. It was another staff member who first suggested to supervisory staff that it was North who had placed the markings on Resident X's arm.

Cathy Neumeier, the facility's Director of Nurses, subsequently instructed staff to continue their attempt at removing the markings without irritating X's skin. She also contacted Meehean, who contacted North via an announcement on the facility's public address system. Speaking to him on the closed telephone system, Meehean told North he was being investigated for patient abuse, and directed him to report for an investigative interview in the conference room. At that interview, North acknowledged to Meehean, Busha and Neumeir that he had placed the markings.

Subsequent to that meeting, North contacted Witness H, Resident X's half-sister and the holder of her power of attorney. Witness H knows North because she had served as guardian ad litem for his children when he got divorced several years before this incident. Based on her conversations with Resident X, Witness H believes that Resident X regards North as her friend, although she may or may not know his name. At hearing, Witness H could not recall if she had ever witnessed Resident X and North together. Witness H has no professional experience or expertise evaluating the conduct of nursing home employes.

At the time that North spoke to Witness H, no one from the facility had contacted her.

As North explained the incident to her, Witness H did not find the matter unsettling or demeaning to Resident X. After her conversation with North, H contacted Meehean, because she had not heard from the facility concerning the matter. In her conversation with Meehean, she did not tell him that she found North's conduct to be inappropriate or otherwise demeaning to Resident X. At the time of his conversation with Witness H, Meehean had not yet made his decision to terminate North.

Meehean reported the incident to the northern regional office of the state regulators, the Bureau of Quality Assurance. That agency, whose jurisdiction is generally limited to allegations of caregiver misconduct, took no formal action to further investigate the matter. The BQA did not interview North, and did not provide the facility with any written response or determination in this matter.

Meehean did not interview resident X about the incident.

On April 16, 1999, following further discussions with senior staff, Meehean issued to North a disciplinary notice terminating his employment. In the section on the notice for the nature of the offense, Meehean checked the box marked "other," explaining "Inappropriate behavior with a resident." Meehean did not check the boxes marked "Resident Abuse:verbal/physical," "Violation of work rule," or "Poor performance." In the section on Statement of facts, Meehean wrote as follows:

> On Tuesday April 13, 1999, John North, with an ink pen, played tic-tac-toe on the arm of (Resident X). (Resident X) is a resident of Pine Crest who has dementia and does not understand the nature of the above actions. Such behavior is demeaning to the resident and shows a total disregard for the resident's dignity.

Following a timely grievance filed on April 20, Meehean denied the grievance on April 22 as follows:

> Mr. North readily admits that he wrote in ink and played tic-tac-toe on the arm of the resident/ There also is no dispute regarding the mental capacity of the resident involved. It is my conclusion that Mr. North's actions and behavior were totally inappropriate. The termination of Mr. North's employment, was (and is) the appropriate response to such actions and behavior.

The association thereafter requested arbitration, in which request the employer concurred.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

The grievant's conduct did not violate any work rule or policy, even though the act was inappropriate. The disciplinary notice which the employer provided to the grievant should stand for the employer's intent at the time of discipline; based on management's failure to indicate any of the expected subject areas, and the lack of added explanatory testimony, all the behavioral areas that were not marked off should be disregarded.

The sole basis for the decision to terminate was the administrator's personal and subjective opinion that the grievant's conduct was inappropriate. The administrator has totally downplayed if not disregarded the context in which the activity occurred, the grievant's clean record, and the fact that no specific policy or in-service meeting could be pointed to forewarn the grievant that his conduct was inappropriate.

Pine Crest management is fully aware that special relationships frequently occur between staff and residents, yet it has failed to craft any policy or rule which addresses these relationships. Without that specific policy, given that the grievant's actual conduct cannot be deemed serious in nature, it is simply unreasonable to believe the grievant should have known he was going to be disciplined for his conduct.

Although the grievant really did nothing to warrant any discipline at all, if any punishment is to be meted out, it should be limited to an oral or written warning, at most. The administrator overreacted to what amount to a fairly trivial incident, and intentionally disregarded the grievant's 7.5 years of unblemished work history when summarily terminating him for a single incident not governed by any work rule at the facility.

The employer's disciplinary action was clearly arbitrary, capricious and/or unreasonable, so that the arbitrator must substitute his judgment to eliminate the draconian penalty of termination.

It is undisputed that there was no work rule in place that governed the conduct in which the grievant was engaged, and that the grievant was never previously warned (in any formal disciplinary situation) about such conduct. There is no possible way that an employe could anticipate being discharged for "goofing off" with one of the residents.

This was a very minimal incident which was blown out of proportion by the administrator; even the resident's own family members had no concern regarding the incident or thought it was remotely close to being serious.

Further, the employer's rules are not reasonably related to its own business efficiency and the performance it might expect from its employes.

The employer did not obtain substantial evidence of the grievant's guilt prior to issuing its discipline. The evidence of guilt should be limited to that obtained by the employer at the time the disciplinary action was taken, and not include evidence obtained afterwards.

Clearly, the degree of discipline was not reasonably related to the seriousness of the grievant's offense and past work record. The administrator clearly overreacted to the situation; his knee-jerk response was to discharge the grievant even though he did not violate any work rule or policy, did not engage in resident abuse or violate any of the resident's rights. The administrator's decision was based solely on his own personal opinion that the grievant treated the resident in an undignified and demeaning manner. At most, it was a trivial offense, and in no way should the grievant have been terminated for this activity.

The employer has not met its burden of proof that the grievant committed any wrong-doing, and has not submitted convincing evidence that the type of penalty assessed was reasonable in light of all the facts and circumstances. The employer's actions were clearly arbitrary, unreasonable and capricious. Accordingly, the grievant should be restored to his position with full back pay and seniority, and, at most, a written warning.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The arbitrator must take judicial notice of the legal responsibilities under which the grievant's employment occurs, including the nursing home's legal obligation to care for its clients. Wisconsin Statutes grant nursing home residents a private cause of action for acts which impair the resident's health, safety, personal care, rights or welfare. Also, residents have the right, under administrative code, to be treated with courtesy, respect, and full recognition of their dignity and individuality. By playing tic-tac-toe on Resident X's forearm, the grievant violated this administrative code. Also, Resident X and her family could being a private cause of action against the nursing home for violations of Resident X's personal rights. The lack of dignity and respect for another human being, especially one as vulnerable as Resident X, violates law and regulations and should not be tolerated..

The grievant's discharge was in accord with the provisions of the labor agreement. First, the grievant readily admitted the conduct, namely playing tic-tac-toe with an ink pen on Resident X's arm. Next, the grievant was well oriented and instructed in proper treatment of residents, in that he received orientation on the Resident's Bill of Rights, had received a copy of the employe handbook policy which clearly addresses discipline, and had attended numerous Resident Rights inservice training programs. The evidence shows that the grievant had an adequate training on the proper treatment of residents, and had proper forewarning of the possible consequences of his actions should he treat a resident in an unacceptable manner. To deny that playing tic-tac-toe on another human being's arm does not show lack of dignity and respect for others is absurd.

An examination of arbitral law and the record clearly demonstrates that the grievant's discharge was appropriate under the circumstances. The sole issue here is whether the punishment fits the crime; a review of the facts of this dispute unequivocally demonstrates that no violation of the collective bargaining agreement occurred. Under accepted arbitral law, "just cause" simply means that an employer, acting in good faith, has a fair reason for disciplining an employe which reason is supported by the evidence. Misconduct and inappropriate behavior which is directly connected with an employer's work, represents willfull disregard of the employer's interest, and is inconsistent with an employe's obligations to the employer, constitute "just cause" for discharge. Disrespectful treatment of nursing home residents is grounds for discipline or discharge and constitutes "just cause."

The grievant's conduct is so grossly inappropriate in a nursing care facility that he should not be permitted to continue employment in this environment. It is well recognized by arbitral law that an employe has a heightened duty of care in dealing with dependent people and that improper treatment of any kind simply will not be tolerated and may ultimately lead to discharge. The lack of thought process and common sense that the grievant showed by playing something so insignificant as tic-tac-toe on another person's arm dictates that the grievant does not belong in an environment where vulnerable, dependent people may easily be taken advantage of. Further, that the grievant was playing a game with a resident rather than performing his maintenance duties reiterates the performance concerns the employer has had with the grievant in the past such as the fact that prior performance evaluations have addressed the grievant's performing only enough work to get by.

The grievant was well aware that Resident X suffered from Alzherimer's-type dementia but showed seriously flawed judgment when attempting to play tic-tac-toe on her arm. There is no room for leeway for such a lack of common sense when considering employment in a nursing care facility. Thus, the employer clearly had "just cause" to discharge the grievant and the decision to discharge is the only appropriate decision under the circumstance. Given the duties and obligations of a nursing home and the care and treatment of its residents and the condition of the resident involved in this case, the only conclusion can be that this employe must be discharged for his behavior. The size of the tic-tac-toe board is not the issue; the only issue is the complete disregard for the dignity of the resident and the deliberate action by the grievant to write on her arm when she could not give any knowing permission to do so. Any continued employment of the grievant sends the absolute wrong message for an employer that must, both by law and by human compassion, place the protection and the dignity of the resident of foremost importance under any circumstance.

It is impossible to specify all forms of unacceptable standards of conduct in an employe handbook, collective bargaining agreement or resident's rights. Some conduct is so clearly absurd to the workplace that a reasonable employe would recognize it as prohibited; the grievant's conduct was so far beyond the bounds of acceptable conduct that there is no reasonable argument to be made to the contrary.

The arbitrator must defer to the employer's determination as to the proper penalty to be imposed for the grievant's inappropriate behavior. Under arbitral law, an arbitrator should not substitute his discretion for that vested with the employer to determine the proper penalty to be imposed for an employe's inappropriate behavior and misconduct, but rather must be limited to the factual determination of whether the employer committed the charged acts and whether good cause existed. In this matter, the grievant admitted to drawing on Resident X's arm and essentially admitted to the existence of just cause.

The evidence clearly establishes that the employer did not act in an unreasonable, arbitrary or capricious manner, and was justified in its decision to terminate the grievant. The safety of the facility's residents is at stake as well as the reputation and licensure of the facility if the employer allows an employe with this type of nonsensible behavior to continue employment in an environment of a wholly vulnerable and dependent population.

The employer gave the grievant forewarning of the possible or probable consequences of the grievant's inappropriate conduct by way of yearly training on resident rights and more specifically treating them with dignity and respect. The employer's decision to terminate the grievant was precipitated by its concern and responsibility for its residents. The employer conducted a fair and objective investigation of this matter; more importantly, the grievant admitted to the conduct. The mere admission of this inappropriate behavior by the grievant should lead to the termination being sustained. The grievant showed such a lack of dignity and respect for another human being that his employment in a nursing care facility with fully dependent residents must not continue.

Accordingly, the grievance should be denied and the discharge sustained.

In reply, the association responds as follows:

The county errs in citing the Wisconsin Administrative Code pertaining to resident treatment, in that it failed to cite this issue as a basis for the grievant's termination. As this is the first time in these proceedings that the county has mentioned this issue, it should be disregarded in light of the lateness in which it was raised. The county has also failed to provide any explanation of how the grievant's actions violated any statutory or code provision, and has clearly failed to meet its burden in this regard.

The county errs in arguing that the grievant had prior notice that his conduct was improper as a result of the provisions of the policy handbook, the Resident's Bill of Rights and previous in-service training. But again, Pine Crest failed to state at the time of discipline that the grievant had violated any established policy. Also, the employer has not cited any particular piece of information provided to the grievant which would have alerted him to the fact that he could be disciplined for engaging in any type of voluntary activity with a resident. The employer's argument is filled with generalities and conclusions, like a sandwich without meat. It is the employer's obligation to prove its case, not the grievant's responsibility to demonstrate why just cause did not exist.

Given the relationship that existed between the grievant and Resident X, and the light-hearted nature in which the activity occurred, the Association is at a loss to determine how this arises to the level of disciplinary action.

The county also errs in asserting that arbitral law and the record support the decision to terminate. The county's argument would make discharge decisions unreviewable; but contrary to the county's assertion, just because management makes a decision in good faith or with fair reason does not establish just cause. Just cause really means a standard arbitrators use to determine whether a decision to discipline is fair, just and reasonable in light of all the facts and circumstances. The decision here fails to meet that standard.

Further, the county's argument that the discharge was appropriate despite the lack of any specific rule prohibiting the conduct the grievant committed is inconsistent with its stated position, and is both absurd and misleading. Moreover, the cases the county cites are not supportive of its position.

Like the emperor with no clothes, the county's arguments are bare and unsupported by facts or common sense; the decision to terminate the grievant for this trivial incident was, plain and simple, arbitrary and capricious. It is obvious the county is doing whatever it can now to justify what it knows to be Pine Crest's poor management decision.

The county errs in arguing that the arbitrator should take a "hands off" approach and simply review the facts and determine whether just cause existed for the grievant's termination. But arbitral authority clearly establishes that the arbitrator should not act in this limited role, but should modify an excessive penalty if warranted by the record.

The discharge of the grievant was clearly unreasonable, excessive, arbitrary and plain unfair. It is necessary for the arbitrator to overturn the imposed discipline, and reinstate the grievant to his former position with complete back pay, seniority rights and benefits.

In its reply, the county responds further as follows:

The association errs in stating there was no dispute at hearing over the grievant's work record, when in fact the record establishes that the grievant has had in the past, and continued to have performance problems at work, which he acknowledged. There is record evidence of poor work performance, and the grievant's evaluations addressed concerns regarding tardiness, absenteeism, and the lack of work performed. The association's contention that the grievant's work record was clean is contrary to the evidence.

The association also overlooks the chronological evidence, which shows that the staff attempted to remove the tic-tac-toe grid from the resident's arm the same day the marking was discovered. By attempting to portray the staff as completely ignoring the marking for 24 hours, the association has again presented skewed facts that are completely unfounded.

The decision to terminate the grievant was based on a fair investigation of the facts. The association does not dispute that the administrator conducted a fair and objective investigation, yet they now allege that the termination was based solely on the administrator's "personal opinion." They ignore that the administrator gathered all the facts and consulted with two long-term professional care givers with a combined 38 years of nursing care experience. The testimony further substantiates that the decision to terminate was made after consultation with staff and the resident's family members.

The association errs in alleging that the employer has attempted to "undermine" Resident X's mental capabilities. The mere facts that she is in the Special Care Unit, and has no recollection of this incident, is an obvious indication of her capabilities. The testimony of the daily care providers further establishes that the employer is not exaggerating her infirmities.

The association errs in ignoring the unwritten rule that calls for the use of common sense, and ignores the fact that the grievant received annual training on resident rights, specifically including training on treating residents with respect and dignity. The association also fails to recognize that the Employe Handbook Policy provides that anyone who violates a resident's rights is subject to discipline including termination. By denying the significance of the grievant's conduct simply because there is no specific rule that states that an employe may not write on a resident with an ink pen, the association's rationale reaches a point of absurdity.

The association also errs in claiming a so-called "special relationship" between the grievant and the resident made this behavior acceptable. Having a special relationship does not give an employe extra rights or privileges; and if the grievant had the relationship he claims, surely he should have recognized that the resident was not always able to comprehend things. Regardless of the excused the association makes for the grievant, his lack of basic judgment skills are not tolerable or excusable under any circumstances in a nursing care facility.

The association has not produced any evidence to support its harsh allegation that the employer acted in an arbitrary and capricious manner toward the grievant. The association argument indicates that the rules and guidelines of the genuine concept of care and dignity and respect that the facility promises to its residents means nothing. It is apparent and unfortunate that the grievant and the association do not consider the act of writing on an elderly lady who suffers from dementia a violation of her personal rights and dignity and respect. The association is merely grasping at straws to excuse the grievant's conduct.

The association's accusation that the administrator did not conduct a proper and complete investigation is just another feeble attempt to discredit the decision to terminate the grievant.

The association also errs in claiming that the administrator should have used corrective discipline; how can you correctively discipline an employe who lacks basic common sense skills and compassion for another person – namely an elderly, vulnerable person who suffers from a sad disease.

A nursing care facility cannot chance or tolerate such foolish behavior from an employe and the employer's decision to terminate is the only suitable response to such unacceptable behavior. Absent any real evidence that the employer has acted in an unreasonable, arbitrary or capricious manner, the arbitrator should not substitute his judgment for the employer's.

The association's attempts to discredit the facts and the employer's investigation are unsupported by the evidence. The grievant had proper training and documentation notifying him of appropriate treatment of residents and the consequences of violating a resident's rights. The grievant showed extremely poor judgment and continues to fail to recognize the significance of his actions. It is the facility's job to care for and protect this vulnerable population and they must be treated with dignity and respect. To expect less than that from staff is destructive to the facility's mission.

The employer had just cause to discharge the grievant and the grievance must therefore be dismissed.

DISCUSSION

There is no question that under any definition of just cause, the employer is entitled to impose discipline on the grievant for his actions of April 13, 1999. The only question is whether termination was too extreme, such that its imposition put the discipline beyond the scope of just cause.

The association seeks to have me evaluate the discipline measured against the so-called "seven factors" as enunciated by arbitrator Carroll Daugherty in Enterprise Wire Co., 46 LA 359 (1966). However, for reasons persuasively presented by John Dunsford in *Arbitral Decisions: The Tests of Just Cause*, in Arbitration 1989, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1990), I have serious concerns over artificially rigid adherence to Daugherty's technical and procedural requirements.

As I evaluate this matter, there are three elements to address. First, did the grievant commit the act as charged? If so, did the employer put the grievant on notice that the act was improper and its commission could lead to discipline. Finally, the paramount issue – was the degree of discipline imposed reasonably related to the seriousness of the grievant's conduct?

The first answer is easy -- the grievant committed the act as charged.

In its broadest terms, the second answer is also quickly evident -- the grievant knew, or reasonably should have known, that this act was improper and subjected him to discipline. The grievant was aware of that Resident X suffered from Alzheimer's-type dementia, and that she was appropriately housed in a locked unit that required special clearance to enter and exit. The employer had provided detailed and comprehensive in-service training activities which specifically address such issues as the condition of those in the special cares unit, and the importance of treating all residents with dignity and respect. The grievant had attended several of these trainings, and is held to understand their import. The employer promulgated a handbook that includes an implied concept of progressive discipline, but authorizing immediate suspension or termination for especially severe incidents. That is, the grievant was put on notice that certain conduct could result in discipline up to and including discharge.

Certainly, the association is correct that the facility did not publish a work rule which explicitly stated "maintenance employes must refrain from drawing an ink tic-tac-toe grid on the arms of elderly Alzheimer's patients." This, however, is not a valid defense. The sensitive skin of an elderly woman is not a writing tablet, and to use it for that purpose may lead to irritation, discomfort, and possibly infection. It was wrong for North to draw an ink tic-tac-toe grid on the arm of Resident X.

It is the remaining question which is the most difficult – whether the employer's decision to terminate North was too severe, such as to take the discipline beyond the bounds of just cause.

The testimony of Witness H is key in evaluating the employer's action. As the closest family member, she would be expected to have personal concern for Resident X's well-being. As the holder of power of attorney, her statements have legal consequence. Despite her importance in assessing the proper level of discipline, Meehean did not contact her; they only spoke at Witness H's initiative, calling for further information after the grievant's call to her.

Meehean told the grievant that, as part of his decision-making process he had discussed the incident with the resident's family. The only such conversation in the record is with Witness H. The testimony as to that conversation directly refutes the employer's claim of just cause. Witness H indicated that the incident did not give her great concern, and further said nothing about the incident being demeaning to Resident X. As a family member with power of attorney, Witness H's observations and comments must be given great weight in evaluating the employer's claim that the grievant's behavior was "demeaning to the resident and shows a total disregard for the resident's dignity."

The association is improperly dismissive of the seriousness of the grievant's conduct, lightly dismissing the offense as "trivial." It isn't, and the grievant knows it. It is absurd for the association to assert that North's conduct "cannot be deemed serious in nature," and to claim that it is "simply unreasonable to believe" that North should have known he was going to be disciplined for his conduct. Contrary to the association's legal arguments, the grievant's demeanor and testimony at hearing evidenced a strong sense of regret, and, I believe, repentance.

The county at hearing and in its brief tries to make the case that the grievant's overall work record is inferior, and that this level of performance is relevant to the determination of just cause for the discharge. This argument is misplaced, however, given Meehean's testimony that he did not review North's work record until after the fact, and that it was not part of his decision to terminate him.

The record establishes that the grievant had been employed at the facility for about seven years; that he had never received any oral or written discipline, and that his supervisors had issued evaluations which raised concerns over such issues as tardiness, absenteeism and zeal for work.

As the county asserts, the very fact that this incident happened during work hours supports an attitude that the grievant was at times lax in his focus on work. He was in the special cares unit to perform maintenance tasks; he was not there to create an interaction with a resident. He was neither trained nor authorized to engage a resident on the special cares unit in unstructured play time. I am sympathetic to his motivation – he encountered a sick old woman who, as he described it, was "just hopelessly sitting there bored," and he tried to amuse her for a few minutes. But in so doing, he disregarded his proper duties and acted well beyond the scope of his authority and training.

I cannot fault the employer for its aggressive attempts to protect the health and welfare of its residents; persons with mental disease or defect, living in the locked special care unit, are among society's most vulnerable, and it should be of comfort to the citizenry that the county has placed such a high premium on protecting the Pine Crest residents.

By its summary discharge of the grievant, the county has shown it would rather be safe than sorry. But in so doing, the county has improperly disregarded the provisions of the collective bargaining agreement which protect the Pine Crest employes.

The employer fired the grievant for "inappropriate behavior with a resident," which behavior was "demeaning to the resident and shows a total disregard for the resident's dignity." The specific nature of the incident, however, calls into question such a conclusory attitude.

Webster's Third New International Dictionary (1993) defines "demean," as "to lower in status, condition, reputation or character; degrade, debase." Without getting unduly philosophical as to the nature of experience or perception, it seems to me an event can meet that definition only if there is a witness, or an act was done against someone's will, or the act was so odious that someone could not sensibly consent to it being done to them.

The day room was empty at the time of the incident, so there was nobody around to see what transpired. Had there been other residents or employes present to see North draw a tic-tac-toe grid on Resident X, the act might thus have become public in such a way as to have the result the employer charged. But that is not what happened.

Even though X and the grievant were the only two persons aware of the incident, the act could still be demeaning to X if it were done against her will. Clearly, X was incapable of giving the degree of informed consent necessary for a significant medical procedure or to participate in legal proceedings. But the evidence does not establish that she was so unaware of her surroundings that she did understand and allow North to draw the tic-tac-toe grid on her arm.

Finally, there is the fact that a similar grid was drawn on North's arm. Although he could not remember at hearing who drew it, this also lessens the impact. If Resident X drew the second grid, it would show her to be an active participant in the event, treating North the same as he treated her. If North drew the grid on himself, it would show that he visited upon himself the same supposed indignity that he wrought on Resident X. Either way, it supports a conclusion that the incident was not especially demeaning or disrespectful to Resident X.

It does not, however, completely refute the employer's basic contention, namely that this was wrongful conduct. To say it was not so severe as to justify immediate termination is not to say it was proper, appropriate, or even acceptable. It wasn't.

By drawing an ink tic-tac-toe grid on Resident X's arm on April 13, 1999, John North violated his responsibility to treat all residents at Pine Crest "considerately and with respect."

However, in light of North's employment history, the specifics of the event, and the sworn statements of Witness H, the employer's immediate and summary discharge of North was unreasonable, such that it was done without just cause.

The determination that the discharge was without just cause, however, does not end the inquiry. As stated by Arbitrator Harry H. Platt, "most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe under all the circumstances of the situation." Platt, *The Arbitration Process in the Settlement of Labor Disputes,* 31 J. Am. Jud. Society 54, 58 (1947), cited with approval in *How Arbitration Works Fifth Edition* (BNA Books 1997, p. 913), wherein it is stated that "the fact that most arbitrators do modify penalties found to be excessive, evidences their general belief that authority exists."

Having found that the discharge was without just cause because it was excessive, I believe I have the inherent authority to modify the penalty to one in keeping with the severity of the event and the surrounding circumstances.

A 62-year-old woman suffering from Alzheimer's-type dementia, residing in a locked unit of a nursing home, should be accorded a heightened degree of care and concern. Moreover, for reasons of health and safety, her skin is not to be used as a writing tablet.

The grievant's act was not so offensive and demeaning to justify his immediate termination. However, it was serious enough to justify a disciplinary suspension.

I believe a disciplinary suspension of three days constitutes a level of discipline consistent with my understanding of just cause.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained in part and denied in part, such that the grievant's discharge is modified to an unpaid disciplinary suspension of three days. The employer shall amend the grievant's personnel file accordingly and make the grievant whole as to wages and benefits, offset by income the grievant earned between April 16 and the date of reinstatement. I

shall retain jurisdiction in the event the parties are unable to agree on the specific application of this remedy, such jurisdiction to lapse on February 15, 2000, unless prior to that time either party requests my further participation in a supplemental proceeding.

Dated at Madison, Wisconsin this 16th day of December, 1999.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

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