BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY HEALTH CARE CENTERS EMPLOYEES, LOCAL 2427 OF THE AMERICAN FEDERATION OF COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

PERSONNEL COMMITTEE OF THE SHEBOYGAN COUNTY BOARD OF SUPERVISORS

Case 342
No. 61369
MA-11905

Appearances:

Ms. Helen M. Isferding, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of Sheboygan County Health Care Centers Employees, Local 2427 of the American Federation of County and Municipal Employees, AFL-CIO, referred to below as the Union.

Ms. Louella Conway, Personnel Director, Sheboygan County Personnel Department, 508 New York Avenue, Sheboygan, Wisconsin 53081-4692, appearing on behalf of the Personnel Committee of the Sheboygan County Board of Supervisors, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union and the County requested the Wisconsin Employment Relations Commission to appoint an Arbitrator to resolve a grievance filed on behalf of Mary Lou Zabel. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing was held on September 19, 2002, in Sheboygan, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by November 14, 2002.

ISSUES

The parties stipulated the following issues:

Did the Employer discharge Mary Lou Zabel for just cause?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I
AGREEMENT

This Agreement made and entered into by and between the Personnel Committee of the Sheboygan County Board of Supervisors . . . and the Sheboygan County Health Care Centers Employees, Local 2427 of the American Federation of State, County and Municipal Employees, AFL-CIO . . . for the purpose of maintaining harmonious labor relations and to maintain a uniform minimum scale of wages, working conditions and hours among the employees, members of the Union of the Sheboygan County Health Care Centers, and to facilitate a peaceful adjustment of all grievances and disputes which may arise between the County and the employees and primarily to maintain the best care and humanitarian consideration of the residents and patients in the facilities involved.

. . .

ARTICLE 3
MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause . . . is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due to him/her for such period of time involved in the matter.

. . .

> Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its Health Care Centers. The Union agrees at all times as far as it has within its powers to preserve and maintain the best care and all humanitarian consideration of the patients at said Health Care Centers and otherwise further the public interests of Sheboygan County. . . .

BACKGROUND

The grievance, dated December 21, 2001 (references to dates are to 2001, unless otherwise noted), asserts, "Employee was terminated because one employee stated she had abused a resident, which is out of character for [her] to do this." The grievance seeks that Zabel be "reinstated & back pay given."

Zabel received a notice of termination, dated December 20, which states:

> On 12/14/01, Mary Lou Zabel, CNA, swore at Resident #15859 and used threatening language and tone during his transfer from bed to shower chair at approximately 4:00 p.m. This meets resident abuse definition per Wisconsin Statutes 149.151 and Sheboygan County Personnel Policy.

The resident is referred to below as MD. The County cared for MD at its Comprehensive Health Care Facility. At the time of the incident, the County operated two other health care facilities: Rocky Knoll Health Care Facility and Sunny Ridge Nursing Home. MD suffers from Organic Brain Syndrome and Parkinson's. He is hard of hearing, frail and elderly. He is incapable of communicating in complete sentences, and requires assistance to move about the facility. Transfers from bed to chair often take two persons. He has limited arm strength. Employees sometimes use a Professional Assistance Lift (PAL) to assist in sit-to-stand transfers of MD. The PAL is a mechanical lift, which uses straps that fit under the arms of a resident in the lifting process. The straps can be irritating for residents without sufficient arm strength to pull their weight off the straps. MD was such a resident, and employees generally perceived him to dislike the PAL.

Zabel worked the second shift at the Comprehensive Health Care Facility in December of 2001. On December 14, the County assigned a recently hired CNA, Lisa Taylor, to accompany Zabel on her rounds as part of Taylor's orientation to the facility. Roxanne Taylor is the PM Supervisor at Rocky Noll. Roxanne Taylor is Lisa Taylor's mother. Lisa Taylor is referred to below as L. Taylor and Roxanne Taylor is referred to below as R. Taylor.

Shortly after L. Taylor's arrival at the Comprehensive Health Care Facility on December 14, she and Zabel entered MD's room to shower him, and to prepare him for his meds. The discharge is rooted in what happened during this period. L. Taylor testified that Zabel yelled at, swore at and threatened MD. Zabel denies all of these behaviors. L. Taylor did not immediately report the incident. The following day L. Taylor visited her mother and described the incident to her. R. Taylor informed her that she needed to report the incident, and L.Taylor said she would. The following Monday, at roughly 2:00 p.m., R. Taylor phoned Char Baumgartner, the Director of Nursing at Rocky Knoll to determine whether her daughter had reported the matter. The call was Baumgartner's first notice of the incident. Baumgartner informed the County's Social Services Director, Ken Plummer, and the Administrator of the Comprehensive Health Care Facility, Charlene Lowe. This initiated the County's investigation of the incident.

On December 17, Baumgartner and Plummer interviewed Diane O'Reilly, Loretta Dinkleman and Kathy Riese. Each is a CNA who worked on December 14 during Zabel's and L. Taylor's shift. None were aware of an incident implicating the abuse of MD. Baumgartner obtained the following written statement of the incident from L. Taylor:

> On Friday, December 14th I was orientating with Mary Lou on 1S. I started my shift at 4:00 p.m. and when I started it we went to MD's room to get him up into the shower chair. He was asleep and we woke him up explaining he was going to get a shower. One of us took his feet and the other his shoulders and [got] him into the sitting position on the edge of the bed. On the count of three we went to transfer him. She asked him if he was going to stand for us and then when he didn't and he started to slide we set him on the shower chair as quickly and best we could. He was not on the chair properly and needed to be lifted and sat back farther. We attempted to slide him back, but the chair picked up with him and he didn't budge. So she got angry and yelled at him in his ear about how he was not cooperating and threatening him with getting the Pal if he wouldn't stand. Then she said to forget it and take him down to the shower room because she wasn't about [to] break her back or lose her baby because he won't fuckin' cooperate, etc. Repeatedly saying "Do you understand me." etc. She then wrapped a blanket around him and told me to take him out. I took him to the shower room, and was trying to make him feel better. I gave him an extra long shower, washed and massaged his head, put lotion on him and finished with some cologne. By the time we were done he was in a better mood and Mary Lou & I got him dressed and took him to get meds. She had made the comment out loud to the rest of the staff that MD wasn't cooperating and she might as well use the pal.

> To the best of my recollection these were the statements she made when we first got him up: "If you['re] not going to stand for me then I'm going to get the fucking PAL – do you want me to get the PAL? Huh?" He then shook his head, and she continued with saying that "I am not about to lose my fucking baby because you won't stand" and "I'm not about to break my fucking back over you."

The statement is dated December 17.

On December 18, Baumgartner and Plummer interviewed Pam Bruckner, a Licensed Practical Nurse who worked on December 14 during Zabel's and L. Taylor's shift. Bruckner stated she knew of no incident implicating the abuse of MD. Later that day, Zabel was met at the time clock and summoned to Baumgartner's office for an interview. Baumgartner suspended her pending further investigation.

On December 19, Plummer and Baumgartner interviewed another CNA. On December 20, they interviewed another CNA, Brenda Hodorff, who authored the following written statement:

> I worked Dec. 14th but heard no cus[s]ing or swearing at a resident. On other oc[c]asions I have heard loud yelling and threat[en]ing things being said to residents. I heard Mary Lou Zabel threaten residents with the pal lift yelling and threat[en]ing them. I've heard this a couple of times. LM and MD do not like the pal lift. I've heard Mary Lou threaten both residents with the pal lift when [they're] not standing.

Hodorff's statement added that these incidents occurred "in the last month." She did not report them prior to authoring the statement.

Baumgartner asked for another written statement from L. Taylor, and received the following statement on December 20:

> When MD was receiving his "cares", he seemed very upset with the environment and the way he was treated. When we first entered the room, he was sleeping and once woken tired & groggy. He seemed weak and not very alert. When he was cued on what he needed to do (stand to go to the shower) he didn't seem very alert or like he comprehended what was going on. As we stood him up he started to slide and unable to bear weight or straighten his legs to stand for transfer. He was put down on the edge of the chair so he wouldn't fall or slide to the ground. He was [visibly] uncomfortable due to the fact he was sitting on himself. When we tried to adjust him and slide him back, he just sat there shaking and had his head down. He did not make any eye contact and

> only responded when prompt[ed] by [repetitive] questions screamed in his ear about the PAL and if he understands. Then he would barely shake or nod his head or mumble a stuttered response. As this continued he shook more & more violently and his eyes were watering. I then wrapped him up in the blanket and took him to the shower room immediately and during that time I was constantly reassuring him that everything was okay and that he didn't do anything wrong and that it shouldn't have happened. By the time I was done with giving him extra care and encouragement, I got him to stop shaking and he seemed much more relaxed and content. When we were done, I had a smile on his face and he was in much better spirits for the rest of the evening.

On December 21, Zabel and Robert Ostermann, her Union Steward, were summoned to a meeting during which Baumgartner and Lowe issued Zabel the termination notice set forth above and a one-day suspension for failing to use a gait-belt in transporting MD. The notice made the discharge effective December 17.

The balance of the background is set forth as an overview of witness testimony.

Lisa Taylor

The County employed L. Taylor at the Comprehensive Health Care Center on December 10. On December 14, L. Taylor accompanied Zabel as part of her orientation to the Center. She and Zabel entered MD's room to prepare him to shower. He was groggy from sleep, and did not want to stand. As they picked him up, he slid down, and they had difficulty placing him in the shower chair. Zabel then began to yell and to swear at him. MD nodded and shook during Zabel's outburst, and his eyes watered. He swung his hands during the outburst, and Zabel warned her to watch out for his hands as they held him. L. Taylor ultimately showered him and prepared him for his meds. She did not report the incident to any supervisor during her shift. She did mention the matter to other employees. Some of them told her to report the incident. She wanted, however, to report the matter to the Director of Nursing "for other reasons."

After her shift on December 14, she stopped by her mother's home to pick up some laundry. During that time she "vented" concerning the incident. L. Taylor was aware that she was obligated to report resident abuse, but told her mother that she thought she should report to the Director of Nursing the following Monday. She did not discuss the incident at work that weekend, except in response to inquiries from other employees. She felt other employees treated her "very coldly" after her mention of the incident.

She authored two statements for Baumgartner, who phoned her at her home for the second statement. She wrote it alone, and delivered it to Baumgartner's office. L. Taylor had, as of her hire with the County, two years of experience as a CNA, but none at a facility that handled patients with mental infirmities. She could not recall when she left County employment.

Brenda Hodorff

As of December 14, Hodorff had worked roughly one year for the County as a CNA. Baumgartner asked her for the statement set forth above and Hodorff thought it was because of an incident in which Zabel threatened to use the PAL on an unwilling resident. Hodorff said the statement reflected an incident when Zabel yelled at MD that "I'm going to use the PAL lift," which MD did not like. She did not report the incident when it occurred, but felt that Zabel, unlike other employees, yelled at MD. Hodorff acknowledged that the County terminated her for absenteeism. She did not file a grievance.

Char Baumgartner

Baumgartner has served as Rocky Knoll's Director of Nursing for three years, and has served the County for seventeen. She was responsible for the investigation and played an active role in the determination to discharge Zabel.

In Baumgartner's view, it is never appropriate to yell or to swear at or in the presence of a resident, which is the behavior the investigation determined Zabel had engaged in. That the State did not find sufficient evidence to pull Zabel's license or to charge her criminally has no bearing on the County's interest in maintaining conformance with its own policies. She stated that the State needed proof beyond a reasonable doubt because when it acted an employee's livelihood, and potentially their personal freedom, was at risk.

She acknowledged that she did not discipline L. Taylor, R. Taylor or Hodorff for failing to report an incident of possible abuse. The County has never disciplined an employee for failing to immediately report an incident, but will discipline an employee for a refusal to report or for a false report.

Baumgartner sought the second statement from L. Taylor to gauge MD's reaction to the incident. She did not speak to L. Taylor regarding the statement other than to inform her that she wanted greater detail regarding MD's response. She asked Hodorff regarding any incidents involving swearing or threatening behavior toward residents. She never supplied Zabel's name, and Hodorff responded with the statement set forth above. She asked other shift employees if they had any knowledge of the December 14 incident, but did not ask where they were at the time of the alleged incident.

Baumgartner stated that she viewed the discharge as necessary because she was convinced that L. Taylor accurately described the situation. L. Taylor and R. Taylor are honest and forthright. L. Taylor was visibly upset by the incident, and fearful concerning the response of other employees. Hodorff's account corroborated L. Taylor's, since it showed similar behavior toward MD.

Roxanne Taylor

R. Taylor has served as Rocky Knoll's PM Supervisor for roughly fifteen months. Her daughter came to R. Taylor's home on December 15 and spoke about the incident. She was notably upset and viewed the incident as abusive, involving Zabel's shouting and using profanity toward a resident who could not do what was asked. R. Taylor advised her to report the incident, but did not immediately call Baumgartner. Rather, she left that to her daughter, and phoned Baumgartner on December 17 to assure that the report had been made. It had not, and she believed she was the first to advise Baumgartner of the incident. R. Taylor did not know if Zabel was scheduled to work on December 15 or 16.

She acknowledged that perceived abuse should be immediately reported to the charge nurse.

Mary Lou Zabel

The County hired Zabel on September 29, 1997 to work in the Food Service Department. She became a certified CNA in 1999. She worked as a CNA while serving as a Food Service Worker, and ultimately successfully posted into the full-time second shift CNA position that she held on December 14.

On December 14, L. Taylor arrived at the Comprehensive Care Center at about 4:00 p.m. She and L. Taylor went into MD's room to get him from bed so that he could shower. The transfer did not go "as easy as it should", but they transferred him to a shower chair. Zable told L. Taylor to wrap MD in a blanket, and she did so. L. Taylor gave MD a shower, which took roughly ten minutes. Zabel then helped dress him. Zabel could not specifically recall, but stated she thought they used the PAL to dress him. They then took MD to the Nurses' Station, where he received his meds. At that point, Zabel informed L. Taylor that they should probably use the PAL the balance of the shift because that would be safer for both of them and for Zabel's baby. That was the only comment she made concerning her baby that evening. Zabel stated that MD did not like the PAL lift.

Zabel stated that it is never appropriate to swear or to yell at a resident and that it is never appropriate to engage in behavior that threatens a resident. When asked if she had behaved as L. Taylor alleged, she responded, "it did not happen." She was unwilling to say

that L.Taylor had lied, and viewed the allegations against her as "a lot of hearsay . . . blown out of proportion." She specifically denied swearing, and stated, "not once did that (any form of the word "fuck") come out of my mouth."

She noted that December 17 was her scheduled day off. On December 18, she was summoned to Baumgartner's office. Baumgartner asked her for a statement concerning a report of swearing to a resident. Zabel prepared a statement, but it addressed a resident other than MD. Baumgartner ultimately did advise her that the allegation concerned swearing and threatening behavior toward MD and suspended Zabel pending an investigation. She did not ask for any other written statement from Zabel.

Zabel described MD as needing virtually complete assistance. He did have sufficient arm strength to swing his arms or to move a wheelchair, but not sufficient strength to fully support his weight during use of the PAL.

Robert Ostermann

Ostermann has worked as an attendant and as a maintenance employee for varying periods of time between 1979 and the present. At the time of Zabel's discharge, he was a Union Steward. He was present for the meeting at which Zabel received her termination notice and notice of a one-day suspension. Ostermann asked how a discharged employee could be suspended, but received no explanation he found meaningful.

Ostermann has never heard Zabel swear or use the term "fuck." MD, to his experience, was only partly coherent, was incapable of following directions, and was typically uncooperative. He did not normally stand to get dressed or otherwise. He did swing his arms and did not like the PAL lift.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The County's Initial Brief

After a review of the evidence, the County argues that it must operate the Health Care Centers in accord with Wisconsin law. Under its "legal obligation to care for its residents", the County must "care for its residents in such manner and such an environment as will promote maintenance or enhancement of the quality of life of each resident" and must respect the legal right of each resident to adequate and appropriate care.

More specifically, the County urges that credible witness testimony establishes that Zabel violated M's rights on December 14. L. Taylor observed Zabel "yelling at MD swearing at him and threatening that she was going to use the [PAL] lift on him." L. Taylor observed that MD "was getting red and he was looking down." Hodorff testified that "she had observed Mary Lou Zabel using threatening language toward the resident." Though L. Taylor and Hodorff did not view the same incident, the testimony of each shows similar behavior by Zabel, and a similar response from R. Taylor corroborated L. Taylor's testimony. Taken together, the "testimony of these individuals is credible and supports the fact that an incident of abuse did occur."

HSS 132 establishes that the "behavior of Ms. Zabel constitutes abuse." State and federal regulations confirm that Zabel's conduct constitutes verbal abuse. That the State did not take Zabel's CNA license and did not pursue criminal charges cannot obscure that the County "has a responsibility to take appropriate action and to insure that such behavior never happens again."

The County maintains personnel policies and provides training that highlights the impropriety of any form of abuse. Zabel was aware of the policies and participated in the training. For the County to maintain its high standards of patient care demanded a significant and prompt response. Zabel's conduct "cannot be tolerated."

The County maintains a progressive discipline policy, and that policy "states termination is the only alternative in situations of resident abuse." The "(y)elling, swearing and threatening a resident" posed here "is a most serious infraction." The vulnerability of residents such as MD demands "great concern." Against this background, "there was no option but to terminate Ms. Zabel." The County concludes by requesting that "the grievance be denied."

The Union's Initial Brief

After a review of the evidence, the Union contends that the just cause standard is best applied through the "seven tests" traceable to Arbitrator Carroll Daugherty. The first standard concerns notice of the disciplinary consequences of inappropriate conduct. The evidence indicates MD was hard of hearing, and the evidence fails to offer any indication that L. Taylor was a competent judge of the propriety of the conduct she testified about. That Zabel, in a raised voice, informed MD that it might be necessary to use a PAL lift cannot be seen as improper standing alone. More significantly, the testimony indicates Zabel did not mention the PAL lift to MD until after his shower.

The Union then contends the County failed to conduct a fair and objective investigation. In this case, Baumgartner served as "witness, prosecutor and final judge." Beyond this, the County "retroactively" fired Zabel to a date preceding the date Baumgartner interviewed her. That Zabel, unlike L. Taylor, was never permitted a chance to make a second statement underscores that the investigation did not seek fact, but corroboration for an already determined outcome. Hodorff was not an unbiased witness, and the County's failure to discipline Taylor and Hodorff for failing to report the alleged abuse similarly undermines the objectivity of the investigation. The evidence "shows Baumgartner "in . . . a hurry and predisposition to terminate."

Nor will the evidence show the County applied its rules even-handedly. The County's failure to discipline Hordorff, L. Taylor or R. Taylor for failing to report the alleged abuse cannot be squared with Sec. 149.151, Stats.

The evidence cannot be characterized as "substantial evidence . . . that the employee was guilty as charged." Baumgartner had an interest in the conclusion of the investigation. Hodorff, herself fired by the County, could supply no specifics on when Zabel allegedly abused MD, and never alleged Zabel swore at anyone. That the State failed to find Zabel guilty of abuse further underscores the weakness of the County's evidence. L. Taylor's testimony is less than credible, since she was new on the job as of December 14, failed to report the alleged abuse, and could not supply specifics on her own employment history much less the alleged abuse. A detailed examination of L. Taylor's two statements shows an inconsistent story prompted by management that cannot be credited.

The County has also failed to meet the final standard of just cause, since "this employee had (an) unblemished record with the Employer at the time of termination" and since the County has failed to demonstrate an incident of actual abuse. The Union concludes be requesting that "the Grievance be sustained (and) the grievant made whole."

The County's Reply Brief

The County contends that the evidence amply demonstrates that Zabel "was aware that the type of behavior she exhibited constitutes patient abuse." Beyond this, the Union mischaracterizes L. Taylor's experience, and improperly contends that circumstances can warrant yelling, swearing or threatening a resident to obtain cooperation to avoid using equipment that the resident does not like.

Nor can MD's hearing difficulty justify Zabel's conduct. Yelling is not an appropriate response. Rather, "the appropriate approach is to look at the resident, get his attention and talk directly to his face."

The Union also mischaracterizes Baumgartner's role in the termination decision. The decision "was not made in a vacuum, but after careful consideration of the facts." Beyond this, the timing of the termination shows no more than that Zabel was placed on leave pending investigation, then terminated effective the last day worked after the investigation prompted the decision to terminate. Nor can the State's action be considered relevant to this matter. The State concluded only that under its standards, abuse could not be proven. The State's letter notes this conclusion has no bearing on County work rules or performance standards.

The Union failed to demonstrate any bias by Hodorff toward Zabel. Beyond this, the evidence establishes that Baumgartner "has never disciplined anyone who delayed reporting an incident of resident abuse." Nor will the evidence support an assertion that Baumgartner prompted any response of L. Taylor's. She wrote her statement at home, without County oversight. Nor will the evidence support an assertion that the incident took place after the shower. Zabel's assertion that it did "is certainly questionable."

More specifically, the County argues that Zabel's assertion that she never swore undermines her own credibility by establishing "her goal to hide her action." To permit her to hide her actions threatens vulnerable residents "incapable of caring for themselves" and undermines the County's mandate to "insure proper care for our residents." The County concludes that: "There is no question, the incident occurred and Ms. Zabel was correctly terminated from employment with Sheboygan County."

The Union's Reply Brief

The Union contends that the County ignores that L. Taylor's testimony cannot account for where she was at the start of the shift on December 14. The County also exaggerates the reason for L. Taylor's visit with her mother after the incident. Unlike the County's assertion, the evidence fails to show that L. Taylor was highly upset by the alleged incident. Similarly, the County's arguments obscure that L. Taylor failed to report the incident, even after being prompted to do so by her mother.

The County also exaggerates its obligations under Wisconsin law. The law demands that the County investigate and report the incident. It does not demand Zabel's discharge. The County's brief also misstates MD's ability to walk and thus the purpose of Zabel's mention of the use of the PAL. Nor can the County's reliance on the testimony of three witnesses mean that there were three witnesses to the December 14 incident. Examination of Hodorff's testimony makes it unpersuasive to conclude that she ever directly observed the alleged use of threatening language by Zabel at any time.

The Union concludes that the evidence will not support the discharge, and thus demands that the grievance be sustained and Zabel be made whole.

DISCUSSION

The stipulated issue is whether the County had just cause to discharge Zabel. The Union used the "Daugherty" standards to argue its position, as did the County in its reply brief. Thus, I use those standards to structure my review of the record. The seven standards are drawn from ENTERPRISE WIRE CO., 46 LA 359 (DAUGHERTY, 1966).

I

Did the County give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?

The evidence establishes that the County met this standard. Resident abuse and its disciplinary consequences can be difficult to define. The level of abuse alleged by the County, however, does not pose a subtle point regarding its definition or its disciplinary consequences. Zabel acknowledged that the conduct she is accused of is abusive. She testified that it is "never, ever, ever" appropriate to swear or to yell at a resident. She added that a resident should not be exposed to threatening behavior.

Even without her testimony, the County has demonstrated that it trained its employees generally, and Zabel specifically, on "Abuse Prohibition and Restraint Policy" and on "Resident Rights and Resident Dignity." The County demands similar training annually of all CNAs. Zabel acknowledged receipt of the County's Personnel Handbook and its attachments, which define abuse and specify a progressive discipline system.

Even if the County provided no training, it meets this standard. As Daugherty noted (46 LA AT 363), "certain offenses . . . are so serious that any employee . . . may be expected to know already that such conduct is offensive and heavily punishable." This is the type of conduct alleged against Zabel. Thus, the County has met the first standard.

II

Was the County's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of its business and (b) the performance that it might properly expect of the employee?

That the County can expect its CNAs to treat residents with respect for their rights demands no elaboration. It should be expected to sanction abusive behavior to preserve the safe operation of its business and to enforce the performance properly expected of a CNA.

The County demonstrated at hearing that it demands a high level of care from its employees. This meets the second standard.

III

Did the County, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

As with the other two factors, the Union's arguments obscure how strong a case the County makes. The County's evidence meets this requirement on its face. It clearly did "make an effort" to investigate. Baumgartner and Plummer contacted each witness to the alleged abuse, and contacted other workers to determine if they had observed any part of the incident. The County's management team discussed the results of the investigation prior to the discharge. This meets the facial requirements of the third standard.

As stated by Daugherty, however, the third standard poses a more demanding requirement than is apparent on the face of the question set forth above. Daugherty stated in his "Notes" (46 LA at 363-364) that this standard provides an accused employee's "day in court." More significantly, the "effort" this standard points to is for an employer to investigate the matter as fully as possible prior to making the decision to discipline. Daugherty noted that if the discipline decision predates the investigation, then there "has usually been too much hardening of positions" (46 LA at 364) to permit an effective determination of fact.

On this point, the Union raises persuasive concerns. Zabel never received a "day in court." On December 18, she offered the County a statement that did not address L. Taylor's allegations. The investigation continued until December 21. At no time did the County obtain Zabel's response to the allegations. This is troublesome. From this perspective, the investigation appears less a disinterested search for fact than a search for corroboration of L. Taylor's account.

Other evidence underscores this troublesome undercurrent. Baumgartner and Plummer did question other shift workers. They did not, however, seek information beyond whether or not the workers knew of the incident. Baumgartner testified that she did not question where the other workers were at the time of the incident. Had any of them been close enough to MD's room to hear shouting, their negative responses would have corroborated Zabel's account, and cast doubt on L. Taylor's.

Nor does the balance of the investigation manifest a concern beyond that necessary to corroborate L. Taylor's account. That Baumgartner sought information from Hodorff to determine if there was past misconduct involving Zabel and MD is appropriate. That the

County took the statement as meaningful is appropriate. However, that the County was willing to take the statement without serious consideration of its lack of specificity is troublesome. Does Hodorff consider a CNA statement that the PAL will be used a "threat" if the resident does not like the PAL? How raised was the voice Hodorff's statement referred to? More troubling is that the County never sought to test this account by questioning Zabel. Beyond this, if Hodorff's statement is meaningful proof that Zabel is guilty as charged, it is not clear what, if any, effort the County undertook to determine if proof existed indicating her innocence. Ostermann testified that swearing is out of character for Zabel. Whether or not this is true, there is no evidence that the County contacted him, or anyone like him. Nor is there evidence the County considered Zabel's record as an employee. Beyond this, Baumgartner sought a second statement from L. Taylor to determine MD's reaction on December 14. This presumes the accuracy of L. Taylor's statement regarding the existence of abuse, and seeks information on its severity. This is not inappropriate. However, this occurred without any evident attempt to get Zabel's account of the incident, and further emphasizes the troubling undercurrent that the investigation was less a disinterested search for fact than for corroboration of L. Taylor's account.

In sum, the evidence affords reason to believe the County immediately credited L. Taylor's account then sought corroboration for it. This is sufficient to meet the stated requirements of the third standard, but poses troublesome issues on the quality of the County's investigation and thus on whether its conclusions can be considered reliable. That issue is more directly posed by the fourth and fifth standards.

IV

Was the County's investigation conducted fairly and objectively?

The Union's arguments understate the strength of the County's case. Under the Daugherty standards, Baumgartner did not act improperly by serving as an investigator and evaluator of the investigation: "At said investigation the management official may be both "prosecutor" and "judge," but . . . may not also be a witness against the employee" (46 LA AT 364). There were two witnesses to the alleged incident, and Baumgartner credited L. Taylor. She did not act as a witness.

Baumgartner, however, shouldered a difficult burden. L. Taylor is the daughter of one of Rocky Knoll's supervisors. This does not make her account incredible. However, it poses a significant burden on an individual asked to serve as prosecutor and as judge. There is at least the appearance that Baumgartner, or other investigators, might be predisposed to credit L. Taylor over another employee. The significance of an allegation of abuse demands that any predisposition be tested. The County's progressive discipline system demands that inquiry into alleged abuse consider the existence and the severity of the misconduct.

The need for fairness and objectivity in the investigation is thus clear. The evidence affords, however, significant doubt regarding the investigation. That the County may not have been able to speak with Zabel until December 18 cannot explain why the County never took a meaningful response from her. An investigation of abuse demands more than a determination of the accuser's credibility. As an investigative matter, credibility is not a personal virtue. Rather, it must be viewed as a reflection of factual accuracy. "Fairness" and "objectivity" must be traced to fact, not personality.

From this perspective, the investigation is flawed. Even if Zabel could only be expected to lie in a formal response, the response would provide the detail by which her account could be tested. More fundamentally, her account should have been taken to afford her a chance to establish her innocence, or at least to establish the degree of her culpability. That she could not respond to Baumgartner's December 18 general inquiry about an incident highlights the need for the statement. Why would an employee who had been directly observed in a significant incident of abuse not have a story prepared? The County did not test the possibility that she had no story prepared because she was unaware of any abuse.

Beyond the troubling undercurrent noted in III above, the County made no evident attempt to test the factual basis of L. Taylor's statements. Her allegations posed reason for further inquiry, even if the County credited them. Her initial statement alleges Zabel asked MD if he was going to stand for them. There is no evidence MD could reliably stand. The assertion begs further inquiry. Even if the statement is taken to mean Zabel sought his assistance in a bed-to-chair transfer, it is not apparent what angered her to the point of abuse. Under L. Taylor's account, Zabel became enraged, in the presence of a stranger she was expected to train, to the point of active abuse. The account provides, however, no insight on what provoked her. At a minimum, this makes it difficult to understand any reticence on L. Taylor's part to report the incident. No more understandable is R. Taylor's willingness to let the incident go unreported until the following Monday. L. Taylor's accounts do not point to an error of judgment or a momentary tantrum. They point to active malice. In spite of this, neither L. nor R. Taylor showed concern about whether Zabel would be working with residents prior to the following Monday. This is not to say either is lying. Rather, it points to an anomaly that warranted further inquiry, at least to determine if the delay in reporting reflected ambivalence on the severity of the misconduct.

Similarly, the County's evaluation of Hodorff's statement manifests something other than a search for fact. Baumgartner acknowledged that Hodorff could supply no detail for the statement. Significantly, there is no evidence the County tested the conclusory nature of the allegation. It did not consult Zabel. Instead, it treated the statement as essential corroboration.

There is no evidence Baumgartner or any other employee acted for reasons beyond concern for MD. Rather, Baumgartner took the depth of L. Taylor's feeling and the severity of the allegations as corroboration of the factual accuracy of her account. However, once the County credited L. Taylor's account, it treated Zabel's as irrelevant. The investigation became not a search for fact, but for corroborating evidence. This makes the investigation something other than fair and objective. Not surprisingly, the investigation produced no reason to question L. Taylor's account as to the existence or the severity of misconduct.

The County has failed to meet the fourth standard.

V

At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Daugherty's statement of this standard is troublesome, for it implies that whether the underlying facts occurred as alleged is less significant than the amount of proof an employer acquires. Since there were only two witnesses to the alleged abuse, and since the County obtained and credited one of those views, it is arguable that it met the fifth standard. Such a view understates, however, the difficulty of applying this standard. In any event, the "charge" to be assessed under this standard is that Zabel yelled at, swore at, and threatened MD.

The record, in my view, poses a level of uncertainty that cannot support a conclusion that the County obtained substantial proof of its charge. The County's conduct manifests this uncertainty. There is no demonstrated basis for obtaining the second statement from L. Taylor. Baumgartner testified she needed it to gauge MD's response to Zabel, but this has no evident basis. MD's perception of Zabel's conduct is irrelevant under the State's or the County's definition of "abuse." If the alleged conduct occurred, it would be abusive even if MD were deaf.

Having acquired the second statement, the County did not subject it to scrutiny. L. Taylor's first statement, read with her testimony, describe Zabel's conduct veering from a tantrum (yelling and swearing at MD for not cooperating) to appropriate care (covering MD with a blanket, then directing L. Taylor to shower him). The second statement describes Zabel's conduct as unrelenting abuse of MD, broken by L. Taylor's taking him to the shower. The County accepted each account, with no evident concern for the discrepancy.

The County's failure to test the factual accuracy of the allegations undermines their force, and interjects uncertainty into its conclusions. The County's unwillingness to permit Zabel to respond to the allegations wished away the uncertainty, but did nothing to resolve it. Under the County's view, Zabel screamed at MD without provocation. She has no prior

history of discipline, and the County has demonstrated it maintains high standards for its employees. Even ignoring the discrepancy between the statements, the uncertainty surrounding how an employee with no prior problems can behave as callously as L. Taylor alleges is noteworthy. This uncertainty is troublesome, and the County's uncritical willingness to consider damning evidence, such as Hodorff's conclusory statement, as corroboration does little to resolve the uncertainty.

Beyond this, the County took no evident interest in the failure of L. Taylor, R. Taylor and Hodorff to immediately report alleged abuse. The failure to report may reflect doubt as to whether abuse occurred. As Baumgartner testified, the County does not discipline a failure to report immediately provided an accurate report is ultimately made. This explains why no discipline occurred, but begs the ultimate question on the accuracy of the allegations. There is no indication the County assessed the possibility that the failure to report manifested uncertainty about what occurred.

More puzzling is the one-day suspension testified to by Ostermann, who noted that the County suspended Zabel for one-day when she received her termination notice. The discipline was for failure to use a gait-belt for MD on December 14. Baumgartner acknowledged that such discipline usually involves each employee involved in a transport. She stated that L. Taylor was not disciplined because she was too new to the job to be held accountable. The suspension is difficult to understand and manifests that the County consistently and uncritically resolved uncertainty against Zabel.

The fundamental difficulty posed is that there were only two direct witnesses to the alleged abuse. From an arbitration perspective, the dilemma is that nothing in L. Taylor's or Zabel's demeanor as a witness indicates fabrication. This is, in part, the same dilemma faced by the County prior to the discharge. The fifth standard highlights that the dilemma must be resolved through weighing evidence and resolving the conflict in favor of the account favored by substantial proof. The flaw in the County's conduct is that there was no weighing process. Zabel was not afforded a chance to respond to the charges, her work record received no evident consideration, and the accuracy of the allegations against her was unquestioned. This underscores that the County immediately credited L. Taylor's account, and directed an investigation to corroborate it.

This process reflects something other a disinterested search for evidence to be weighed in crediting one account over the other. The process yielded untested conclusions corroborating L. Taylor's account, but this falls short of meeting the fifth standard.

VI

Has the County applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

The Union argues that the absence of discipline for failing to report abuse and for the failure to use a gait-belt manifests discrimination. This argument has no persuasive bearing on the application of this standard. Baumgartner's testimony establishes that the County does not discipline employee failure to promptly report alleged abuse if the employee ultimately offers a reliable account. The absence of discipline does not reflect discrimination, but the County's decision to credit Zabel's accusers. There is no evidence the County applied its policy choice less than evenhandedly.

The absence of a suspension for the gait-belt is more troubling. As Baumgartner acknowledged, such discipline typically falls on each member of a transport team. However, this is less than persuasive evidence of discrimination. The County treated L. Taylor as a trainee, and held her trainer accountable. This is arguably discriminatory, but more probably affirms the pattern by which the County resolved conflict in favor of L. Taylor and against Zabel. That pattern is addressed in the other standards. The County based the suspension on its consistent commitment to credit L. Taylor's allegations.

In sum, the County has met this standard.

VII

Was the degree of discipline administered by the County reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in her service with the County?

The parties' dispute on this standard focuses on (a). The County did not weigh Zabel's work record as required in (b). Its failure to consider Zabel's work record is not fatal under this standard since the abuse alleged arguably precludes the need to consider mitigating factors.

Daugherty's statement of this standard turns on a "proven offense", which highlights that the fifth standard focuses on more than the amount of evidence an employer acquires. More to the point, the County's imposition of discharge presumes that the "proven offense" is Zabel's yelling at, swearing at, and threatening MD on December 14. As noted above, the County's investigative process will not bear this burden. Since the County lacked substantial proof that Zabel acted as charged, it is impossible to find that the alleged abuse constitutes a "proven offense."

This summary statement obscures how difficult this case is. The fundamental difficulty in applying (a) is the all or nothing posture of the parties' litigation. This is a valid tactical choice, but complicates resolution of the grievance. The Union's consistent understatement of the strength of the County's case obscures significant issues. For example, Zabel testified that she did not yell at MD, but the Union focuses considerable argument on MD's hearing difficulties. There is no reason to consider MD's hearing difficulty unless L. Taylor heard a raised voice. However, no less troublesome is the County's unwillingness to grant any validity to Zabel's view of the incident. The County's consistent assertion that it is legally bound to discharge Zabel obscures that the necessary threshold to the asserted duty was to determine the existence and degree of misconduct. The asserted duty to discharge rests on the County's unflinching reliance on L. Taylor's statements.

As noted above, it is unpersuasive, viewing L. Taylor's demeanor as a witness, to conclude she fabricated her testimony. Thus, the County's reliance on her testimony cannot be faulted, standing alone. I am convinced something in Zabel's conduct on December 14 offended L. Taylor. Unlike the County, I am unwilling to conclude that "something" is the level of abuse she alleges. This precludes finding that the County has met this standard.

This reflects more than the flaws in the investigation. The County's view of L. Taylor's testimony unpersuasively demands that Zabel be totally discredited. As noted above, the evidence will not bear this burden. More significantly here, Zabel's testimony has persuasive force. Part of its strength is that she did not seek that L. Taylor be totally discredited. When afforded the opportunity, Zabel declined to label L. Taylor as untruthful. Rather, she focused on an investigation based more on hearsay than fact. The County's unflinching reliance on L. Taylor's account puts a burden on it that is not borne by supporting evidence. Zabel's testimony does not pose the same difficulty. The evidence does not warrant totally discrediting L. Taylor, and Zabel's testimony does not.

Beyond this, Zabel's testimony has persuasive force because it was candid. Her testimony regarding her knowledge of MD's condition was complete and accurate, even where that knowledge can be used against her. She stated that the transfer on December 14 did not go as easily as it should, and acknowledged that MD could swing his arms. This arguably corroborates L. Taylor's assertion that Zabel warned her to watch out for swinging arms. Similarly, Zabel freely acknowledged MD did not like the PAL, even though the statement arguably corroborates L. Taylor's assertion that she threatened MD with the PAL. Similarly, Zabel testified that MD could move a wheelchair on his own, even though this arguably corroborates L. Taylor's assertion that MD's clinging to the chair angered Zabel. This candor contrasts with L. Taylor's written statements, which changed and grew more strident with time. More specifically, Zabel testified that L. Taylor placed the blanket around MD after they arranged him in the chair. This is consistent with L. Taylor's second written statement but inconsistent with her first, even though L. Taylor's first statement paints Zabel in a more

favorable light. The contrast to L. Taylor's two statements is stark. The second makes Zabel more malignant and L. Taylor more benign than the first. That Zabel testified without evident concern for the repercussions lends credibility to her account.

This contrasts starkly to the results of the County's investigation, which neither sought nor discovered reason to doubt any of L. Taylor's assertions. Zabel's views played no role in the investigation. When Zabel supplied a statement that did not address L. Taylor's accusations, the County did not appear to consider the possibility that her failure to address the allegations manifested an indication of innocence. Inconsistencies between L. Taylor's statements prompted no concern with their reliability. On balance, the stark contrast favors the Union's view over the County's. Zabel's testimony was credible, spoken with no evident concern for the repercussions of what she said. This is difficult to square with L. Taylor's account, which demands concluding that Zabel, in front of a stranger, deliberately and flagrantly abused a resident.

I am convinced that something in Zabel's behavior on December 14 offended L. Taylor. As the County forcefully argues, this could mean that Zabel is hiding something. However, I am not convinced that the record affords substantial evidence that the "something" is abusive behavior. Under (a) of the seventh standard, the only "proven offense" to justify discharge is the abusive behavior of yelling at, swearing at and threatening MD. Thus, the evidence does not meet (a) of the seventh standard.

A review of the seven standards thus precludes finding that the County had just cause to discharge Zabel. The all-or-nothing posture of the litigation precludes sustaining a level of discipline other than discharge. Accordingly, the Award entered below finds a violation of Article 3. The final sentence of the first paragraph of Article 3 establishes the scope of the appropriate remedy, which is set forth below.

AWARD

The Employer did not discharge Mary Lou Zabel for just cause.

As the remedy appropriate to its violation of Article 3, the County shall make Mary Lou Zabel whole by reinstating her to the CNA position she occupied prior to her discharge effective December 17, 2001, and by compensating her for the wages and benefits she would have earned but for her discharge.

To address any issue regarding the implementation of the remedy set forth in this Award, I will retain jurisdiction over the grievance for not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 9th day of December, 2002.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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