BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EXTENDICARE d/b/a THE WILLOWS OF SUN PRAIRIE

and

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) LOCAL 150

Case 6
No. 62167
A-6057

Appearances:

For Extendicare d/b/a The Willows of Sun Prairie: **Attorney David W. Miller,** Baker & Daniels, Suite 2700, 300 Meridan Street, Indianapolis, IN 46204; **C. William Isaacson,** Senior Labor Counsel for Extendicare, 111 E. Michigan Ave., Milwaukee, WI 53201.

For SEIU Local 150: **Attorney Marianne Goldstein Robbins,** Previant, Goldberg, Uelman, Gratz, Miller and Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212; **Alex Rysavy,** 8021 W. Tower Avenue, Milwaukee, WI 53223.

ARBITRATION AWARD

Extendicare d/b/a The Willows of Sun Prairie (hereinafter referred to as Employer) and Service Employees International Union (SEIU) Local 150 (hereinafter referred to as Union) are parties to a collective bargaining agreement covering the period from January 1, 2000 to December 31, 2002. The parties are currently negotiating terms and conditions to be included in a successor collective bargaining agreement, but have mutually agreed to extend the aforesaid collective bargaining agreement that would have otherwise terminated on December 31, 2002 for an indefinite period pending their negotiations for a successor agreement. Such indefinite extension covers all dates germane to this proceeding. The parties' agreement provides for binding arbitration of grievances as therein defined that may arise between the parties. On February 28, 2003, the Union filed a request with the Wisconsin Employment Relations Commission for a WERC Commissioner or member of its staff to serve as the sole arbitrator of a grievance that has arisen between the parties. Commissioner A. Henry Hempe was appointed by said Commission to hear and decide said dispute. A hearing was conducted on May 6, 2003 in Madison, Wisconsin. No transcript of the proceeding was prepared. Each party filed a brief postmarked May 23, 2003. Each was received by the Arbitrator on May 27, 2003. By agreement of the parties, neither filed a reply brief.

STATEMENT OF THE ISSUE

The parties stipulated to the following statement of the issue:

Did the Employer discharge the grievant, Kay Coy, without just cause?

If so, what is the appropriate remedy?

FACTS OF THE CASE

The Employer is a corporation that operates eight skilled nursing homes, one of which is a 55-bed facility located in Sun Prairie, Wisconsin, known as "The Willows." The Willows employs 72 employees.

The grievant, Kay Coyle, had been employed by the Employer at the Sun Prairie facility in its Food Service department as an A.M. cook 1/ for 7 ½ years until she was discharged in January 2003. Until October 2002, Ms. Coy had never been disciplined by the Employer. In 1999, Ms. Coy had played an active role in the Union's campaign to organize certain service and maintenance employees, a role that included writing a column in the Union's newsletter under the *nom de plume* of Norma Kay and distributing authorization cards to facility employees. (The literary alias was ultimately penetrated by the Employer.) After the Union won exclusive representation rights for the defined bargaining unit, Ms. Coy became a member of the Union negotiating team, and continues to serve as a Union negotiator while the parties currently bargain for a successor labor agreement.

1/ Ms. Coy's daily hours of employment were 5:30 a.m. to 2:00 p.m.

Ms. Coy's only written employee performance evaluation is dated August 23, 2001 and reflects, on balance, an above-average rating. Ms. Coy was not assessed at a level less than "at accepted level of performance" in any category. 2/

2/ The evaluation was made by Ms. Coy's supervisor, Virginia Schuh, then Food Service Manager. She rated Ms. Coy in 10 separate categories. In the categories designated as Attendance, Communications, Cooperation, and Job Knowledge/Employment Documents, Ms. Coy was found to be "At Accepted Level of Performance." In the categories designated as Punctuality, Safety Consciousness, Respect for Other's Rights & Property, Quality of Work, and Quantity of Work, Ms. Coy was rated as being "Above Accepted Level of Performance." In the category designated as Grooming, Ms. Coy scored the maximum number

points allowed. Comments in the evaluation included the following observations: "(g)ood personal hygiene, always neat;" "(r)esponds well to direction and supervision;" "(h)as very good work performance – knows her job, needs no supervision;" "very good worker – needs to ask for additional duty." The evaluator further noted that Ms. Coy's "(a)ttendance at all staff in-service [meetings] needs to be improved," and listed her strengths as "cooking, working with others – except 1 staff member, good to resident[s], team player." Finally, the evaluator suggested that "(g)etting along with M.B." should be a goal and objective for the next rating period.

However, the Employer describes a sequence of four incidents arising in the last quarter of 2002 and early 2003 in support of its discharge, asserting that they provide assistance in assessing the grievant's motivation. The Employer also introduced evidence of two attendance deficiencies that occurred between the second and third instances, for which the grievant received 1st and 2nd warning notices.

First Incident – October 9, 2002

The first incident cited by the Employer occurred in early October, 2002. This was the same month that Beth Pahmeier embarked on her duties as Food Service Manager on a full-time basis at The Willows of Sun Prairie. 3/ As Food Service Manager, Ms. Pahmeier was in charge of the day-to-day food service operations at the Willows. Her responsibilities included supervision of the grievant and eight other Food Service Department employees.

3/ Ms. Pahmeier has a 4-year college degree in dietetics. Prior to becoming Food Service Manager she had split her time as a dietician for both The Willows and another facility operated by Extendicare. Her title was Nutritional Services Manager.

On October 9, 2002, Ms. Coy came to work at 5:30 a.m. clad in work clothing that included a T-shirt decorated with an SEIU logo. Wearing a T-shirt that featured a union (or other non-brand name logos), according to Ms. Coy, was not unusual for her or other employees. In late morning, however, Food Service Manager Pahmeier, in her supervisory capacity, directed Ms. Coy to turn the T-shirt inside out, replace it with another T-shirt, or go home and put on a different shirt, but return to work.

In response to Ms. Coy's inquiry as to why she had to change her T-shirt, Ms. Pahmeier advised her that the T-shirt was inappropriate. In response to Ms. Coy's protest that she had worn the same T-shirt to work (as well as other T-shirts with other wording (e.g., Green Bay Packers) on other occasions without incident, Ms. Pahmeier merely advised Ms. Coy that the T-shirt violated the dress code.

Ms. Coy refused to turn the T-shirt inside out or change into a different one at the work premises. She knew that other employees had worn T-shirts with wording other than brand names permitted by the dress code, and believed she was the only employee against whom the T-shirt restriction had ever been enforced. The grievant understood her supervisor's alternatives as requiring her to change her T-shirt, turn it inside out or leave the premises. Although Ms. Pahmeier subsequently asked Ms. Coy to stay at work, she also insisted that Ms. Coy comply with her directive to change her-T-shirt or turn it inside out. Instead, Ms. Coy punched out, and left the premises at approximately 11:00 a.m. Her decision to leave the work premises had the practical consequence of costing her 3 hours of pay.

Ms. Pahmeier acknowledged that her attention had been directed to Ms. Coy's SEIU T-shirt by a Pat Leech, apparently a regional management-level employee of the Extendicare corporation. Ms. Pahmeier understood Ms. Leech's point to be that the T-shirt being worn by Ms. Coy was in violation of work rules contained in the Employees' Handbook, thus constituting a violation of corporate policy.

The incident was written up on a "Disciplinary Action Report" as a Class II violation. According to the Employee Handbook, a Class II offense is a middle-level violation, falling between a Class I offense (relatively minor) and a Class III offense (serious). As to disciplinary action being taken, the report indicated that the report constituted "final notice." Although Ms. Coy had lost 3-hours of pay by leaving the work site, the box on the Disciplinary Action Report indicating "suspension without pay" and the amount of time the employee was suspended was not checked or filled out.

Ms. Coy claims she was unsure whether she was being written up for wearing a T-shirt with a union (SEIU) logo or leaving the premises. The Disciplinary Action Report cites "being away from duty station without authorization" as the work rule or policy that was violated. In the section entitled "Describe what happened," Ms. Pahmeier included a statement that Ms. Coy had been directed to change out of a T-shirt that violated the Dress Code.

Ms. Coy refused to sign a copy of the discipline because she believed she was the only employee to have ever been disciplined for a T-shirt logo violation. The Union filed a grievance on Ms. Coy's behalf. The grievance reached the Step 2 level (facilitator administrator or his/her representative) that is provided in the parties' collective bargaining agreement. The then facility administrator, William Steele, restored to Ms. Coy the 3-hours of pay she had lost by leaving the work site on October 9. 4/ The written settlement of the grievance is silent as to whether the discipline would remain in Ms. Coy's personnel file.

4/ The Union understood the resolution of the grievance to include the additional remedy of the Employer withdrawing the "first notice" discipline. The Employer maintains that it agreed only to restore 3 hours of pay to Ms. Coy. Resolution of this disagreement is not before me.

As it turned out, Ms. Pahmeier's understanding that the T-shirt being worn by Ms. Coy violated *corporate* policy set forth in the Employee Handbook was incorrect. The only Dress Code in effect at the time had been conceived by the former administrator of the facility, William Steele, and promulgated by him in a 1-page memo to facility employees. It banned, *inter alia*, ". . . T-shirts, shirts, or sweatshirts with wording other than brand name." It was effective on 9/1/01 and applied only to the Willows of Sun Prairie. On 11/7/01, Ms. Coy had acknowledged receiving a copy of the Dress Code.

The Employer offered no evidence to refute the Union's claim that wearing T-shirts with other than brand name logos was commonplace for employees at The Willows in Sun Prairie or that Ms. Coy was the only employee at The Willows of Sun Prairie to have been disciplined for a T-shirt logo violation of the Dress Code. Ms. Pahmeier indicated that she was unaware of any employee other than Ms. Coy that had ever been asked to change a T-shirt. Sometime following the T-shirt incident involving Ms. Coy, the T-shirt restriction that she had purportedly violated was rescinded.

Second Incident – November 6, 2002

On November 6, 2002, at a scheduled "in-service" session with food service employees, Food Service Supervisor Pahmeier distributed to the employees a list of what were described as ". . . issues that need to be worked on and resolved immediately." Some 15 issues were listed, each highlighted by a "bullet-point." At the bottom of the page were two blank spaces, one designated for a signature (acknowledging receipt of the sheet), the other for the date. Ms. Coy did not sign the sheet she had received, leaving hers on the table in front of her when the meeting ended. After the employees had left the area, Supervisor Pahmeier noticed that the sheet Ms. Coy had in front of her was unsigned. Ms. Pahmeier picked up the unsigned sheet that had been in front of the grievant. At the top she wrote Kay Coy's name. Although she had neither a signature nor requested an explanation from Ms. Coy for the absence of a signature, at the bottom of the sheet Ms. Pahmeier wrote, "refused to sign, 11/6."

At hearing, Ms. Coy indicated that she had not intentionally refused to sign the sheet, but was unaware that her signature was required. She said she regarded the sheet as an aid to following the discussion of the issues listed on it, and believed a copy of the sheet would be posted in the kitchen. Ms. Coy agreed that she had signed a paper acknowledging receipt of a copy of the Employee Handbook almost eight years before, but insisted that she was unaware she was required to sign an acknowledgment that she had read the "issues" paper presented at the November 6 in-service session.

It does not appear that Ms. Coy was ever disciplined for her alleged refusal to sign the sheet.

Attendance Deficiencies – 11/8/02 & 12/19/02

The Employee Handbook outlines what is described as an "Absentee Control Program." Under that program, an employee is subject to receive a "first notice" (first warning) for three (3) absences within a twelve (12) month period, a "second notice" (second warning) for five (5) absences within a twelve (12) month period, a "final notice" (final warning) for six (6) absences within a twelve (12) month period, a "discharge warning" for seven (7) absences within a twelve (12) month period, and actual discharge from employment for eight (8) absences within a twelve (12) month period. Absence due to a medical condition not covered by the Family and Medical Leave Act is recorded as one (1) absence occurrence regardless of the number of consecutive days missed for the same medical reason.

On 11/8/02, Ms. Pahmeier issued a "first notice" to Ms. Coy for a 4th absence within a 12 month period. Ms. Pahmeier's descriptions of the absences indicated that Ms. Coy had called in sick to work on 6/7, 8/30, 10/17, and 11/8.

On 12/20/02 Ms. Pahmeier issued a "second notice" to Ms. Coy, for an absence occurring on 12/19/02. The absenteeism notice indicated that there had been 5 occurrences in the last 12 months not covered by the Family and Medical Leave Act.

Ms. Coy had refused to sign an acknowledgment that she had received a copy of the "first notice" because she thought she was being treated differently than other employees. Ms. Coy did sign an acknowledgment that she had received a copy of the "second notice."

"Absenteeism" is not regarded as a disciplinary offense, and is handled under a different procedure than occurrences subject to discipline.

Third Incident – January 6, 2003

Early in the new year, a simple inquiry by a worker at The Willows of Sun Prairie employed as a House Keeper precipitated a third incident between Food Service Manager Pahmeier and Grievant Coy. On January 6, 2003, at about 11:45 a.m., a House Keeping employee, Guy Coleman, approached Ms. Coy in the facility's kitchen and asked her at what time the food cart would be wheeled out on the floor for meal services to residents. Ms. Coy indicated the food cart would be out on the floor between 12:00 noon and 12:30 p.m. Food Service Manager Pahmeier overheard the exchange and corrected Ms. Coy's estimate. According to Ms. Pahmeier, the food cart would be off the floor by 12:15 p.m.

The time on which Ms. Pahmeier was insisting was part of an "Activity Guide" (food serving schedule) that Ms. Pahmeier had initiated in late December.

Ms. Coy protested to her manager that the 12:15 time was unrealistic because it was not possible to serve the residents in the dining room in only 15 minutes. Ms. Coy said she had attempted to show her manager the impossibility of serving lunch in the dining room in only 15 minutes, but that Ms. Pahmeier raised her voice to talk over Ms. Coy's objections and refused to listen to Ms. Coy.

Ms. Pahmeier indicated the two women were approximately 10 feet apart. She quoted Ms. Coy as stating that the schedule would not work. Ms. Pahmeier acknowledged that she had raised her voice and "raised" her finger at Ms. Coy, but said she did so to get Ms. Coy's attention. Ms. Pahmeier admitted to being "slightly agitated" at the time of the incident.

Ms. Pahmeier then complained to then-Acting Administrator John Hackett, who had temporarily succeeded to the administrative duties formerly exercised by William Steele at The Willows of Sun Prairie. In a written memo, Ms. Pahmeier alleged that Ms. Coy had ". . . raised her voice to me, saying this time of serving wasn't going to work." Ms. Pahmeier's memo accused Ms. Coy of having ". . . a disrespectful tone . . ." that did not allow Ms. Pahmeier the chance to explain or reply to Ms. Coy's comments. Ms. Pahmeier acknowledged in her memo that she " . . . had to raise her voice above hers [Coy's] and tell her that she was being very negative about this and she needed to stop."

Mr. Hackett personally investigated Ms. Pahmeier's complaint. His investigation included an interview with three witnesses to the encounter.

House Keeper Guy Coleman and two food service employees had overheard the Coy-Pahmeier exchange. In a statement taken by Mr. Hackett on January 7, Mr. Coleman described the incident as a disagreement between two grownups, who were talking it out. Mr. Coleman asserted he saw no disrespect.

In her January 7 statement to Mr. Hackett, Judy Waalkens, a 5-year Food Service Aide veteran described the grievant as uncooperative. She said Ms. Coy argued with Ms. Pahmeier and seemed unwilling to help the situation. Both women, according to the Waalkens statement, became angry.

At hearing, however, Ms. Waalkens augmented her brief statement to Mr. Hackett. She quoted the grievant as telling Ms. Pahmeier that the new schedule doesn't work. She said the grievant was trying to explain her objections to the schedule, but that Ms. Pahmeier wouldn't listen. Ms. Waalkens also asserted that she had told Mr. Hackett that Ms. Pahmeier had been yelling at Ms. Coy.

Dietary PM Cook Lynne Fiske was the third employee that witnessed the Coy-Pahmeier exchange. Lynne Fiske is the sister of the grievant. Her statement to Mr. Hackett was taken on January 6. In the statement Ms. Fiske said she heard her sister say, "this isn't realistic,"

adding, "all of a sudden Ms. Pahmeier blew up." Ms. Fiske went on to say that Ms. Pahmeier shook her finger at the grievant, saying, "You're just being negative, I don't want to hear it any more." With that, according to the statement, Ms. Pahmeier " . . . stormed down the hall into her office." Ms. Fiske's testimony at hearing was consistent with her statement to Mr. Hackett.

Following the conclusion of his investigation, Mr. Hackett concluded there was no basis for discipline against Ms. Coy as a result of her verbal exchange with Ms. Pahmeier on January 6.

4th Incident – January 7, 2003

The final incident in the sequence cited by the Employer took place on January 7, 2003 -- the day following the Pahmeier-Coy kitchen encounter.

A round of collective bargaining with the Employer's team for a successor labor contract had been scheduled for January 7. The grievant is a member of the Union's negotiating team.

At about 7:30 a.m., prior to the start of the negotiating session, the grievant called the kitchen at The Willows. She wanted to reach Martha Bast, employed at The Willows as a cook/food service aide. Ms. Coy explained that Ms. Bast's brother operated a car repair shop and she (Ms. Coy) wanted to know when his shop opened. She hoped to obtain a specific repair shop recommendation from him as to a particular problem she was having with the brake lights on her car. (The car had been in the brother's shop two days earlier).

Ms. Bast answered the phone. She was making toast at the time. Ms. Coy began with opening amenities of "how's it going?" According to Ms. Coy, Ms. Bast seemed flustered, and before Ms. Coy had a chance to ask for the information she wanted, Ms. Bast began to complain that there was no way she could complete her kitchen tasks in the time allotted under Ms. Pahmeier's new schedule. Ms. Coy said she tried to calm down Ms. Bast, offering verbal bromides of "take it easy," "relax," "take your time."

Ms. Bast agreed that Ms. Coy opened by asking, "How's it going?" Ms. Bast also acknowledged responding, "There's no way I can do this" [in the time allotted under Ms. Pahmeier's new food service schedule.] However, Ms. Bast interpreted Ms. Coy's next comments as hostile and subversive to Ms. Pahmeier's new schedule.

According to Ms. Bast, Ms. Coy next advised her to "slow down" *so that Ms. Pahmeier's new food service schedule wouldn't work*. At hearing, Ms. Bast volunteered the additional information that Ms. Coy had referred to Ms. Pahmeier as "a bitch" on several previous occasions, though apparently not during this phone call. That information had not been included in a written statement prepared by Ms. Bast on January 7.

The telephone conversation lasted less than a minute. When it ended, Ms. Bast reported that Ms. Pahmeier approached her as if to ask what the telephone conversation was about, but that Ms. Bast waved her off. However, Ms. Bast subsequently reported her "slow down so that Beth's schedule doesn't work" interpretation of the conversation to Virginia Schuh, the Assistant Food Service Manager. Ms. Schuh relayed Ms. Bast's version to Ms. Pahmeier, who, in turn, sent a memo on the matter to Administrator John Hackett

On cross-examination, Ms. Bast admitted that she did not get along well with Ms. Coy. She admitted that she has referred to Ms. Coy as "a bitch" on several occasions in the past, and had asked Ms. Pahmeier to schedule her and Ms. Coy in the kitchen at different times. Martha Bast is the only food service employee at The Willows of Sun Prairie with the initials M.B. Presumably, she is the employee to whom Virginia Schuh referred in Ms. Coy's employee evaluation (see footnote 2).

According to Ms. Bast, "don't go too fast" to her means the same as "slow down." Although her written statement of January 7 contained only the "don't go too fast" comment, at hearing Ms. Bast said Ms. Coy told her *both* to take her time and to slow down. Ms. Bast agreed that performing the kitchen responsibilities "too fast" is a problem.

The Cook/Food Service Aide's written report of January 7 contained three sentences:

> On 1/7/03 I received a phone call at 7:25 AM from Kay Coy. She told me not to go too fast in the dining room and to take my time. She also told me that she was going to grieve about whatever happened on Mon[day], 1/6.

After providing her written statement, Ms. Bast was questioned by John Hackett. According to Hackett's notes of the interview, Ms. Bast stated: "She wants to make certain that the plan does not work. 'Beth [Ms. Pahmeier] thinks she can do this, but I know we cannot.' At Mr. Hackett's request two days later, Ms. Bast signed his notes as representing what she had said to him on January 7.

The grievant wrote her version of the telephone conversation on 1/17/03:

> I called Martha to find out what time her brother's shop opens. She said hello, I said "How's it going. She said "There's no way I can do this in 15 minutes. I said "Don't worry about it, take your time and do it the way you always do. She said "I gotta go." I said "Goodbye."

At hearing, the grievant denied having called Ms. Pahmeier "a bitch." She further denied that she was attempting to cause a "slowdown." In fact, she asserted that she had done

her best to comply with the new schedule. The grievant further noted without contradiction that under the "old" schedule she completed her tasks in less than the time allocated to them.

On January 20, 2003, Ms. Coy was discharged from her employment at The Willows for several alleged violations:

- Encouraging another employee to engage in a work slowdown.
- Class III 12. Serious violation of resident rights.
- Class III 10. Insubordination.
- Class II 11. Interfering with or purposeful distraction of another employee in performance of work.

The Disciplinary Action Report was written by John Hackett. Mr. Hackett wrote that his investigation concluded that ". . . on 1/7/03 Kay Coy phoned another employee and advised her to not work too fast in the dining room so that the new job guide would not be successful."

After Ms. Coy was fired from her employment, Ms. Bast became a full-time AM cook. Up to that time she was a full-time employee, but had been required to split her time as both a cook and a Food Service Aide. Food Service Aide Judy Waalkens has worked with both Ms. Coy and Ms. Bast for several years. According to Ms. Waalkens, although Ms. Bast was paid a cook's rate even when she functioned as a Food Service Aide, she far preferred her duties as a cook to those of an aide.

In January, 2003, Assistant Food Service Manager Virginia Schuh left the employ of Extendicare and did not appear as a witness in this matter. In February, 2003, Ms. Pahmeier's employment as the Food Service Manager at The Willows of Sun Prairie also ended. However, Ms. Pahmeier is still employed by Extendicare at a facility located in southeastern Wisconsin. The reason for her transfer was attributed to her travel convenience.

Finally, the new food service schedule Ms. Pahmeier had initiated at the Willows and to which the grievant (and Martha Bast) had objected has been rescinded and the former schedule is back in effect.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 – GRIEVANCE AND ARBITRATION

Section 3.1. The Employer agrees to meet with duly accredited officers and committees of the Union upon grievances pertaining to meaning or application of the Agreement, in accordance with the procedure provided below. A

grievance, subject to the following procedure, shall include any and all disciplinary actions taken by the Employer, and all questions and disputes involving contract interpretation and any and all questions and disputes involving conditions of employment.

. . .

Step 2 If there is a failure to resolve at Step 1, the grievance must be presented within seven (7) working days from the failure to resolve in Step 1 to the Administrator, or his/her representative, for investigation. If the aggrieved employee has requested the Union to be involved, administration will provide for a meeting of representatives of the Union and the Employer for negotiation purposes within seven (7) working days of his/her written request to do so. The Employer shall provide written disposition within seven (7) working days of the meeting. If there is failure to resolve at this Step, either party may file an appeal to arbitration within ten (10) working days. Failure of the employee to go to Step 2 within seven (7) working days of the response of Step 1 of the grievance bars further action by the Union or the employee.

Step 3 If the grievance is not settled in Step 2, the Union will notify the Employer's Corporate Legal Department, in writing, of its intention to submit any grievance to arbitration. The arbitrator will be selected by and from the staff of the Wisconsin Employment Relations Commission. The decision of the arbitrator will be final and binding on both parties to this Agreement.

Section 3.2—The cost of the Arbitration shall be shared equally by the Employer and the Union.

Section 3.3—The decision of the arbitrator shall be final and binding on both parties. The arbitrator has no authority to add to, subtract from, modify, or ignore any provision of this Agreement.

. . .

ARTICLE IV – SECURITY

Section 4.1 – The Union agrees for itself and its members that there shall be no picketing, strikes, sympathetic strikes, sit-downs slowdowns, or work stoppages for any reason whatsoever, and the Employer agrees that there shall be no

lockout during the life of this Agreement, it being the mutual desire of both parties to provide for uninterrupted, continuous service.

ARTICLE 5 – SENIORITY

. . .

Section 5.3 – Seniority and all other accrued rights shall cease upon:

a. Discharge for just cause
b.

. . .

ARTICLE 10 – SUSPENSION, DISCHARGE, RESIGNATION

Section 10.1 – The Employer may discipline an employee for just cause, but in respect to discharge shall give a warning of the complaint against such employee in writing, and a copy of the same to the Union, except that no warning notice needs to be given to an employee if the cause of the discharge is for such reason as:

a. dishonesty
b. drinking, possession of illegal drugs or being under the influence of illegal drugs or alcohol while on company property
c. recklessness that could result in an accident to a patient
d. abuse of a patient, verbal or physical
e. sleeping on the job
f. leaving patients unattended
g. disclosing privileged information
h. the second time an employee does not report unavailability for work at least one (1) hour before starting time. However, no such action shall be taken if the employee can show to the reasonable satisfaction of the Employer that she was physically prevented from coming to the nursing home due to illness or other emergency.

The Union will be notified in writing within three (3) working days after an employee is discharged.

Section 10.2 – Should the Union wish to contest a discharge, suspension, or termination, written notice thereof shall be given to the Employer within fifteen days (15) calendar days, in which even the issue thereafter shall be submitted to, and determined, under the grievance procedure specified in Article III, Section

3.1, commencing Step 2 of this Agreement. Failure to give this notice bars the Union and the employee from further action.

PROVISIONS OF THE EMPLOYEE HANDBOOK CITED BY THE EMPLOYER OR FOR ILLUSTRATIVE PURPOSES

Groups of Offenses and Associated Penalties

Class I Offenses: Examples of these offenses include, but are not limited to: (other offenses may also merit these penalties)

1. Failure to comply with employer uniform or name tag policy.
2. Disruptive or unruly behavior or unreasonable noise on facility premises.
3. Creating or contributing to unsanitary conditions.
4. Improper or wasteful use of equipment and/or supplies.
5. Minor infraction of facility safety rules.
6. Minor disrespect to any superior.
7. Not attending a mandatory inservice.
8. Punching some else's time card or having someone punch your for time worked.
9. Working unauthorized overtime.
10. Minor medication error.

Penalties for Class I Offenses:
First Offense: First Notice
Second Offense: Second Notice
Third Offense: Final Notice
Fourth Offense: Discharge Warning
Fifth Offense: Discharge

Class II Offenses: Examples of these offenses included, but are not limited to: (other offenses may also merit these penalties)

. . .

7. Being away from duty station without authorization.

. . .

Penalties for Class II Offenses
First Offense: Final Notice
Second Offense: Discharge warning
Third Offense: Discharge from employment

Class III Offenses: An employee will be subject to discharge for a Class III offense. Other offenses may also merit discharge. Class III examples include, but are not limited to:

. . .

11. Insubordination; refusal to follow a direct order.

. . .

12. Serious violation of resident/patient's rights.

. . .

Absentee Control Program (pp. 33-4)

I. Tardiness/ Early Leave * * *

II. Absence

An absence is defined as missing more than 50% of the scheduled shift. The following corrective measures will apply:

a. Upon three absences within a twelve (12) month period, the employee will receive a **first notice**.
b. Upon five (5) absences within a twelve (12) month period, the employee will receive a **second notice**.
c. Upon six (6) absences within a twelve (12) month period, the employee will receive a **final notice**.
d. Upon seven (7) absences within a twelve (12) month period, the employee will receive a **discharge war**ning.
e. Upon eight (8) absences in twelve (12) months, the employee will be **discharged from employment**.

III. No Call/No Show * * *

IV. Recording Procedure * * *

V. Absence for Medical Condition

Any absence for a medical condition not covered by FMLA will be recorded as one (1) absence occurrence regardless of the number of consecutive days missed for the same medical reason.

VI. Policy Exceptions * * *

VII. Record Correction Procedure * * *

POSITIONS OF THE PARTIES

Employer

The Employer focuses on Ms. Coy's January 7, 2002 telephone conversation with Martha Bast, and urges that the grievant not only directed Ms. Bast to "go slow," but added "I do not want the plan (Timed Activity Plan) to work." The Employer interprets Ms. Coy's statements as " . . . clearly, and unequivocally, inciting a slowdown in breach of the collective bargaining agreement (hereinafter CBA) and contrary to reasonable work rules." The Employer additionally finds Ms. Coy's conduct as "insubordinate," describing it as ". . . an effort to interfere with a co-worker's performance of her duties.

The Employer argues that few actions are more harmful than an employee's attempt to instigate a slowdown or insubordination and that discharge from employment is the well-recognized penalty for such conduct.

The Employer finds Mr. Hackett's conclusions as to what transpired in the Coy/Bast telephone conversation as both reasonable and entitled to deference. The Employer notes that even Ms. Coy acknowledged that she had advised Ms. Bast to "take your time . . . do the work the way you always have." This, according to the Employer, was directly contrary to the instructions Ms. Bast had received from Ms. Pahmeier, and supports Mr. Hackett's conclusion that Ms. Coy was attempting to instigate a work slowdown

The Employer further contends that in the brief three months Ms. Pahmeier had served as the facility's Food Service Manager, Ms. Coy had repeatedly challenged Ms. Pahmeier's authority. In support of this contention, the Employer points to Ms. Coy's walking off the job, her refusal to sign a memorandum evidencing attendance at an in-service training session, her refusal to sign a disciplinary action report, and her engagement in a "heated argument" about Ms. Pahmeier's new Timed Activity Plan.

The Employer argues that the CBA grants the Employer the right to manage its business, including the right to make reasonable work rules and the right to discharge employees for just cause. The Employer asserts that the Employee Handbook it promulgated to employees contains reasonable work rules that the Union has never grieved. Those work rules include prohibitions against insubordination, refusing to follow a direct order, violating residents' rights, and interfering with another employee's work performance.

The Employer notes that an employer's right to establish work rules and maintain discipline is a fundamental management prerogative. Citing arbitral authority, the Employer defines a *reasonable* work rule as one that is known to the employees, addresses a legitimate, management objective, does not violate the contract, and does not impose a standard that is

impermissibly strict or harsh. *Regal Plastic Co.*, 86 LA 788, 791 (Woolf, 1985); *Alcolac Chem. Corp.* 55 LA 306, 312 (Robertson, 1970).

According to the Employer, Ms. Coy received the work rules contained in the Handbook on no less than two occasions, and signed an acknowledgment of receipt each time. The Employer argues that since a slowdown is specifically prohibited by the CBA, it rises to the level of a negotiated policy and cannot be assailed.

The Employer asserts that rules banning insubordination, interfering with a co-worker's tasks or a slowdown are fundamental and cannot be challenged on the grounds of reasonableness. The Employer cites *Dietrich Industries Inc.* 113 LA 905, 907-08 (Feldman, 1999) as authority for the proposition that an employee's statement he was out to "fuck" the company and his attempts to limit the company's production of finished product was instigating a slowdown and warranted termination. Other arbitral cases offered by the Employer include *Walgreen Co.*, 100 LA 468 470-1, (Shieber, 1992) [telling co-workers to slowdown is instigating a slowdown and warrants termination], and *Hoover Group, Inc.* 97 LA 1006, 1007-08, (Madden, 1999) [telling employee that "you better slow down" or "you better slow down, your work product does not look too good" is urging an employee to restrict output and is an impermissible slowdown warranting discharge].

The Employer asserts that arbitral cases recognize that corrective discipline is ill suited for instances in which employees have engaged in a slowdown, citing *Collis,* 50 LA 1157 (Doyle, 1968). It is also ill suited, according to this Employer, for instances in which the employees have intentionally tried to defeat an employer's new methods of operation. Discharge is appropriate, the Employer contends..

Moreover, says the Employer, it is not necessary the employee's efforts at a slowdown have been successful, citing *Dietrich Industries Inc.* (supra at 908), *Hoover* (supra at 1009), and *Walgreen Co.* (supra at 469-70).

The Employer offers two reasons for discounting as meritless the Union's contention that since slowdown or insubordination are not listed as infractions for which summary discharge is appropriate a prior written warning is required: 1) slowdowns are specifically prohibited by the CBA, and thus not a matter of just cause, but a contract violation; 2) the list of offenses in Article X of the CBA for which termination is appropriate is not all-inclusive – indeed, other forms of egregious misconduct (e.g., carrying a loaded firearm, sexual misconduct, assaulting a supervisor) are not listed in Article X, but are, nonetheless, easily recognized as warranting immediate discharge.

The Employer acknowledges the right of employees to challenge management action, whether the action is discipline or changes in procedure. But, the Employer insists, the employee's method of protest must be through the exclusive grievance/arbitration procedure set forth in a collective bargaining agreement.

The Employer argues that Ms. Coy's challenges were outside this procedure. On October 9, 2002, the Employer asserts that Ms. Coy walked off the job instead of reversing or removing an item of clothing to which Ms. Pahmeier objected. The Employer contends that Ms. Coy's refusing to sign her letter of discipline of October 20, 2002 (for the alleged October 9 offense) was also an inappropriate protest. The Employer believes Ms. Coy was further demonstrating defiance on November 6, 2002, this time in response to changes in dietary department procedures, when she failed to sign a Memorandum of a department meeting in which the changes were outlined. The Employer also cites the unrefuted assertion by Ms. Bast that Ms. Coy's statement the Timed Activity Plan "sucked" as further evidence of Ms. Coy's unacceptable way of dealing with management directives. Moreover, says the Employer, on January 6 Ms. Coy initiated a conversation with Ms. Pahmeier and "bitterly protested" the Timed Activity Plan, thus again demonstrating a preference for confrontation as a means of protesting management actions.

The Employer concedes that no one of these incidents, by itself, would warrant discipline. But, says the Employer, they all provide valuable background against which Ms. Coy's motives may be assessed and a reasonable conclusion drawn as to whether Ms. Coy would encourage a co-worker to engage in a slowdown as a means of protesting a management action.

The Employer finds pretextual Ms. Coy's reason for calling Ms. Bast on the morning of January 7 (finding out what time Ms. Bast's brother opened his auto repair shop). The Employer finds culpability in Ms. Coy's acknowledgment that she told Ms. Bast to "take your time and do it the way you have always done," arguing that Ms. Coy's advice was contrary to Ms. Pahmeier's directive to change procedures.

The Employer attacks Ms. Coy's version of her telephone conversation with Ms. Bast as not credible. The Employer alleges that Ms. Coy " . . .'will adjust the truth' when it suits her purpose." In support of this accusation, the Employer first notes Ms. Coy's initial denial that she had received an Employee Handbook that she quickly changed when she apparently saw counsel for the Employer reach in his file for exhibits to test that denial.

In support of its efforts to undermine Ms. Coy's reliability as a witness the Employer offers five more examples: 1) the testimony of Ms. Pahmeier as to the October 9 T-shirt incident and the subsequent discipline imposed conflict with Ms. Coy's explanation that she believed she had been directed to leave; 2) Ms. Coy's explanation that she did not understand she was required to sign the department meeting memorandum of November 6; 3) the timing of Ms. Coy's telephone call to Ms. Bast the morning of January 7 was deliberately designed to pull Ms. Bast from her duties; 4) Ms. Coy's "lame" excuse for making the call to Ms. Bast was that she wanted to find out when Ms. Bast's brother would open his car repair shop that

morning, but that question was never asked; 5) Ms. Coy's admission that she resorts to "self-help."

Conversely, the Employer urges that Ms. Bast's version of the events to which she testified is entirely credible. The Employer does not accept that Ms. Bast disliked Ms. Coy so much that she would lie about her in an effort to cause her discharge. Further, according to the Employer, Ms. Bast's demeanor does not suggest a person mentally adroit enough to formulate a devious plan to lie about the contents of Ms. Coy's phone call when questioned about it by Ms. Schuh.

Finally, the Employer points to the direct interest in the outcome of this proceeding held by Ms. Coy as providing a possible motive to testify falsely. Ms. Bast, according to the Employer, has nothing to gain by lying.

The Employer denies the Union accusation that it (the Employer) was influenced in its termination decision by any of Ms. Coy's union activity, and points to a dearth of evidence in the record that indicates any management hostility to Ms. Coy's union activities or the Union. The Employer finds Ms. Coy's complaint to OSHA concerning gas leaks in a stove and a defective refrigeration system a "non-event," even though it apparently resulted in an OSHA inspection. The OSHA inspection of the facility caused no unusual events to occur, says the Employer, adding that inspections of heavily regulated businesses, such as nursing homes, are routine.

Finally, the Employer argues that the Arbitrator should not substitute his judgment for that of the Employer concerning the level of discipline. In support, the Employer offers an extensive quote from *Van Chevrolet, Inc.*, 80 LA 1298, 1301 (Madden, 1983):

> " . . . If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management. the functions of management would have been abdicated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management . . ." [Quoting *Stockham Pipe Fittings Co*., 1 LA 160 (McCoy).

The Employer asks that the discharge of Kay Coy be upheld and the grievance be denied.

UNION

The Union observes that historically the Employer bears the burden of proving just cause in discharge arbitration. Citing arbitral precedent, the Union describes the discharge of

an employee as the "capital industrial penalty," that must be supported by "a clear or substantial preponderance of the evidence."

The Union contends that the Employer has failed to meet this burden.

The Union lists an arbitral definitions of "slowdown" as "a deliberate effort to reduce output in order to obtain concessions, citing *Manville Corp.,* 89 LA 880 (Ross, 1987). The Union finds *Black's Law Dictionary* (5th Ed. at 1245) in accord, as well as *Pantry Pride Enterprises,* 79 LA 883 (Carson, 1982). The Union denies that the grievant encouraged a slowdown.

The Union argues that that Ms. Coy opened her January 7 telephone conversation with Ms. Bast with a polite inquiry of how things were going. The Union notes agreement between Ms. Bast and Ms. Coy that Bast responded by saying there was no way she could do the serving in 15 minutes. Thus, argues the Union, the grievant was not the person that brought up the topic of the new schedule.

The Union urges that Ms. Coy's next comment to Ms. Bast was intended merely to help calm down Ms. Bast. According to the Union, Ms. Bast's own initial recitation of Ms. Coy's words [(she said) "not to go too fast," and "to take my time] is in general agreement with Ms. Coy's version of her words [don't worry about it, take your time, do it as you always do it]. These words, say the Union, give no evidence that Ms. Coy was instigating a slowdown.

The Union views Ms. Coy's words as encouragement to Ms. Bast, i.e., don't worry, take adequate time to do your job.. The Union argues that inasmuch as many facility residents are in fragile health and require special diets, care must be taken to insure each receives the appropriate, ordered menu.

The Union disagrees that Ms. Coy's words reflect insubordination just because they appeared to contradict instructions from Ms. Pahmeier. To the contrary, the Union posits, just as an employee is not insubordinate when she refuses to perform a job in a manner that will endanger her own safety, employees engaged in patient care are not insubordinate when they act on a reasonable belief that to do otherwise would endanger patients. In support, the Union cites *Southern Cal. Permanente Hospital*, 106 LA 1033 (Bickner, 1996). Thus, according to the Union, neither Ms. Coy's version, nor Ms. Bast's initial version, demonstrate any intent on Coy's part to pressure management.

The Union acknowledges Ms. Bast's subsequent statement to John Hackett that augmented her original version of Ms. Coy's telephone statements. But, says the Union, the subsequent statement that added an improper motive [" . . . to make sure that the plan does not work"] is unreliable, citing *Federal Aviation Administration*, 112 LA 129, 132-33 (Sergent, 1999). The Union notes that while Ms. Bast's initial statement closely parallels that of Ms. Coy; the addendum to it was sought by Interim Facility Administrator Hackett in an interview with Ms. Bast and appears only in his handwriting. The Union also cites *Niagra Mohawk*

Power Co., 116 LA 1709 (Babiskin, 2002) for the proposition that the existence of prior consistent or inconsistent statements is an important consideration in determining witness credibility.

The Union further questions Ms. Bast's credibility by noting the hostility that has existed between Ms. Bast and Ms. Coy since at least late August, 2001, as well as the fact that Ms. Bast has benefited by Ms. Coy's discharge since that enabled Ms. Bast to work full-time at her preferred job as cook. The Union notes that the arbitrator may discredit Ms. Bast's testimony because of possible bias or personal animus, citing *Huga Bosca Company*, 109 LA 533 (Frankiewitz, 1997) and *Dayton Public Library*, 117 LA 71, 86 (Bell, 2002). The Union also cites *Bernard Engineering Co.,* 86 LA 523 (Briscoe, 1985) for the proposition that the testimony of an interested witness be discounted.

The Union describes Ms. Bast as having adopted a defensive posture on the witness stand, with her arms folded in front of her, and urges the arbitrator to take Ms. Bast's demeanor into consideration. The Union also notes the testimony of Dietary Aide Judy Waalkens indicating that Ms. Bast had previously misrepresented an issue involving Ms. Waalkens.

In summary, the Union urges the arbitrator to disregard the portion of Ms. Bast's testimony not encompassed by her original statement based on 1) inconsistency with her prior statements, 2) hostility towards Ms. Coy, 3) demeanor, and 4) past instance of misrepresenting an issue.

The Union additionally argues that Ms. Coy was treated in a disparate manner because of her leadership role in the Union. The Union notes that the Employer is attempting to rely, in part, on a disciplinary report arising from a misapplication of its dress code. The Union contends that if Ms. Coy's comments on January 7 were insubordinate [don't worry, take your time], Ms. Bast's self-admitted statement ["there's no way I can do this within 15 minutes"] was also insubordinate. Yet, the Union notes, Bast received no discipline for her comment, but Coy was fired.

The Union further urges that Ms. Coy received no written warning prior to her discharge and that this violates the prior written warning requirement contained in Article X of the CBA in that the discharge was for none of the enumerated reasons listed therein. Although the Union concedes that "insubordination" is listed as a Class III offense in the Employee Handbook, it argues that it is a well-settled arbitral principle that a contract controls over a unilaterally promulgated handbook.

The Union insists that Ms. Coy was not insubordinate in that she never refused to obey a direct order, citing *Auto Warehousing Co.*, 114 LA 699 (Brodsky, 2000) and *Heckett Division of Harsco Corp.,* 94 LA 647 (Crane, 1990).

The Union finds ridiculous the Employer's claim that a 15-minute delay in food service would seriously violate a patient's rights. Any violation of patients' rights took place when

management reduced the breakfast serving time for facility residents, according to the Union. Ms. Coy's concern that employees take enough time to plate patients' meals properly demonstrates concern for, not abuse of, patients' rights, the Union adds.

Finally, the Union argues Ms. Coy was placed in double jeopardy. Ms. Coy was suspended on January 7, 2002, after the exchange with Ms. Pahmeier on January 6 and the telephone conversation with Ms. Bast on January 7. Following the Employer's investigation that took place on January 7, Ms. Coy was reinstated on January 8 and returned to work on January 9. She was then suspended a second time on January 10 and ultimately discharged.

The Union finds unconvincing the Employer's explanation that its first investigation on January 7 focused only on the Coy/Pahmeier exchange on January 6, and the second suspension on January 10 was in reaction to the Coy/Bass telephone conversation on January 7. The Union notes that the Employer took witness statements concerning both incidents on January 7, and was fully aware of each when it reinstated Ms. Coy on January 8.

The Union requests that the arbitrator sustain the grievance of Kay Coy, and further order her reinstatement to her position of Dietary Cook with full seniority and benefits, that her employment record be expunged, that she be made whole for all losses resulting from her termination, and that the arbitrator retain jurisdiction for any disputes as to implementation of said award.

DISCUSSION

On January 20, 2003, the grievant was discharged by her employer for 4 asserted reasons:

1. Encouraging another employee to engage in a work slowdown;
2. Class III 12. Serious violation of resident rights;
3. Class III 10. Insubordination.
4. Class II 11. Interfering with or purposeful distraction of another employee in performance of work.

The task of the arbitrator is to determine whether the Employer had just cause to discharge the grievant, Kay Coy.

Clearly, a fundamental precept of generally accepted employment law is that an employee owes to the employer a duty of reasonable, good faith efforts to execute assigned employment tasks, unless carrying out an assignment threatens the safety of the employee or others. A deliberate employee slowdown violates that duty. "A slowdown of production purposefully taken by any employee is an intolerable act, a gross imposition by that employee. It cannot be tolerated and is the subject, properly so, of severe discipline." *Dietrich Industries*

Inc., 905, 908 (Feldman, 1999).

Discharge, of course, is a severe discipline. At least one arbitrator described it as the capital industrial penalty." *Metropolitan Atlanta Rapid Transit Authority,* 80 LA 829, 835 (Singer, 1983). Thus, in discharge cases arbitrators have consistently ruled that the burden of proof lies with the employer. Elkouri, *How Arbitration Works,* 5th Ed. (1997), p. 411.

"To establish a charge of attempting to impede work -- inducing a concerted slowdown -- requires compelling proof." *Walgreen*, 100 LA 468, 471 (Shieber, 1992) citing *Veritrox Piezoelectric Division, and Teamsters, Local 416,* 84 LA 1315, 1319 (R.I. Abrams, 1985). To be sure, establishment of the charge in support of a discharge is still a civil, not a criminal, matter, so proof beyond a reasonable doubt is not required. But neither is it so casual a matter that a mere preponderance of the evidence would suffice to sustain the discharge.

Consistent with the foregoing, and the practice of some at the Wisconsin Employment Relations Commission, the quantum of proof that is required in this matter to sustain the discharge is the middle burden, i.e., "a clear and convincing preponderance of the evidence. See *Superior City Employees Union,* WERC, MA-10838 (Emery, 2000); *Bay Area Medical Center,* WERC, A- 5723 (Nielson, 1999).

Encouraging an Employee to Engage in a Work Slowdown

Although the Employer sought to justify its discharge of Mr. Coy with four listed causes, it is clear that the Employer's interpretation of Ms. Coy's telephone call to Martha Bast on January 7 is the critical element of the justification. The Employer chose to interpret Ms. Coy's words to Ms. Bast as an attempt to induce Ms. Bast to engage in a slowdown. To a greater or lesser extent, the other three causes cited by the Employer in support of the discharge are spin-offs or derivatives of the first.

The Employer provided evidence of a sequence of three separate incidents arising in the last quarter of 2002 and January 2003. None were listed as "reasons" or "causes" for the dismissal. In fact, in its Brief the Employer concedes that none of these incidents by themselves would warrant discipline. Instead, the Employer urges their consideration as valuable background against which Ms. Coy's motives may be assessed.

Perhaps. But if the incidents are to be used for that purpose, in fairness they may also be used as a basis of assessing and apportioning responsibility for the occurrence of those incidents among the parties involved.

SEIU T-shirt Incident

It is unclear whether Ms. Pahmeier would have noticed the T-shirt with the SEIU union logo being worn by Ms. Coy had her attention not been directed to it by a corporate regional manager that was visiting the facility that particular day. The regional manager apparently and

erroneously advised Ms. Pahmeier that wearing the T-shirt violated the corporate dress code. Ms. Pahmeier relayed the same misinformation to Ms. Coy, along with a directive to change out of the T-shirt, turn the offending T-shirt inside-out, or go home.

At hearing, Ms, Coy was adamant that she understood her alternatives were to change the shirt or leave the facility. In her testimony Ms. Pahmeier stated that she offered Ms. Coy the alternatives of either turning the offending T-shirt inside out or changing into something else *at home*. Ms. Pahmeier also testified she didn't really want Ms. Coy to go home and urged her not to. She said Ms. Coy's response was that she had to.

Ms. Coy's unrefuted testimony indicated that she had worn the SEIU T-shirt to work on other occasions prior to October 9 and had never been told the T-shirt (or any other T-shirt with a logo violated a dress code. She said she asked Ms. Pahmeier why she had to change the shirt and was told the shirt was "inappropriate." In response to Ms. Coy's next comment that she'd worn the T-shirt to work in the past, Ms. Pahmeier said the T-shirt violated the dress code.

Ms. Coy opted to leave and punched out some three hours before her shift would have normally ended. She was written up for "being away from duty without authorization." Her refusal to sign an acknowledgment that she received the reprimand and "final notice" is described by the Employer as an example of self-help and defiance. Ms. Coy filed a grievance. As it turned out, wearing the SEIU T-shirt was not against corporate policy. Ms. Coy had the three hours of pay she lost by punching out restored to her and the matter was deemed settled.

Understandable as Ms. Coy's resentment may have been, her refusal to sign an acknowledgment that she had received a copy of the attendance "final notice" for leaving the facility before her shift ended on October 9 was arguably imprudent. But, in my view it pales into insignificance when compared to 1) the egregiously erroneous misinformation on the corporate dress code policy supplied to Ms. Pahmeier by a regional manager that should have known better, and 2) the unfortunate (albeit undoubtedly innocent) compounding of that error by Ms. Pahmeier in her exchange with Ms. Coy.

Given Ms. Pahmeier's acknowledgment in her testimony that the options she offered Ms. Coy included changing into something else *at home*, I have no trouble in crediting Ms. Coy's version that *she* understood that her alternatives included leaving the facility to go home. Ms. Coy's confusion may have resulted from the stress she was experiencing; perhaps Ms. Pahmeier was less than clear in offering the alternatives. Indeed, until she read the "final notice," Ms. Coy was unsure whether she had been written up for violating the corporate dress code or leaving the premises. Moreover, it appears that responsible management at The

Willows recognized the unfair position in which Ms. Coy had been placed by restoring her pay.

I note the disagreement between the parties as to the exact terms of that settlement. Both sides acknowledge that Ms. Coy was made whole for the wages she lost by punching out three hours before her shift was scheduled to end. The Union insists that the settlement also included expunging the incident from Ms. Coy's Personnel or Employment Record. The Employer is equally adamant that this element was not included.

It may be helpful to the parties' future relationship if the parties were able to resolve this disagreement between them. It is beyond my jurisdiction to do so. As a practical matter it is probably of no consequence to the grievant should a formal, final resolution not occur. In effect, by restoring to Ms. Coy her loss of pay, the Employer has assumed at least some responsibility for the incident's unfortunate occurrence.

November 6 Incident – Failure to Sign Acknowledgment of Attendance at In-Service.

The facts of this incident have been set forth earlier in some detail.

Although Ms. Coy was never disciplined or questioned about her failure to sign the sheet evidencing her attendance at the November 6 in-service, the Employer now contends her failure was a deliberate refusal and cites it as further evidence of Ms. Coy's defiance of Ms. Pahmeier's.

I do not agree. If management believed Ms. Coy was somehow objecting to Ms. Pahmeier's list of issues, it was incumbent on management to air the issue with Ms. Coy at the time. Ms. Pahmeier's note stating that Ms. Coy *refused* to sign appears, at best, to represent Ms. Pahmeier's interpretation, untested and unverified by any conversation with Ms. Coy. Given the lack of any follow-through by management on this matter, I discount an interpretation of the matter that would work to Ms. Coy's detriment.

January 6 Argument between Ms. Pahmeier and Ms. Coy.

It is instructive to note that Ms. Coy **did not initiate** this incident. It rather began with an innocuous question from another employee, who asked Ms. Coy what time the food cart would be wheeled out on the floor for meal services to residents. Ms. Coy responded the food cart would be out on the floor between 12 noon and 12:30 PM. Ms. Pahmeier overheard the exchange and corrected Ms. Coy. Ms. Pahmeier told the inquiring employee the food cart would be off the floor by 12:15.

This incident is also recounted in some detail, above.

None of the three witness to the incident accuse Ms. Coy of disrespect or insubordination. One witness describes it as a "disagreement" between two grown-ups." A second witness said both women were angry and that Ms. Pahmeier wouldn't listen to Ms. Coy's objections. A third (the grievant's sister) attested to Ms. Pahmeier's anger, finger shaking, and refusal to listen. Ms. Pahmeier, herself, acknowledged that she had been slightly agitated, had raised her voice, and had raised her finger at Ms. Coy.

Although Ms. Pahmeier reported the incident in writing for then Acting Administrator John Hackett and accused Ms. Coy of having had a disrespectful tone, Mr. Hackett concluded there was no basis for discipline.

I do not agree with the Employer's current conclusion that this incident demonstrates Ms. Coy's willingness to use confrontation as a method to protest management actions rather than the grievance procedure. Even discounting the account of the argument given by the grievant's sister, neither of the other two accounts demonstrate disrespect on the part of Ms. Coy towards Ms. Pahmeier. Both appear to be credible.

In particular, the testimony of Food Service Aide Judy Waalkens concerning the January 6 discussion appears to have been uncontrived, balanced and has the ring of truth. Ms. Waalken's account did not spare either Ms. Coy or Ms. Pahmeier from criticism. Both women were described as angry. Ms. Coy was described as uncooperative. Ms. Pahmeier was described as unwilling to listen and yelling. Clearly, it was not either woman's finest hour. To place all of the blame for this incident on Ms. Coy's shoulders as the Employer now attempts, is not only unfair, but ignores Mr. Hackett's conclusion that no discipline should be imposed.

Ms. Coy's Telephone Call to Martha Bast on January 7.

The telephone call from Kay Coy to Martha Bast on January 7 constitutes the gravamen of the Employer's charge against the grievant that *she encouraged another employee to engage in a work slowdown*. The facts of this incident are fully set forth above. On this state of the record I am unable to sustain the discharge.

The parties agree on virtually all of the salient facts, with one exception – the testimony of Martha Bast! The Employer accepts the testimony of Martha Bast without apparent reservation, but attacks the credibility of the grievant. The Union defends the credibility of the grievant, but attacks the credibility of Martha Bast.

Under all of the circumstances, I credit the Union's interpretation. Notwithstanding her stake in the outcome of this matter, I find the testimony of Kay Coy to be credible. Conversely, I do not find the testimony of Martha Bast to have the ring of reality.

In making findings of credibility, I found helpful the factors announced by Arbitrator Babiskin, *Niagra Mohawk Power Corp.,* 116 LA 1709, 1714 (2002). Arbitrator Babiskin writes:

> The factors I have used to make my credibility findings include, but are not limited to the following: 1) the demeanor of the witnesses and the manner in which testimony was given, 2) the extent of the witnesses' *capacity* to perceive, recollect or communicate matters testified to, 3) the extent of the witnesses' *opportunity* to perceive matters testified to, 4) his character for honesty and veracity, 5) the existence or non-existence of bias, interest or other motive, 6) prior consistent statements, 7) prior inconsistent statements, and 8) his admission of untruthfulness or dishonesty.
>
> A witness can give incorrect or inaccurate testimony without lying or perjuring himself.
>
> An employee or witness can in good faith give answers or provide information that is "dead-wrong" without being guilty of misconduct or falsifying statements or documents.
>
> People can sincerely believe something happened, even if it did not. People "misremember" all the time. This does not automatically make them liars. The human mind is a fallible instrument.

The demeanor of Martha Bast as she testified was not impressive. She appeared tense and defensive. Her veracity was questioned by Food Service Aide Judy Waalkens. While the capacity of Ms. Waalkens to perceive, recollect, or communicate some matters may have been limited, her capacity to perceive, recollect, or communicate the basis for her doubts concerning Ms. Bast's credibility seemed more than adequate.

The long-standing animosity that existed between Ms. Coy and Ms. Bast was also well-documented, not only by direct testimony, but by a 2001 job evaluation of Ms. Coy in which Ms. Coy was urged to try to improve relations with Ms. Bast. Given this history, a basis for bias on the part of Ms. Bast is revealed.

Contrary to the Employer's view that Ms. Bast had no stake in the outcome of the grievance hearing, it is clear that she did. Until Ms. Coy was discharged, Ms. Bast was required to split her hours between acting as a Cook and acting as a Food Service Aide, despite her strong preference to be a full-time cook. Once Ms. Coy was discharged, Ms. Bast

received the opportunity she wanted and has been slotted into the kitchen's operation as a full-time Cook.

Moreover, Ms. Bast was clearly agitated, highly stressed, even distraught when Ms. Coy reached her by phone. Under this circumstance, Ms. Bast's recollection of the conversation may be understandably blurred. The recollection she reported to Mr. Hackett and repeated at hearing may be nothing more than her *assumption* that Ms. Coy wanted the food service schedule to fail – an assumption that could have been additionally nourished by animus or self-interest, or both.

Moreover, given the history of antagonism between Ms. Bast and Ms. Coy, it also seems highly unlikely that Ms. Coy would select Ms. Bast as a confidential operative to slowdown Food Service operations. By both women's account, it was Martha Bast, not Kay Coy, who denounced Ms. Pahmeier's new food-service schedule at the beginning the January 7 phone conversation. Ms. Coy's explanation that her advice to an obviously distraught Ms. Bast to "take it easy," "relax," take your time" was intended to calm Ms. Bast appears far more plausible than the belief that Ms. Coy had suddenly accepted Ms. Bast as her confidante.

Finally, there is inconsistency between the written statement Ms. Bast prepared concerning the telephone exchange and the verbal statements she later made to Ms. Schuh and Mr. Hackett. While neither version includes Ms. Bast's highly stressed criticism of the new food service schedule, it was only her verbal statements that Mr. Hackett attempted to memorialize in writing that inculpated Ms. Coy. Indeed, it was not until Ms. Bast testified at hearing that she related her initial response to Ms. Coy's phone call. This, of course, was what had precipitated Ms. Coy's reassurances to Ms. Bast. In my opinion, these inconsistencies, when coupled with expressed doubts by one witness as to Ms. Bast's reporting credibility, Ms. Bast's distraught emotional state at the time of Ms. Coy's phone call to her, the antagonism between the two women, and Ms. Bast's obvious interest in the outcome of the proceeding make the Bast slowdown accusation against Ms. Coy dubious support for discharge.

In contrast, I found Ms. Coy's testimony as straightforward as her personality. Ms. Coy, for good or aught, is neither devious nor subtle. The colloquialism, "What you see is what you get" seems applicable to her. Moreover, it seems unlikely to me that this employee, whose last work evaluation in 2001 from her supervisor was well-above average, who had no history of discipline prior to the questionable incident on October 9, 2002, and who was consistently able to perform her kitchen duties in less time than that prescribed under the "old" food-service schedule, would be motivated to sabotage kitchen operations due to poor personal chemistry between her and Ms. Pahmeier.

The Employer finds Ms. Coy's reason for calling Ms. Bast on the morning of January 7 to be "a lame excuse," noting that Ms. Coy never did ask Ms. Bast the question that Ms. Coy claimed had prompted her call [what time does your brother's shop open?]. But when Ms. Coy reached Ms. Bast that morning what she found was an emotionally agitated, highly

stressed, distraught kitchen employee, who doubted her capability to function successfully under the new time constraints. Under the circumstances, it is understandable that Ms. Coy's question receded into an inferior priority to the immediate need of reassuring and encouraging Ms. Bast to continue to do her work.

The Employer points to Ms. Coy's initial denial that she had received a copy of corporation's work rules and claims she changed the denial only after seeing counsel for the Employer reach into his brief case for an exhibit. That is one interpretation. Another is that Ms. Coy first received her copy of the work rules when she was hired – May 15, 1995. She received a revised copy at on February 3, 1999. In each case she signed and dated an acknowledgment of receipt. I find neither invidious nor unusual that Ms. Coy's initially had no memory of either event – one that took place 7 ½-years previous to the date of hearing, the other, more than 4-years previous.

Class III 12. Serious Violation of Resident Rights.

No evidence was adduced at hearing that Ms. Coy's conduct at work has ever violated the rights of any of the residents at The Willows. If any resident's morning meal on January 7 was delayed by the one-minute telephone conversation between Ms. Bast and Ms. Coy, the event is so *de minimis* as not to warrant further discussion.

Class III 10. Insubordination.

This charge founders on the same shoals, as did the "slowdown" accusation. Suffice to reiterate that I do not perceive that Ms. Coy intended her advice to Ms. Bast on the morning of January 7 to contradict Ms. Pahmeier's new food service schedule. In my view, Ms. Coy's believed she had encountered an emergency situation and offered words of encouragement and reassurance to Ms. Bast. Ms. Coy's intent was to calm Ms. Bast so that food service operations on behalf of the residents could continue, unimpeded by Ms. Bast's agitated emotional state.

Moreover, as the Union points out, "insubordination" has been identified as a "refusal to obey a direct order." *Auto Warehousing Co.,* 114 LA 699, 702 Brodsky, 2000). I find no direct order from a management representative of the Employer to Ms. Coy that she disobeyed.

Interfering with or Purposeful Distraction of Another Employee in Performance of Work.

Presumably, Ms. Coy's phone call to Ms. Bast to ask about a matter not connected with operations at The Willows is the basis for this accusation. Had Ms. Coy been able to ask her question, it does not appear that the entire conversation would have taken more than 30 seconds. This is simply too *de minimis* to support a discharge.

Indeed, as events unfolded, when she reached Ms. Bast Ms. Coy recognized a higher priority had developed than learning what time Ms. Bast's brother opened his car repair shop. As a responsible employee, Ms. Coy dealt with that higher priority and attempted to encourage the distraught Ms. Bast to do her best to continue her food service efforts on behalf of the residents.

Under these circumstances, Ms. Coy did not interfere with or purposefully distract another employee in the performance of her work.

Summary

In summary, I find the Employer has not sustained its burden of proof in this matter. Specifically, I find that the Employer's discharge of Kay Coy lacked just cause.

I note that the Union has raised several ancillary arguments, including the charge that Ms. Coy was treated disparately, that her discharge violated the "Prior Warning" requirement in the parties' collective bargaining agreement, and that Ms. Coy's discharge violated the concept of "Double Jeopardy."

However, based on my determination that the Employer lacked just cause to discharge Ms. Coy, it is unnecessary to deal with theses additional Union arguments and I decline to do so.

AWARD

Based on the foregoing findings and discussion and the entire record herein, the grievance is sustained.

The Employer lacked just cause to discharge the Grievant, Kay Coy. The Employer is directed to reinstate Kay Coy to the position of Dietary Cook that she held when she was discharged and to make Ms. Coy whole with respect to any losses she incurred (including wages, benefits and seniority) as a consequence of her discharge, less any monies she received or could have received because of her discharge.

The Employer is further directed to expunge any record of this discharge from Ms. Coy's Personnel or Employment Record.

I shall retain jurisdiction over this matter for a period of 60 days hereafter in the event the parties have any questions concerning the implementation of this award.

Dated at Madison, Wisconsin this 22nd day of August, 2003.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator

rb
6565