

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EXTENDICARE HOMES, INC. d/b/a SHEBOYGAN PROGRESSIVE CARE CENTER

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, AFL-CIO, CLC

Case 8

No. 63311

A-6105

(Watts Grievance)

Appearances:

David W. Miller, Baker & Daniels, Attorneys at Law, 300 North Meridian Street, Suite 2700, Indianapolis, IN 46204-1782, on behalf of the Employer.

Andrea F. Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, on behalf of Local 150 and the Grievant.

ARBITRATION AWARD

According to the terms of the 2002-05 collective bargaining agreement between SEIU, Local 150, AFL-CIO, CLC (Union) and Extendicare Homes, Inc., d/b/a Sheboygan Progressive Center (Employer or Center), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator regarding the discharge of Cherie Watts. Hearing in the matter was held at Sheboygan, Wisconsin, on August 4, 2004, and August 26, 2004. No stenographic transcript of the proceedings was made. The parties agreed to submit their initial briefs, two copies to the Arbitrator for her exchange postmarked September 27, 2004. The Arbitrator received initial briefs on October 4, 2004, and exchanged them. The parties reserved the right to file reply briefs but as they filed none, the record herein was closed by letter confirming same, dated October 25, 2004.

ISSUES

Was Cherie Watts terminated for just cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 7-SCHEDULES

7.1 Postings. Schedules shall be posted at least two (2) weeks in advance for all departments.

7.2 Changes. After the schedules have been posted, no changes therein shall be made without at least twenty-four (24) hours verbal notice to the affected employee of the intended change. This change must be mutually agreed to between the Employer and the employee.

7.3 Requests for Time Off. Requests for days off, leaves of absence, holidays, personal days and vacations shall be made at least two (2) weeks before the first day of the requested leave, except in cases where such prior notice is not possible. The Employer will respond in writing to said request within one (1) week of the date of the request, or the request will be considered to have been granted.

7.4 Swapping Days or Hours. Requests for swapping days or hours will be submitted in writing to the appropriate supervisor for approval at least three (3) workdays prior to the intended change. Where swapping of days or hours is approved in writing, those changes must occur in the same pay period. No swaps will be approved which would require the payment of overtime unless previously approved by the Employer in writing.

7.5 Working Unscheduled Shifts. All employees who are asked to work on their days off or any additional shifts shall be guaranteed a minimum of four (4) hours work or pay. Any employees who work an unscheduled workday will be paid a premium of three dollars (\$3.00) per hour in addition to their normal rate of pay. Any employee who works an unscheduled weekend will be paid a premium of six dollars (\$6.00) per hour in addition to his/her normal rate of pay. The employee has no obligation to ask any person who, by working, requires the payment of overtime.

7.6 Seniority. Consistent with the provisions of 7.5 above, the Employer will make every reasonable effort to ask in the most senior employee on the list for

the affected classification, thereafter asking less-senior employees in affected classifications in rotation. The Employer has no obligation to ask any person who, by working, would require the payment of overtime.

7.7 Shift Schedules. Shift schedule hours for purposes of any appropriate premiums will be

First shift	6:30 am to 2:30 pm
Second shift	2:30 pm to 10:30 pm
Third shift	10:30 pm to 6:30 am

ARTICLE 13 – SUSPENSION, DISCHARGE, RESIGNATION

13.1 Just Cause. 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:

1. dishonesty
2. drinking
3. illegal drug usage
4. recklessness that could result in an accident to a patient
5. abuse of a patient, verbal or physical
6. sleeping on the job
7. leaving patients unattended
8. disclosing privileged information

The Employer shall offer any bargaining unit employee the right to Union representation before any discipline or questions leading to discipline are presented. Union representation is defined as a designated Work Site Leader or Union staff. The Union Representation form should be completed, (see Exhibit A - Union Representation)

13.2 Grieving Disciplines. Should the Union wish to contest a discharge, suspension, or termination, written notice thereof shall be given to the Employer within fifteen (15) calendar days, in which event the issue thereafter shall be submitted to, and determined, under the grievance procedure specified in Article III, Section 3.1, commencing to Step 2 of this Agreement. Failure to give this notice bars the Union and the employee from further action.

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13.4 Time Limits on Disciplines. The Employer will discipline within seventy-two (72) hours of working days of the event happening or known to have happened for which the employee is being disciplined or within seventy-two (72) hours of working days of the notice of such event. This time line may be extended by mutual agreement of the parties and such agreement will not be unreasonably denied.

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13.7 Disciplines and Personnel Files. When an employee works twelve (12) consecutive months without receiving a written discipline or eighteen (18) months in the case of verbal abuse, sexual harassment, or willful inconsiderate care, all previous notices shall not be used against the employee in any further disciplinary action and shall be removed from the file.

ARTICLE 15 - MANAGEMENT RIGHTS

The Employer has the sole and exclusive right to determine the number of employees to be employed the duties of each of these employees, the nature and place of their work, whether or not any of the work will be contracted out as long as the contracted work shall not dissipate the classification, and all other matters pertaining to the management and operation of the nursing home.

RELEVANT PORTIONS OF EMPLOYEE HANDBOOK

The human resources policies in this handbook are effective September 1, 2002, and supersede any previous policies. These policies are subject to review and revision as warranted by changing conditions. The company reserves the right to establish, amend, or abolish policies at any time as the needs of the company may require. These policies apply to all employees of health care facilities operated by Extencare Health Services, Inc. and any of its subsidiaries (hereafter sometimes collectively referred to as EHSI) except where a specific policy may be superseded by a collective bargaining agreement.

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DISCIPLINE PROCEDURE (FOR NON-INTRODUCTORY EMPLOYEES)

The safe and efficient operation of the facility requires that all employees comply with our work rules. These rules are designed to maintain a safe and pleasant environment for residents/patients, visitors, and staff.

The purpose of the Discipline Procedure is to correct improper employee behavior by the use of the least severe penalty possible, consistent with the employee's offense. Employees will be subject to disciplinary penalty for violations of employer work rules. The right to fair and impartial discipline does not establish any actual or implied contract of employment with the employer. All employment is at will.

Prior to imposing any disciplinary penalty, your supervisor will investigate to determine whether a work rule has been violated. You will ordinarily be afforded an opportunity to tell your side of the story to your supervisor before any final discipline is applied. You may be asked to provide a written statement. In serious circumstances, an employee will be suspended pending investigation. No written notice is given to an employee suspended pending investigation.

The penalties available to management are specified herein. If you believe you have been unfairly disciplined, you may utilize the "Employee Complaint Resolution Procedure" provided in this handbook.

The following are the disciplinary penalties for non-introductory employees, in order of severity:

1. **First Notice:** An initial Disciplinary Action Report outlining the improper conduct, its consequence(s), and a warning against repeated violations. A copy of this notice is recorded in the personnel file.
2. **Second Notice:** More serious than the first notice, this penalty is also recorded in the personnel file.
3. **Final Notice:** The final notice against work-rule violations. This is documented in the employee personnel file.
4. **Discharge Warning:** This severe penalty is your last chance and the final step before discharge and is recorded in your personnel file.
5. **Discharge from Employment:** This is the last step and the employee's employment is terminated.

Work rules, and the penalties associated with their violations, are grouped into three (3) general categories as follows:

Class I: These are normally lesser breaches of policy which can be simply corrected without serious disciplinary measures. Supervisors will issue a notice to employees for minor violations with an emphasis on correcting the behavior.

Class II: These are violations which necessitate immediate disciplinary action in the form of a final written notice for the first offense. Because Class II infractions are more serious, the first and second notice steps are skipped.

Class III: These are serious violations of facility rules or employee misconduct which justify discharge without regard to the employee's length of service or prior conduct.

In all classes, the lists of offenses are not all inclusive. Employees can be disciplined for any lawful reason under circumstances the company deems appropriate. Employment is always at will.

Disciplinary action more than 18 months old will not be considered for purposes of progressive discipline.

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. Employees who are not in the proper uniform will be asked to punch out and go home to change. The employee will not be paid for that time, but will be expected to return to work. If the employee does not return, it will be counted as an occurrence of absence.
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 employee, supervisor, or any other individual in the facility.
7. Not attending a mandatory inservice.
8. Punching someone else's time card or having someone punch yours for time worked.
9. Failure to follow proper call-in procedures.

10. Working unauthorized overtime and/or working off-the-clock.
11. Minor medication error.
12. Repeated failure to properly use time/swipe card and/or excessive Oops slips.
13. Personal phone calls at work - making or receiving calls during work hours.
(Employees may return calls during scheduled breaks and meal periods.)
14. Violation of the company's policies or procedures relating to HIPAA.

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 include, **but are not limited to;** (other offenses may also merit these penalties)

1. Smoking in an unauthorized area.
2. Improper documentation in resident/patient medical records.
3. Horseplay or misconduct which does not result in damage to property or injury to any person.
4. Verbal abuse or serious discourtesy to any other employee, supervisor, or any other individual in the facility.
5. Violation of sexual harassment/offensive behavior policy. (Could be a Class III violation.)
6. Serious disrespect to any supervisor.
7. Being away from duty station without authorization.
8. Failure to report to the supervisor an on-the-job accident or injury.
9. Inconsiderate care of any resident/patient of the facility not considered by management to be abuse.
10. Soliciting monetary contributions or distributing non-work related materials in patient care areas.
11. Interfering with or purposeful distraction of another employee in the performance of his/her work.
12. Eating food prepared and intended for residents/patients.
13. Use of profane, obscene, vulgar, or abusive language. (Such language used toward a resident/patient is considered abuse, therefore is considered a Class III offense.)

14. Receipt of a gift, loan, or compensation from a resident/patient or resident/patient's family member.
15. Minor violation of resident/patient's rights.
16. Violation of a facility safety rule.
17. Use of resident/patients personal property (radio, TV, phone, etc.) with or without permission.
18. Willful failure to perform job duties.
19. Smelling of alcohol, but not impaired. (Employee will be sent home without pay.)
20. Failing to *immediately* report to a supervisor an incident of abuse, neglect, or mistreatment witnessed by an employee or of which an employee has knowledge.
21. Dishonesty in the use of the call in policy. An example of this would be calling in sick and going to the State Fair.
22. Serious violation of the company's policies or procedures relating to HIPAA.
23. Violation of any rule or requirement set forth in this handbook that is not otherwise classified.

Penalties for Class II Offenses:

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|-----------------|--------------------|
| First Offense: | Final Notice. |
| Second Offense: | Discharge Warning. |
| Third Offense: | Discharge. |

CLASS III OFFENSES: An employee will be discharged if an investigation reveals they have committed a Class III infraction. Other offenses may also merit discharge. Class III examples include, **but are not limited to:**

1. Verbal, mental, physical, or sexual abuse of any resident/patient of the facility, family member, visitor, or fellow employee, or neglect or mistreatment of any resident/patient of the facility.
2. Theft, damage, or destruction of property of employer, resident/patient, visitor, or other employee of the facility. Misappropriation of company property.
3. Falsification of any document, including the employee's employment application; punching someone else's time card or having someone punch yours for time not worked.
4. Disorderly conduct on facility property resulting in injury to any individual, or fighting on company premises.
5. Removing unauthorized records or disclosing any confidential information concerning other employees, residents/patients, or the facility. This includes but is not limited to discussing a resident/patients medical condition, personal, or financial status with other residents/patients, families, or visitors.
6. Drinking or possession of alcoholic beverages, use or possession of drugs, or being under the influence of drugs or alcohol while on company property.

7. Sleeping during working hours.
8. Being in possession of or bringing in weapons on facility property (e.g., guns, knives, etc.).
9. Failing to report to a supervisor an incident of abuse, neglect, or mistreatment witnessed by an employee or of which an employee has knowledge.
10. Refusal to follow a direct order from a supervisor. (Insubordination)
11. Serious disrespect to any supervisor in the presence of others that disrupts the work place.
12. Serious violation of resident/patient's rights.
13. Serious medication error that could or does result in harm to a resident/patient.
14. Serious violation of a safety rule.
15. Fraud or participation in fraud which harms the company.
16. Committing unlawful acts on facility property.
17. Walking off the job during your shift.
18. Tape recording, videotaping, or in any other way recording, without permission, written or oral communications between or among management, co-workers, residents, or family members.

BACKGROUND

Sheboygan Progressive Care Center (Center or Employer) is a 120 bed skilled nursing facility serving elderly, chronically ill and short term rehabilitation patients located in Sheboygan, Wisconsin. The Union has represented 105 service and maintenance employees at the Center since 1998.

The Center has had an Employee Handbook since at least April, 2000, and same was revised in September, 2002. The Union received copies of both Handbooks and never objected to or grieved them. The Grievant, Cherie Watts (Watts), received a copy of the effective Handbook when she was hired on January 17, 2001, as a part-time Certified Nursing Assistant (CNA) and Center records show that Watts received a copy of the revised Handbook in 2002.

Although Article 7 lists different shift starting times, normal shifts at the Center (which operates 24/7) are as follows:

- 1st Shift, 6 am-2:30 pm
- 2nd Shift, 2 pm-10:30 pm
- 3rd Shift, 10:30pm-7am.

If there is an open shift, that is, one caused by vacation, illness, leaves or insufficient CNAs to cover the shift, the Staff Coordinator, Jenny Keuhl-Peutz (Peutz) who is responsible

for scheduling all Center employees, posts the open shift(s) on the bulletin board in the back

hall of the Center on a “Sign-Up Sheet” (E-15) 1/. If a CNA is interested in “picking up” extra hours outside their normal hours of work, they sign on the sign-up sheet for the amount of time they are willing to work. If the interested CNA is the most senior and his/her selection will not result in overtime, Peutz then marks “OK” next to the interested CNA’s signature on the sign-up sheet and she highlights the name of the employee selected in yellow; Peutz also marks “NO” next to the name of CNAs who signed but were not selected to work. Peutz also posts another document (on the same bulletin board), a “Confirmation Sheet” (E-16), showing those who have volunteered and been selected to cover pick-up hours (open shifts).

1/ Employer and Union exhibits shall hereafter be listed as E-1 or U-1, etc., respectively.

The Master Schedule for CNAs (E-13 and E-14), covers a six week period and lists all CNAs, their regular hours of work and their FTE status. Although the Master Schedule was formerly posted on the glass of Staff Coordinator Peutz’ office prior to August, 2003, employees had objected that such posting violated their privacy and in August, 2003, the Master Schedule was then posted on the bulletin board in the back hall and copies thereof were also placed in a pocket folder next to the posted copy so that employees could take a copy. Peutz stated that to check their schedules, CNAs can look at the sign-up sheets and the confirmation sheets she posts; that she has sometimes notified CNAs of their changed hours if she thought they would not be likely to see any of the various posted schedules before the start of the shift in question.

CNAs can receive “Pick-Up Bonus” (PUB) pay pursuant to Section 7.5 and 7.6 of the effective labor agreement if they work extra hours and fill out a PUB slip requesting same. If the selection of the most senior CNA would create overtime liability then the shift will go to a less senior CNA who had signed their interest. Only if just one CNA (a senior one) signed for the work will the shift go to the senior CNA at overtime. These PUB slips have a place for the CNA to write their name, the hours worked for which they are claiming PUB pay, a place for the CNA’s signature and a line, “APPROVED BY” which must be signed either by Peutz or by a supervisor such as the Charge Nurse. Article 7, Section 7.4, also provides for the trading of days/shifts but no overtime pay may be earned/claimed on a trade. 2/

2/ Section 7.4 does not refer to PUB pay.

Center policy/procedures do not describe PUB procedures. There is no evidence that CNAs have received any in-service training regarding how to fill out PUB slips and how and when to submit slips. Not all CNAs look at the Master Schedule for their hours. CNA Ross stated that she never looks at the Master Schedule for her hours and that she believes that Peutz would tell her if her schedule changed. CNA Fermelia stated that she looks at the Master

Schedule when a new one is posted every six weeks, otherwise she looks at the sign-up and

confirmation sheets; and once when she went to the bulletin board to get a copy of the Master Schedule, there were none in the pocket folder and she had to get one from the Charge Nurse. 3/ Fermelia stated that if her hours were changed she would expect someone from management to tell her. CNA Nowak did not testify on this point.

3/ Peutz gives copies of the CNA Master Schedules to payroll and puts one in the Nurses' office.

FACTS

Grievant Watts was employed at the Center as a CNA until her discharge on October 29, 2003, for "falsification of pick-up hours and the receipt of pick-up bonus' not earned. . . ." After her hire in mid-January, 2001, Watts regularly worked half shifts: 5:00 p.m. to 10:30 p.m., Monday through Friday and every other weekend, with every other Tuesday and Friday off. Watts was listed on the Center Master Schedules as a 0.7 FTE and she was considered a part-time employee. Simply put, Watts regularly worked 10 half shifts in a pay period except for full shifts every other weekend (2:00 p.m. to 10:30 p.m.). Watts was a good employee with a good attendance record and no disciplinary warnings in her file until her discharge on October 29, 2003.

Sometime in August, 2003, Watts went to Staff Coordinator Peutz and asked if she (Watts) could get more regular work hours. Peutz told Watts that she would give Watts what she could but that she could not give Watts all 2:00 p.m. start times because she would have to post an opening under the Union contract. 4/ Peutz stated that she never told Watts what she would do for her regarding extra hours. No evidence was submitted to show that Watts was ever notified (orally or in writing) by the Center or by Peutz that her status had been formally changed from 0.7 FTE, to reflect additional regular work hours that were added to her schedule beginning September 4, 2003. No written record of the changes Peutz made in Watts' work hours was ever placed in Watts' personnel file.

4/ Watts stated without contradiction that Peutz often asked her to work pick-up hours "under the table" calling her before the hours were posted, in order to avoid having to follow the Union contract/seniority.

Peutz never posted an opening after speaking to Watts in late August. Prior to September 4, 2003, Watts had been consistently listed as starting work at 5:00 p.m. (E-13), but after September 4th Peutz listed Watts as working 8 or 9 of her 10 work days starting at 2:00 p.m. Peutz admitted that on the Master Schedule covering the period after September 4th (E-14), she simply gave Watts whatever hours she (Peutz) needed to complete the schedule without talking to Watts about the changes and that she used white-out to change Watts' starting times from 5:00 p.m. to 2:00 p.m.

In late August, 2003, Payroll/Accounts Payable Clerk Heather Rahmer resigned without notice. Rahmer's duties were given to Center Business Office Manager Wendy Dekker, Watts' sister. As Office Manager, Dekker was a supervisory employee who had access to computerized payroll records, including details of employees punching in and out and Dekker had the authority to change these details without approval from her superiors. Dekker stated without contradiction that after Rahmer left, she had to handle all payroll and that she did not have time to check to make sure that all PUB slips were signed by a supervisor. 5/

5/ No one asked Dekker if she told Peutz she would no longer be receiving PUB slips after Rahmer quit..

In early October, 2003, Center Administrator Klug received a call from Corporate Payroll stating that it appeared that Dekker had given herself eight hours extra pay. Klug was directed to look into the matter. Klug called Corporate Field Analyst Hollen (who is responsible to audit Business Offices and to train Business Office staff). Klug explained the situation to Hollen and asked for her assistance.

On October 17, 2003, Hollen arrived in Sheboygan to examine the Center's payroll records. Hollen briefly checked Center records and reported her preliminary findings to Klug: According to Center past practice (which differed from Corporate practice), Dekker was entitled to the eight hours extra pay she had claimed as holiday pay. However, Hollen also found some other payroll irregularities: that Dekker was adding punches (in and out) to her own payroll record, that Dekker was adding lunch punches to her sister Bonnie Bohman's payroll record 6/ and that extra PUB's were being paid to Dekker's other sister, grievant Cherie Watts.

6/ Bohman was then the Dietary Department Head; she also had the authority to go into the Center computer and change punches for her employees and herself.

On October 20th, Hollen returned to the Center with Corporate Executives Levonovich and Strawecki to perform a complete payroll audit of the Center. This audit team reached the following conclusions based upon their investigation of Center records:

- 1) There were added lunch punches on Bohman's record but there was no evidence to show that Bohman did not work through those lunches.
- 2) It appeared that Watts had received PUB money for 10 to 15 shifts or partial shifts for which Watts was regularly scheduled to work, requiring a conclusion that Watts was not entitled to the bonus money therefor.
- 3) All other PUB's had been properly claimed and paid during the audit period.

As a result of this audit, Klug concluded that Bohman should receive a written counseling. Klug issued Bohman a written counseling, dated October 21st, advising her that she was “not consistently following the Meal Break Time Clock Policy.” The counseling also referred to page 15 of the Employee Handbook and advised Bohman as follows:

. . .

The company expectation is that all employees will use the time clock to accurately record their work time (and meal break time when taken). In the event that an employee misses a time clock “punch” a properly authorized OOPS slip is required to be submitted to payroll to ensure that the missed “punch” is properly recorded.

Any employee who, after verbal counseling, continues to be non-compliant with the above policy is subject to formal disciplinary action.

. . .

On October 22nd, Klug and the Audit Team met with Watts. No one told Watts the purpose for the meeting. No one accused Watts of any wrongdoing at the meeting. Levonovich asked Watts to describe her understanding of the PUB system and then to write down that understanding. Watts told the interviewers essentially as she wrote, as follows:

Upon receiving bonus hours, a [sic] employee must be asked or sign up on a bonus sheet. As to the hours requested by the facility, sometimes it’s verbal sometimes not. Sometimes written on a sheet. Then an employee picks up those bonus hours and works them. Upon completion of those hours an employee fills out a bonus or pick up sheet and signs it with the hours he/she picked up (worked) then the employee places it in a bonus sheet in the back by the time clock. I’m not sure what happens to them after that.

I personally don’t know when I am exactly bonus or not. I asked for full time starting at 2 pm as of Sept. 1st, however I don’t know wether [sic] or not I am scheduled or not unless I look at the time roster daily or call Jennie Kuehl and ask because some days I am 2 some 5 I just never no [sic]. So then I fill in a bonus sheet and wait to see if it’s accepted or not.

At this meeting in response to questioning by the Audit Team, Watts stated that the reason she put in so many PUB slips was because she did not know what her schedule was and she submitted the PUB requests to see whether she would get paid for them; that she did not notice a change in the amount listed on her paychecks because she never checks this, and because she worked all the hours involved, she thought her checks would be larger. At the end

of this meeting, Klug suspended Watts pending further investigation. Neither at this meeting nor at any other time, did anyone in management show Watts any evidence against her and Watts was never asked whether she had colluded with Dekker.

At some point on October 22nd, Klug and the Audit Team met with Dekker. Levonovich asked Dekker what her understanding was of the lunch punch policy and the PUB policy. 7/ Dekker wrote the following statement in response to these questions:

My understanding of bonus is \$3.00 per week day \$6.00 per weekend.

I also understand a supervisor is supposed to sign bonus forms. But did not always have time to get them. I am very overwhelmed with my job since Heather left & was told I would only be doing Payroll once per week. (I have an email stating this)

7/ Hollen stated herein that she trained Dekker in her Business Office Manager position and that she had told Dekker that PUB slips had to be reviewed by the Staff Coordinator (Peutz) prior to payment. At the instant hearing, Dekker was not asked to admit or deny Hollen's statement.

Based upon the above, Klug terminated Dekker by e-mail on October 29th, for having added punches to her own employment record, for changing her record using the computer after the fact and for having improperly granted PUB's to Watts. 8/

8/ Hollen and Klug stated that a supervisor adding punches to her own payroll records is unethical. However, they cited no rules or policies that Dekker had violated by adding punches to her own record.

Klug also decided to terminate Watts on October 29th and did so in a meeting at which Watts had Union representation. The reason for the discharge was stated in the discharge notice, quoted above. Watts denied any wrongdoing and refused to sign the discharge notice. Watts was not shown any PUB documentation on October 29th, nor was she asked to respond to any accusations — she was simply discharged. Klug stated herein that he believed that Watts' actions were "fraudulent and dishonest" and they merited immediate discharge.

Evidence Submitted at Hearing

Klug admitted herein that the only way that anyone could determine that Watts had been paid PUB's for time she was regularly scheduled to work was if one looked at the Master Schedule. Klug stated that Watts went to a full-time schedule during the last week of August,

2003. 9/ However, Klug also admitted that Watts never received an FTE status change document and no one from management ever told Watts that her hours had changed or that she was full-time. Klug admitted that Watts was never paid for time she did not actually work and that at no time prior to her discharge did anyone in management tell Watts that she was (improperly) submitting PUB slips for regular hours, or that Dekker had changed the PUB system and that she should have her slips approved by her supervising Nurse.

9/ However, this assertion was incorrect. Watts' hours from September 4 through the end of September, 2003 were not full-time (E-13).

The Center submitted a Master Schedule herein, covering August 18 through September 28, 2003, (E-13) which showed that Peutz had listed Watts thereon as working 0.7 FTE. On the subsequent Master Schedule (E-14), which covered the period from September 29th through November 11th, Peutz listed no FTE number next to Watts' name. On E-13, there were nine employees listed as 1.0 FTE, seven employees working 0.8 or 0.9 FTE, and eight part-time employees working 0.7 FTE or less. Employer Exhibit 14 showed that Peutz had only six employees working 1.0 FTE, nine working 0.8 or 0.9 FTE and six part-time employees working 0.6 FTE or less to fill the CNA schedule on and after September 29th. Clearly, Peutz had many extra hours to fill during this time, given the fact that at least two 1.0 FTE's and one 0.3 FTE were unavailable to work.

The testimony herein regarding the pick-up bonus system varied widely. However, it is undisputed that the Center gave its employees no specific training concerning how to fill out PUB slips and when to apply for same. CNA Ross stated that she sometimes left PUB slips for Peutz to sign and turn in; Nowak stated that she never left PUB slips for Peutz but that she normally took them to the payroll office. CNAs Ross, Watts, Fermelia and Frericks stated that they normally left their completed PUB slips in the pocket folder on the bulletin board. Nowak and Fermelia stated that they believed that a supervisor or Peutz had to sign their PUB. However, Frericks stated that Peutz once told her that a supervisor did not have to sign PUB slips because Peutz always checked them over prior to payment. Nowak and Watts stated that no written PUB procedure existed; and Ross stated that she did not know whether the Center had a written PUB policy or procedure. Frericks stated she was unsure when she first saw E-17 (the written PUB policy submitted herein) — whether she saw it six to eight months, or up to one year before the instant hearing. 10/ The posting (E-17) read in relevant part as follows:

Bonus Hours:

Full/Part-time employees will receive a bonus of \$3.00hr (weekday) & \$6.00hr (weekend) for any unscheduled shift worked. When an employee signs up for a

bonus shift it will be approved by the Staffing Coordinator. After the shift has been approved, that employee is responsible for that shift. If the employee cannot work that shift, they are responsible to find a replacement.

If an employee is asked to stay over their shift for more than 1 hour (less than 4 hours) they will be paid for 4 hours at their base rate of pay. If the employee is offered 4 or more hours to work but they work less than 4 hours, they will only be paid for the hours worked.

When an employee works a bonus shift they must fill out a pink bonus slip. This must be signed by the charge nurse on that shift. If the employee fails to do this or fails to turn in a slip, then that bonus cannot be paid.

Trades:

Trades between full-time employees need to be made in the same pay period. There will be no trades approved that result in overtime. Trades need to be filled out on a white trade slip, signed and dated by both employees. Trades need to be turned in at least 3 days prior to the intended trade.

...

10/ Only CNA Frericks was asked about E-17, a posting regarding PUB's among other things. Frericks stated that she thought she saw E-17 posted by the time clock six to eight months before the instant hearing (January, 2004, to March, 2004, after Watts was fired). On cross, Frericks stated that E-17 could have been posted one year ago (August, 2003, before Watts was fired). As no other CNAs who testified were asked about this exhibit, I find that the Center failed to prove that this posting was made prior to Watt's discharge.

Peutz stated (and the documentary evidence showed) that prior to August 27, 2003, Peutz was the only one who signed Watts' PUB slips. Peutz stated that she did not recall whether she signed the PUB slips submitted herein before or after Watts turned them in; that she (Peutz) never told Watts at any time, to get her PUB's signed by a supervisor before turning them in; that after Rahmer quit without notice and Dekker changed what Peutz understood to be the PUB procedure, Peutz stated that she never notified employees or supervisors of the change and she never complained of the change to Center management.

Watts stated that she never looked at the Master Schedule to check her hours, that she simply asked Peutz what her hours were or she looked at the sign-up sheets that Peutz had marked "OK" and highlighted to show who had received the extra hours (E-15) because these were always accurate. Watts stated that she never looked at the confirmation sheets because

they were often inaccurate. Watts stated that she never turned in a PUB for an approved trade; that she picked up a lot of extra hours and that Peutz often gave her extra hours “under the table” — without following the Union contract.

Dekker and Watts stated that they never discussed the PUB procedure and that Watts never asked Dekker to authorize pay for Watts that she was not entitled to. Dekker stated that Administrator Klug and the Director of Nursing at the Center regularly receive detailed payroll information (at least once per quarter) showing CNA PUB pay. Hollen stated herein that if Dekker had done her job, Watts’ improper PUB requests would have been caught before they were paid out.

The Center submitted copies of Watts’ PUB slips covering the year prior to this hearing (E-18), punch detail reports for Dekker (E-19) and Watts (E-20) and a spread sheet showing an audit of payroll punch details for Watts (E-21). 11/ Hollen stated that this and other documentation she prepared for the instant hearing (E-22), demonstrated that from January 16, 2003, through August 25, 2003, Watts submitted 84 PUB slips; that 4 of these were not signed by Peutz on the “approved by” line and that 80 of these were (properly) paid; that from August 27 through October 22, 2003, Watts submitted 53 PUB slips, only 2 of which were signed by Peutz on the “approved by” line (the rest were unsigned). Employer Exhibit 25 showed the PUB requests that Hollen stated herein were improper and should not have been paid because Watts had either traded shifts (August 27, September 14 and 27), or Watts was regularly scheduled to work 2:00 p.m. to 10:30 p.m. and therefore not entitled to PUB money for 2:00 p.m. to 5:00 p.m. (September 10, 12, 18, 24, 26, October 10 and 13). 12/

11/ Although the Union requested all documents supporting Watts’ discharge on the grievance form, the Center never released the documentation (E-22 through 25) to the Union until the day of the instant hearing, at the time Hollen testified herein.

12/ Peutz admitted changing the Master Schedule, using white-out, changing Watts from 5:00 p.m. starts to 2:00 p.m. starts, without notifying Watts thereof, for the dates September 4, 10, 12, 18, 24, 26, and October 10 and 13, 200

Employer Exhibit 21 listed Watts’ PUB requests from August 30 through October 17, 2003, which the Center argued were inappropriate. This document showed that Watts was paid \$484.52 more in PUB’s than she was entitled to under the Center’s theory of the case. Employer Exhibit 23 showed all CNA PUB requests, excluding Watts’, for the period August 28 through October 20, 2003, which it argued showed that other CNAs had made proper requests. However, this document showed that 36 CNA PUB requests were denied for being improper, as follows:

- 1) Meyer, 9 denied;
- 2) Penney, 8 denied;

- 3) Schieble, 3 denied;
- 4) Grunow, Eernisse, Garcia, Abraham, 2 each denied;
- 5) Herman, Lauersdorf, Herbert, Adelich, Balde, Grabowski, 1 each denied.

None of these employees was warned or disciplined for making these improper requests. These slips also showed that if PUB requests were improper in the past, that Peutz simply noted this for payroll and the requests were not paid.

Finally, Employer Exhibit 24 showed that Watts regularly worked extra hours and received PUB pay in every pay period from January 6 through October 26, 2003, in amounts ranging from to a low of \$64.80 to a high of \$445.23, for an average of \$211.80 per pay period. There is no allegation herein that Watts was paid for hours she did not work.

POSITIONS OF THE PARTIES

The Employer

The Center argued that the PUB system was clear and well-known to employees, as demonstrated by the testimony of CNAs herein. In this regard, the Center noted that its work rules were properly promulgated, reasonable and that Watts was fully aware of them, as she had received copies of the Employee Handbook (and the later amendment thereof), during her employment at the Center. Here, pursuant to the parties' labor agreement, the Center reserved the right to manage its business, make reasonable work rules and terminate employees for a first offense of dishonesty.

The Center urged that Watts had filled out PUB's in order to receive pay she was not entitled to, "just to see if they would get paid" by the Center. The Center argued that all CNAs except Watts stated that they had seen E-17 posted on the bulletin board. 13/ Therefore, Watts' statement that she never saw E-17 must be rejected and her PUB requests must be found to constitute dishonesty, a violation of the trust and confidence essential to an employee-employer relationship, which the Center should not have to tolerate.

13/ The evidence herein did not support the Center's argument on this point.

The Center contended that although Watts claimed that she did not know her schedule, she repeatedly submitted bonus pay forms for time she was not entitled to bonus pay. The Center queried that if Watts did not truly know her schedule, how was it that she was never tardy or absent on and after September 4, 2003. Although Peutz began changing Watts' schedule on September 4th, as Peutz never assigned Watts to a full-time position, there was no

need to give Watts notice of a classification change. The Center pointed out that Union Representative Penney had stated after a meeting with Watts regarding her termination that no one (employed at the Center) could claim they did not know their schedule. 14/

14/ As Penney was not called as a witness herein, this assertion therefore, constituted hearsay.

Watts' claim that she got extra hours by signing up or at the request of Peutz' or the Charge Nurse was not supported by the evidence. In this regard, the Center noted that Watts had claimed PUB pay for three days that she had traded shifts (August 27, September 14 and 27); that she had not been assigned through the sign up sheets when she wrongly claimed PUB; and the Union never proved that Watts' assertion was correct that the Nurse must have asked her to come in early on these days (from 2:00 p.m. to 5:00 p.m.). The fact that Watts had claimed PUB for four hours pay on the weekend of September 20th when she was regularly scheduled to work a full shift could not be explained away by Watts' assertion that she must have traded, then asked for the day off and then later agreed to pick up hours, as no changes appeared on the schedules and no sign-up sheets supported Watts' assertion.

Watts' claim that she did not notice that her paycheck had increased during the period after September 4th was simply incredible, as the amounts averaged \$200 per pay period, larger than any amounts Watts had received prior to September 4th. Regarding Watts' claims for minimum hours payments, although the Union argued that this was a matter of contested contract interpretation, it put in no evidence to support this argument. The Center urged that the facts clearly showed that Watts submitted 23 PUB requests for pay she was not entitled to.

In addition, the Center asserted that the evidence demonstrated that Dekker acted in collusion with Watts to defraud the Center. On this point, the Center noted that it was not a coincidence that only Watts' PUB slips were processed by Dekker and that only Watts asked for PUB pay she was not entitled to during the relevant period. These facts clearly showed that both Dekker and Watts should have known that they would get caught. Yet, the Center analogized, "jails would be empty" if criminals could resist committing wrongful acts that were easily detected.

Here, the facts proved that Watts knowingly committed "payroll fraud." For example, the Center pointed out that prior to August 26, 2003, Watts claimed PUB 84 times and was paid for and entitled to PUB on 80 of those occasions. Between August 26th and October 17th, Watts improperly claimed PUB 24 times, 5 of these requests were for time she was actually working a trade of a regularly scheduled full-shift on a weekend. These facts showed that Watts was dishonest in claiming PUB on these occasions and are sufficient to prove that Watts knowingly requested pay she was not entitled to receive.

As the Center must be able to trust its employees who serve frail and disabled residents in need of protection, the Center should be free to terminate Watts without issuing her a prior warning as her conduct was intolerable, constituting dishonesty and fraud. The Center, therefore, sought that the grievance be denied and dismissed in its entirety.

The Union

The Union argued that the Center must prove fraud in order to sustain Watts' discharge for the reasons it gave in the termination notice. To do this, the Center must prove that Watts deliberately falsified records and intended to willfully deceive or defraud the Center out of pay she was not entitled to receive. The Union noted that the Arbitrator need not find Watts innocent of all charges, but only that there is another credible explanation for the facts of record, in order to sustain this grievance. The Union urged that in a case such as this, where the grievant is alleged to have committed serious misconduct, arbitrators have used a higher standard of proof, such as beyond a reasonable doubt or to a moral certainty and it urged the Arbitrator to do likewise.

The Center has asked the Arbitrator to find that Watts engaged in fraud based solely upon inferences as no direct evidence of the fraud was submitted. The Union asserted that the Center never proved that Watts sought compensation that she knew she was not entitled to receive. It was therefore as likely, in the Union's view, that there had been a misunderstanding about Watts' schedule between Peutz and Watts or that Watts had been careless, or at worst, negligent in submitting her PUB requests. The Union pointed out that even gross negligence or carelessness does not constitute fraud in a case such as Watts'.

The Union contended that in any event, the Center could not prove that Watts actually requested pay to which she was not entitled, as there was no evidence submitted to show that Watts' regular schedule from September to October, 2003, was changed and that she was made aware of a change. In this regard, the Union noted that Peutz admitted that she changed Watts' hours, using white-out, after she posted the September to October, 2003, Master Schedule; that she (Peutz) never posted a full-time CNA position after September 4th and that she did not recall telling Watts, either orally or in writing, that she (Peutz) had changed Watts' schedule. Specifically, Peutz stated that she only told Watts that she would see what she could do about giving Watts more hours at Watts' request.

The Union urged that there was no obvious pattern of schedule changes made by Peutz; that Peutz never changed Watts' FTE or her starting/ending time designations on the September-October Master Schedule; and that Peutz listed no FTE for Watts on the November Master Schedule. All of these facts demonstrated that Watts could not have known what her "regular" schedule was in September and October, 2003. The fact that many of Watts' pick up hours were not on PUB slips showed that these hours must have resulted from unanticipated

absences. Watts' testimony on this point, therefore, stood uncontradicted, as Peutz was not involved in determining for which days Watts improperly claimed PUB and Peutz did not testify on that point.

The Union argued that Watts never intended to be overcompensated. The Union noted that if Watts had known that Peutz had changed her regular schedule, she would not have signed up for extra hours on September 30, and October 15, 16 and 20, and Watts would not have put in PUB requests for those days. Rather, if she had truly intended to defraud the Center, she would have claimed she had been called into work and she would have put in PUB requests on that basis. In the Union's view, this evidence showed that Watts did not know what her schedule was in September and October, 2003, or that it had been changed.

In the Union's view, Watts' worst offense was failing to look at the Master Schedule. The Union noted that CNAs Frericks and Ross stated that they expected that Peutz would tell them if their regular schedules were changed. The Union argued that it is up to management to deny requested pay if it is improperly claimed. Watts simply made an error in judgment, with no intent to deceive or defraud, in requesting PUB's and the Center should not have discharged her therefor. Rather, the Center should have instructed Watts on how to properly use the (amended) PUB system.

The Center cannot fairly impute the alleged wrongdoing of Watts' sister to Watts. In this regard, the Union noted that Dekker stated that she did not know that Watts' schedule had been changed in September 2003, and that she did not use the Master Schedule to calculate payroll. The Center submitted no evidence to show that Watts knew that Peutz had stopped getting PUB slips, that Watts knew that her schedule had been changed or that any member of management ever told Watts to have her PUB requests signed by a supervisor as the system had been changed. Here, the evidence showed that Watts merely followed the same PUB procedure — having Peutz approve her slips — for her entire employment. This also showed that Watts never formed the intent to receive pay to which she was not entitled.

Finally, the Union made several due process arguments as follows. The Union pointed out in its brief, as it had at the instant hearing, that the Center failed to identify dates and times that Watts had incorrectly received PUB's for almost one year after Watts' discharge despite the Union's timely request for all such information in the grievance form and thereafter. This made it very difficult for the Union to process the grievance and to present its case herein. Indeed, many Employer Exhibits were not sent to Union Counsel despite her requests therefor, the Center apparently deciding to wait to give its documents (testified to by Hollen) to the Union on the day of hearing. In addition, the Union observed that the Center never charged Dekker or Watts with conspiring to receive extra pay during the processing of the grievance. The fact that the Center never asked Peutz to determine the days/shifts that Watts was improperly paid PUB or to confirm when she called Watts into work in October, 2003, shows that the Center may not have had this information at the time it discharged Watts.

In all the circumstances of this case, given the Center's failure to meet its burden of proof, the Union urged that the grievance must be sustained and that Watts must be reinstated with full backpay and benefits.

DISCUSSION

The initial question in this case is what burden of proof should be applied based upon the charges the Center made against Watts in the termination letter. The Center discharged Watts for "falsification of pick-up hours and receipt of pick-up bonus' not earned," citing the Employee Handbook, Class III offenses 3 and 15. Under the Employee Handbook, for a Class III offense the Center can immediately discharge an employee without having given him/her any prior warnings or discipline concerning the conduct. Item 3 prohibits "falsification of any document" and item 15 prohibits "fraud or participation in fraud which harms the Company." In item 3, examples are given of the type of falsification envisioned: falsifying an employment application and an employee punching another's timecard or allowing another to punch the employee's timecard.

The Random House Dictionary of the English Language (College Ed., 1968) at page 477 defines the term, "falsify" as follows:

1. To make false or incorrect, esp. so as to deceive.
2. To alter fraudulently.
3. To represent falsely; misrepresent.

The charge that Watts falsified her pick-up hours and received pay "not earned" necessarily requires that Watts have had knowledge and an active intention to mislead or deceive the Center; that is, that she be shown to have asserted as truth something that she knew was untrue or inaccurate in order to gain a benefit that she was not entitled to receive. In this case, therefore, the Center must prove that Watts intended to fill out PUB slips so as to receive pay to which she knew she was not entitled.

In this case, the record showed that Watts regularly worked extra hours and that Watts worked all of the extra hours she claimed during the period after September 4, 2003 and prior to her discharge. In these circumstances, Watts' claim that she did not notice that her pay had increased after September 4, 2003, makes logical sense. In addition, although Watts should probably have confirmed what her regular schedule was after she spoke to Peutz about being assigned more regular hours, the fact that Watts did not do so does not rise to the level of dishonesty. Indeed, Peutz' schedule changes showed no obvious pattern of increased work time which might have led Watts to realize on her own that Peutz had changed her work schedule. In addition, I note that there is no evidence that Watts was ever told she must look at the Master Schedule to determine her schedule. Indeed, Watts' system for determining her

schedule -- looking at the sign-up sheets that Peutz had highlighted -- gave her sufficient reliable information to allow her to work whatever hours Peutz scheduled her to work after September 4th.

Furthermore, no evidence was submitted to show that Watts' regular schedule was formally changed by Peutz or anyone else in management on or after September 4th. Watts stated without contradiction that she never received notice of any schedule change. Even Peutz did not state that she gave Watts any notice of a schedule change and Peutz admitted that she never told Watts what she would do for her regarding Watts' request for additional regular hours. In addition, it should be noted that CNAs Ross and Fermelia (the only CNAs questioned thereon) corroborated Watts, that if their regular schedules were changed, they would expect Peutz to notify them of the change.

The fact that Peutz changed the Master Schedule using "white-out," changing Watts' regular hours and eliminating her .7 FTE designation, the fact that Peutz also admitted that she never spoke to Watts about changes she had made to Watts' schedule and the fact that Peutz never assured Watts that she would receive any extra hours, support the Union's argument that Watts could not have known that she had requested PUB money to which she might not be entitled. It is significant that Peutz never denied Watts' assertion that Peutz gave Watts hours "under the table" in order to circumvent the Union contract.

The evidence also failed to prove that there were any written PUB procedures in effect prior to October 29, 2003 and that Watts and other CNAs were trained regarding how and when to properly submit PUB slips. Indeed, the testimonial evidence showed that CNAs had different assumptions about and different methods for submitting PUB slips. In this regard, I note that CNA Nowak agreed with Watts that no PUB procedure existed and CNA Ross stated that she did not know whether a written PUB procedure existed. Only one CAN, Frericks, was questioned herein regarding E-17 (the posting covering PUB slips among other things), and she stated initially that she thought she saw the posting after Watts was terminated (6 to 8 months before the instant hearing). Thus, this evidence was insufficient to support the Center's assertion that Watts was dishonest in making her PUB requests.

The Center's assertion (and the evidence proffered to support it) that Watts claimed PUB's when she was working trades and when she was scheduled to work a full shift on a weekend do not prove that Watts was dishonest in making these PUB requests. Watts could have simply been mistaken in making these requests. It was up to Center managers to catch Watts' errors at the time they were made, promptly instruct Watts on the proper procedure for requesting PUB's and if she continued to wrongly request same, Center managers should have disciplined Watts therefor. However, according to this record, Watts was never instructed in the proper use of PUB requests nor was she warned regarding how and when she should make PUB requests prior to her discharge. In addition, it is significant that 13 CNAs made improper PUB requests, from one to nine times each, during the same time that Watts submitted her requests, yet none of these CNAs was terminated, nor did they receive any discipline.

Furthermore, Peutz admitted that she never told Watts that Dekker had told her that she (Peutz) would no longer be expected to check and approve PUB slips. Watts' testimony herein was uncontradicted that no one at the Center told her that Peutz would no longer be approving PUB's. In these circumstances, Watts was never given a chance to choose to follow "proper" PUB procedures. Although it may have been negligent or reckless of Watts to simply submit PUB requests to see if they would be paid, the Center did not prove that this conduct was dishonest or fraudulent as no evidence was presented to show that Watts intended to receive PUB money that she knew she was not entitled to.

The Center argued that because Watts' sister, Wendy Dekker, became Office Manager in late August, 2003, that Watts and Dekker must have conspired to defraud the Center of PUB money. However, the Center failed to prove any facts to demonstrate that Watts and Dekker in fact conspired to defraud it of PUB pay. Rather, the undisputed evidence showed that Watts and Dekker never spoke about the PUB system and Watts denied ever asking Dekker to authorize extra pay for Watts that she was not entitled to receive. In addition, Dekker's testimony stood unrefuted that upper management –Administrator Klug and the Director of Nursing—received detailed payroll reports quarterly showing PUB pay. At the very least, someone from management—either Dekker or one of her superiors—should have discovered Watts' PUB requests and brought problems regarding them to Watts' attention prior to the Hollen audit being performed. In all of these circumstances, it cannot be said that the Center proved that Watts falsified Center records, as charged by the Center or that she knowingly requested PUB pay to which she knew she was not entitled. 16/

16/ If Watts received PUB pay she should not have received this was the Center's error.

In this case, the Center has failed to meet its burden of proof that Watts, in fact, knowingly falsified her PUB slips and that she intended to request and receive PUB pay that she was not entitled to. 17/ I note that Watts never received any discipline prior to her discharge and that the Center considered her a good employee for the 2.5 years of her employment. The grievance must be sustained, as follows:

17/ The Union argued that the Center failed to afford Watts due process by failing and refusing to release information it had allegedly relied upon in deciding to discharge Watts (E-22 through E-25) until the day of the instant hearing. The Center's conduct on this point was unacceptable. Without some level of cooperation between the parties, it becomes impossible for a union to properly assess a grievance – whether it should settle the case or proceed to arbitration. However, as the Union has prevailed herein and the contract contains no remedy to address this point, the axiom, "no harm no foul" applies.

AWARD 18/

Cherie Watts was not terminated for just cause. Therefore, the grievance is sustained. The Center shall immediately reinstate Watts with full backpay and benefits and Watts' personnel record shall be expunged of her October 29, 2003, discharge.

18/ I shall retain jurisdiction herein (over the remedy only) for 60 days after the date of this Award, should the parties have difficulty agreeing upon the details of the remedy herein.

Dated at Oshkosh, Wisconsin, this 13th day of December, 2004.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator