BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SKAALEN SUNSET HOME, INC.

and

SEIU DISTRICT 1199W/UNITED PROFESSIONALS FOR QUALITY HEALTH CARE

Case 51
No. 66881
A-6287

(Hendrickson discharge grievance)

Appearances:

Kathy Horton, Administrator, Skaalen Sunset Home, Inc., 400 North Morris Street, Stoughton, Wisconsin, 53589, appearing on behalf of Skaalen Sunset Home, Inc.

Nicholas Fairweather, Cullen Weston Pines & Bach LLP, 122 West Washington Avenue, Madison, Wisconsin, 53703, appearing on behalf of SEIU District 1199W/United Professionals for Quality Health Care.

ARBITRATION AWARD

Skaalen Sunset Home, Inc., hereinafter the Home or Employer, and SEIU District 1199W/United Professionals for Quality Health Care, hereinafter the Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide the Hendrickson discharge grievance. A hearing was held on July 12, 2007 in Stoughton, Wisconsin. The hearing was not transcribed. The record was closed on August 21, 2007, upon receipt of post-hearing briefs. Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate Article 14 of the parties' 2004-2007 collective bargaining agreement when it terminated Michelle Hendrickson in October, 2006?

PERTINENT CONTRACT PROVISION

The parties' 2004-2007 collective bargaining agreement contains the following pertinent provision:

ARTICLE XIV – Discharge and Discipline

Section 1. Discipline for Just Cause. The Home may discharge, suspend or otherwise discipline for cause any employee who has satisfied his/her probationary period, subject to the grievance procedure. Normally such discipline shall include the sequence of verbal warning, written warning, suspension and termination. If the Home decides to suspend an employee, such suspension shall commence as soon as reasonably possible following the decision to suspend, and the term of the suspension shall, to the extent that scheduling will reasonably permit, be served as one continuous time period. The Home shall notify any bargaining unit member of their right to union representation at any disciplinary meeting, or any meeting that will result in discipline against that employee, and will arrange that representation with the Union if so requested.

Section 2. Notification of Discipline. The Home shall notify the Union, by mailing written notification thereto, and by delivery to one of the employees designated by the Union as a Union delegate, of any discharge or suspension of any employee, within 48 hours of such discharge or suspension.

Section 3. Notice to Contest. If the Union desires to contest the discharge or suspension, it shall mail or hand deliver written notice thereof to the Home within 7 days from the date of the receipt of the notice of discharge or suspension. In such event, the dispute shall be submitted and determined under the grievance and arbitration procedure hereinafter set forth; however, commencing at Step 3 of the grievance procedure.

BACKGROUND

The Employer operates a nursing home in Stoughton, Wisconsin which provides nursing care and services to elderly and infirm residents. It operates under state regulations. The Home employs Certified Nursing Assistants (CNA's) to deliver non-acute nursing care to residents and assist them with their daily living activities. The Union is the exclusive collective bargaining representative for the Employer's CNA's. Michelle Hendrickson was a CNA with the Employer for about three years until her discharge on October 25, 2006. This case involves her discharge. Prior to her termination, she had not been previously disciplined.

According to Barbara Kroda, the Employer's Director of Nursing, Skaalen has a zero tolerance policy for patient abuse. Under that policy, the Employer terminates anybody who abuses residents, be it verbal or physical abuse. This policy is reviewed yearly with staff at inservices. The administration becomes aware of suspected abuse as a result of reports from family, staff, residents, etc. Upon receipt of a report of abuse, interviews are done and a determination is made.

FACTS

Hendrickson was discharged from her employment with Skaalen on October 25, 2006 for patient abuse of a resident that allegedly occurred on October 18, 2006.

That day, Hendrickson was working the 2:45 to 11:15 p.m. shift on Unit 6 of the nursing home. One of the elderly residents she was caring for was C.M. According to his CNA care plan document, C.M. can be "confused at times" and "resistive at times". Additionally, various witnesses described him as easily agitated. That said, the care plan document also indicates that he is "able to make his needs known." That means he can communicate verbally. C.M. does not have any history of inflicting harm on himself. That night, C.M. pressed the call light button on his wall in his room numerous times. When a CNA sees the call light and/or hears the accompanying buzzer, they are supposed to check on the resident and find out what they need. According to Hendrickson, she responded to C.M.'s call light about five times that night. The last time she went to check on C.M. that night, another CNA, Ashley Burdick, went into C.M.'s room with her. The focus of this case is on what happened when Hendrickson went into C.M.'s room for the final time that night at the end of her shift.

When Hendrickson entered C.M.'s room that time, C.M. complained to her about the noise coming from the hallway from people talking. Hendrickson then moved C.M.'s bed away from the wall. She did this to keep C.M. from reaching and pressing the call light on the wall. This action upset C.M. and made him angry and agitated. C.M. then tried unsuccessfully to hit Hendrickson. Hendrickson backed away from C.M. and told him it was not nice to hit. Before she left the room, Hendrickson told C.M. that another call light was still attached to his bed which he could press for an actual emergency. According to Hendrickson, that was the extent of what happened.

Hendrickson then went back to the nurse's station and told those present that C.M. had just tried to hit her.

While it is Hendrickson's position that the facts just noted were the full extent of the incident, that's not what C.M. subsequently told two managers.

About 11 p.m., C.M. complained to another CNA, Thomas Harris, about Hendrickson's treatment of him. While the record does not indicate what C.M. told Harris, Harris responded to what C.M. told him by immediately going to Floor Nurse Nancy Reyes

and telling her that he had just received an abuse complaint from C.M. Per the Employer's standard operating procedure, Reyes then began an investigation into the matter to determine what had occurred.

Reyes and LPN Diane Martinson immediately went into C.M.'s room to interview him. When they arrived, C.M. was awake and laying in his bed. Reyes observed that C.M. had a red inflamed mark above his right eyelid; the red mark was that noticeable. According to the Employer's patient records, the red mark was not present on C.M. earlier. Reyes asked C.M. how he had gotten the red mark above his eyelid, and C.M. responded that a girl, who he later physically described and identified by the first name of Michelle, had scolded him and poked him in the eye while shaking her finger at him. C.M. then shook his finger to imitate a shaking/pointing action. C.M. told Reyes that she (i.e. Michelle) had poked him in the eye while she was pulling his bed away from the wall. The red mark above C.M.'s eyelid was treated that night with an ice pack.

Following her interview of C.M., Reyes called her supervisor and informed him what had happened. Reyes then wrote up an incident report and submitted it to Barb Kroda, the Employer's Director of Nursing. Reyes' incident report provides in pertinent part:

> I was on the BCD side of Unit 6 as floor nurse on the evening of 10/18/2006. I was on the computer finishing charting at about 2315 when Thomas Harris requested that writer and the supervisors join him in ____ room to relay an incidence of apparent abuse. Supervisors were not able to come up to the unit at that time so I and Diane Martinson LPN along with Thomas went into _____ room. Resident was laying in bed. Noted to have a red inflamed mark to the top of his R eye lid. Upon closer examinations it was an area of about 1 x 0.5cm red area with evidence of superficial abrasions at about 45 degree angle to the eye. Resident stated that an aid came into his room. Asked what she looked like and he stated "She was short and slender. . .her hair was pulled back into a pony tail. . .it was light brown." Asked what color clothing she was wearing and resident stated "I don't recall." Asked him if she was wearing purple and resident stated "No, the one that was wearing purple is nice. She is kind of heavier build. It wasn't her. . . I think the person's name is Michelle who was in here. She is mean." He proceeded to state that "She was yelling." Asked what she was saying and he stated "She was smart mouthing me. I told her to leave but she wouldn't." He was not able to state what she was saying. "She was scolding me." Resident was shaking his finger to imitate the action she had made. "Then she came over here [indicated around the head of his bed] and she pulled out the bed away from the wall all the while her hands were flying all around as if she was really angry. . . she kept shaking her finger at me." Asked why she had pulled the bed away from the wall and resident stated "because she was angry at me." Asked if how he got the mark over his eye and he stated "She poked me." Asked how she did it and he stated "when she was shaking her finger at me." Asked why she had come into the room. He stated

> "I wanted them to be quite out in the hall, they were going up and down the hall talking. I couldn't sleep. I called them into my room." Asked what time it was and he stated "about an hour ago." Time was between 2315 and 2320.

The next day, October 19, the Employer's Social Worker, Sally Paulson, interviewed C.M. about what had happened the night before. C.M. told Paulson virtually the same story she told Reyes – namely, that a female aide was mad at him, pointed her finger at him and poked him in the eye when she was pulling his bed away from the wall. Although C.M. could not remember the aide's name, he described for Paulson what she looked like. The record indicates that the person he described was Hendrickson. Following her interview with C.M., Paulson wrote up an incident report. It provides in pertinent part:

> On this date, writer spoke with _____ regarding incident that occurred on 10/18/06. _____ stated that one of the aides who has long, light brown hair, tied in a pony tail, with a slender build approached him in his room yesterday evening. He could not remember her name but said, "she was working with Ashley." He said this aide "gets picky" and "is always teasing me." _____ stated she came into his room and "started babbling, which she knows I don't like. I think she was trying to get my goat and make me upset." He said he told her to "get out of here, if you don't want to talk straight." He states this upsets her and she said he was being "mean." He asked her "Do you realize what mean means? It sounds like what you've been doing to me." He said this seemed to upset her and then she left. He thinks she told Ashley something and then Ashley came into his room. He said to writer "she wound her finger up and around and pointed at me and said 'What do you need _____ and I said you both better get out and quit testing me on things that are wrong." _____ visually showed writer how she moved her arm/hand in a circle and then pointed at him. He said she then left and a few minutes later the original aide came back into the room and "she was angry." He said she started "another disagreement" and "kept babbling." He states that he told her "if you want to continue to babble, there's the door, find it." This angered her and she pulled his bed out from the wall. He said to writer "She has a temper, and I think she loses control of her mind. I believe she can't think straight." He said after she pulled the bed out she went in between the bed and the wall and "had her hands flying all around and all of a sudden she poked me in the eye. I don't know if it was planned." _____ could not remember anything else about the incident. He stated that after this, she left and "the other girls" came in and gave him an ice pack, which he says he used for about 45 minutes. _____ had a red mark above his eyelid, and when asked about it he said it "hurt."

That same day, Nursing Director Kroda interviewed six people to determine what they may have seen or heard first-hand as it related to the incident that occurred in C.M.'s room the night before. The six people were Reyes, LPN Lisa West, CNA Jeannette Peterson, CNA Jody Brogan, CNA Ashley Burdick and Hendrickson. Reyes, West, Peterson and Brogan

were not in C.M.'s room at the time of the incident and therefore did not see or hear anything first-hand. Burdick and Hendrickson were in C.M.'s room at the time of the incident and therefore saw and heard what happened first-hand. In her interview, Burdick told Kroda that C.M. was very agitated with both her and Hendrickson, yelled at them and swung his arms. She indicated that Hendrickson pulled C.M.'s bed away from the wall in order to keep him from pushing the button on the wall. She further indicated that Hendrickson did not yell at C.M., shake her finger at him or threaten him. At Kroda's request, Burdick subsequently prepared a written statement about the incident. Her written statement essentially mirrored what she told Kroda. In her interview, Hendrickson told Kroda that after she moved C.M.'s bed away from the wall, C.M. became very agitated/mad with her, swung his arms and tried to hit her. She intially said she did not yell, hit or poke C.M. in his eye (like C.M. said she did). When Kroda asked Hendrickson how C.M. got the red mark above his eyelid, Hendrickson said that she may have accidentally hit the resident, but did not remember doing so. At Kroda's request, Hendrickson subsequently prepared a written statement about the incident. Her written statement essentially mirrored what she told Kroda except that it (i.e. her written statement) does not contain the admission she made to Kroda that she may have accidentally hit the resident. In her written statement, Hendrickson contended that C.M.'s accusations against her were false and unfair.

After completing the interviews and reviewing the incident reports and written statements noted above, Kroda concluded that "the alleged incident meets the definition of abuse." Kroda terminated Hendrickson for patient abuse on October 25, 2006.

The Union grieved Hendrickson's discharge and the grievance was appealed to arbitration.

. . .

The Employer subsequently reported the incident involving C.M. to the (State) Department of Health and Family Services, which investigated the matter. After doing so, the agency issued a letter wherein it found that there was "insufficient evidence to prove that the incident occurred as alleged." Thus, it made no finding of patient abuse. The letter went on to say that that determination does not "affect, negate or resolve" any employment issues. Since there was no finding of patient abuse by that department, Hendrickson remains on the State's caregiver registry.

. . .

At the hearing, Hendrickson testified she did not hit C.M. in the eye on October 18, 2006. She implied that C.M. hit himself.

CNA Burdick, who was in C.M.'s room at the time of the incident, did not testify at the hearing. C.M. did not testify either.

POSITIONS OF THE PARTIES

Union

The Union contends the Employer did not have just cause to discharge Hendrickson for patient abuse. It makes the following arguments to support that contention.

First, with regard to the standard which the arbitrator is going to use to analyze whether just cause exists, the Union asks the arbitrator to use the DAUGHERTY standard in his analysis.

Next, with regard to the level of proof that the Employer needs to meet to prove that Hendrickson engaged in the wrongdoing alleged (i.e. patient abuse), the Union contends that in this case, the arbitrator should require the Employer to prove its claim beyond a reasonable doubt. Here's why. First, it notes that an accusation of physical abuse of a resident will likely create a "black mark" on Hendrickson's record, thereby making future employment as a CNA difficult, if not impossible. Second, the Union also notes that "the conduct of which Hendrickson has been accused" (i.e. patient abuse), "is also the type prohibited by Wisconsin's criminal code" (citing Sec. 940.295). As the Union sees it, these two reasons (i.e. the potentially disastrous effect on Hendrickson's career and the criminal nature of the conduct) require the arbitrator to use the standard of proof used in criminal cases (i.e. the "beyond a reasonable doubt" standard). According to the Union, the Employer did not meet its burden of proof under that standard.

Next, the Union avers that the Employer did not prove that Hendrickson struck the resident as alleged. It maintains that Hendrickson's account that she did not strike him in the eye should be credited for the following reasons. First, it notes that the resident (who claimed that Hendrickson struck him) did not testify at the hearing. As a result, his version of the incident was not subject to cross-examination. Second, it characterizes the red mark which was above the resident's eye as "miniscule". Third, it asserts that the only other witness to the incident (besides Hendrickson and the resident) was Burdick and "her testimony was consistent with Hendrickson's". Fourth, the Union submits that the allegation that the resident made against Hendrickson (i.e. that she struck him in the eye) may have been suggested to him by the Employer's officials when they interviewed him. According to the Union, the resident is "the type of patient who would be susceptible to 'suggested' interview responses."

Finally, the Union argues that in order to meet the definition of abuse used by the State Department of Health and Family Services, as well as by Skaalen, the Employer has to establish that Hendrickson acted with an intent to cause harm. The Union asserts that "Skaalen has not alleged that Hendrickson intentionally struck the resident, nor has it offered any evidence that would raise an inference of intentional conduct." As the Union sees it, this alone is a sufficient basis for the arbitrator to sustain the grievance.

In sum, it is the Union's view that the Employer did not prove that it had just cause to discharge Hendrickson. It therefore asks that the grievance be sustained, Hendrickson reinstated, and a make-whole remedy issued.

Employer

The Employer's position is that it did not violate the collective bargaining agreement when it terminated Hendrickson on October 25, 2006. For background purposes, the Employer notes that it has a zero tolerance policy for any kind of patient abuse because its primary function (as a nursing home) is to keep its residents safe. The Employer contends that Hendrickson violated that policy on October 18, 2006 when she poked a resident above the eyelid. According to the Employer, that constituted patient abuse. Building on the premise that Hendrickson committed patient abuse, the Employer maintains it had just cause to discipline her. The Employer further avers that the discipline it imposes in all patient abuse situations is discharge. Consistent with that practice, that was the discipline imposed here. The Employer elaborates on these contentions as follows.

The Employer notes at the outset that the abuse charge came from a resident. After the resident made the abuse allegation to another CNA, the Employer asserts it conducted a thorough investigation into the matter. First, two managers (Reyes and Paulson) interviewed the resident separately about what happened the night of October 18, 2006. The Employer avers that the resident essentially told both of them the same story about what happened: namely, that Hendrickson got mad at him, pointed her finger at him, and while shaking her finger poked him above the eyelid. Second, following the resident's interview, Kroda interviewed six people regarding the matter. After doing so, it was ascertained that the only people with first-hand knowledge about what happened were C.M., Hendrickson and Burdick. When Kroda interviewed Hendrickson, she asked Hendrickson if she touched, hit or poked the resident, and Hendrickson initially said she did none of those things (i.e. touch, hit, or poke C.M.). Thus, she denied the charge/accusation made against her by C.M. Later, though, when Kroda asked Hendrickson how C.M. got the red mark above his eyelid, Hendrickson admitted that she may have accidentally hit his eye. Following the Employer's investigation, it concluded that C.M.'s complaint that Hendrickson poked him above the eyelid was well founded for the following reasons. First, as the Employer sees it, the red mark above C.M.'s eyelid proves that C.M. was poked with a finger and thus was the victim of physical abuse. Second, the Employer notes that the resident identified Hendrickson as the person who did it. According to the Employer, the resident had nothing to gain by falsely identifying Hendrickson as the person who did it. Putting the foregoing points together, the Employer maintains that the record evidence establishes that C.M. was poked above the eyelid by someone, and that the person who did it was Hendrickson.

Next, the Employer addresses the fact that the (State) Department of Health and Family Services found there was "insufficient evidence to prove that the incident occurred as alleged." As the Employer sees it, that finding should have no bearing on the outcome of this case. Here's why. It reiterates that it has a zero tolerance policy for patient abuse. The Employer

maintains that its policy imposes a higher standard of resident care by its employees than is statutorily required. The Employer avers that Hendrickson violated that policy when she physically abused C.M.

In sum, it is the Employer's view that Hendrickson's termination for patient abuse was justified under the circumstances and should not be overturned. It therefore asks that the grievance be denied and the discharge upheld.

DISCUSSION

The parties stipulated that the issue to be decided here is whether the Employer violated Article 14 of the parties' collective bargaining agreement when it discharged Hendrickson. Article 14, Section 1 is entitled "Discipline for Just Cause". As the title indicates, that clause subjects employee discipline to a just cause standard. That means that the Employer retains the right to discipline employees, so long as it has just cause for doing so. In this case Hendrickson was discharged, so the obvious question to be answered is whether the Employer had just cause to discharge her.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase "just cause" is not defined in the collective bargaining agreement, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. Some apply the seven-step DAUGHERTY standard. (That's the standard the Union asks me to apply here). Others apply a standard which consists of a two-prong analysis: the first element is whether the employer proved the employee's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was commensurate with the offense given all the circumstances. Of these two approaches, I'm going to apply the latter here (i.e. the two-prong analysis). I only apply the DAUGHERTY standard if the parties agree to it, and that did not happen here.

Having so found, the next question is what level of proof the Employer needs to meet to satisfy the two elements just referenced. The standard normally used by arbitrators is the "preponderance of the evidence" standard. The Union contends that in this case though, that standard is insufficient because "the conduct of which Hendrickson has been accused" (i.e. patient abuse) "is also the type prohibited by Wisconsin's criminal code" (citing Sec. 940.295, "Abuse and Neglect of Patients and Residents"). Building on that premise, the Union asks the arbitrator to use the standard of proof used in criminal cases, namely the "beyond a reasonable doubt" standard. The reason it does so, of course, is because the bar for proving something "beyond a reasonable doubt" is much higher than the bar for proving something by the "preponderance of the evidence." I decline to use the higher standard in this case. Here's why. While perpetrators of patient abuse can be charged criminally under the statutory provision just cited, that did not happen here. Thus, Hendrickson was not charged with a crime. Since this is not a criminal case, there is not sufficient grounds for imposing the

standard of proof on the Employer used in criminal cases. As a result, the standard of proof that the Employer needs to meet in this case is the normal "preponderance of the evidence" standard.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct. In making that call, I will address two separate components: did the employee do that which was alleged, and if so, was that misconduct? The second component will be addressed first.

Since this is a patient abuse case, I've decided to begin with the following general comments about the topic. Patient abuse in a nursing home is an extremely serious matter because of the home's legal obligation to care for its residents. The home must protect its residents along with its reputation. Failure to do so would be to the detriment of all persons connected with the operation. That being so, it is clear that the Employer has a legitimate concern with, as well as a direct interest in, preventing patient abuse. Thus, patient abuse constitutes misconduct.

The focus now turns to whether the Employer proved that Hendrickson engaged in the behavior alleged (i.e. patient abuse).

In this case, like many discipline cases, some critical facts are disputed. The critical fact that's disputed here is whether Hendrickson hit/poked the resident above his eyelid on October 18, 2006. The Employer alleges that Hendrickson did that while Hendrickson denied doing so.

There were three people in the resident's room at the time of the incident: Hendrickson, Burdick and the resident. Given their close proximity to each other, they each had to see and hear what happened. Two of them did not testify at the hearing: the resident and Burdick. It was not surprising that the resident did not testify because elderly residents usually don't testify in patient abuse cases – particularly in cases like the present one where they are the alleged victim. It was surprising though that Burdick did not testify. Here's why. Burdick is still employed at the Home and therefore was available to testify at the hearing. Had she testified, her testimony presumably would have been consistent with what she told Kroda in her interview and what she put in her written statement. Had she so testified, her testimony would have buttressed Hendrickson's account of the incident (namely, that she did not hit/poke the resident above the eyelid), and there would have been two employees – not just one – whose account of the incident contradicted the resident's. However, as was just noted, Burdick did not testify at the hearing even though she was available to do so (since she's still an employee of the Home). That meant that Hendrickson's testimony was not corroborated at the hearing even though it could have been. As a result, the arbitrator is faced with the proverbial "he said – she said" situation (with the "he" being the resident and the "she" being Hendrickson).

While Hendrickson testified at the hearing that she did not hit/poke the resident in the eye on October 18, 2006 as the Employer alleged, I find that she did for the following reasons.

First, the charge against Hendrickson was made by the resident himself and unfolded as follows. Shortly after the incident, the resident complained to another CNA about what had just happened, and that CNA reported it to Nurse Reyes. Following standard operating procedure, Reyes then went and interviewed the resident. This involved asking him questions and following up on his answers. The resident told Reyes that an aide, who he identified by the first name of Michelle, had scolded him and poked him in the eye while shaking her finger at him. The next day, Social Worker Paulson interviewed the resident, and he essentially told her (Paulson) the same story he told Reyes – namely that a female aide was mad at him, pointed her finger at him and poked him in the eye when she was pulling his bed away from the wall. While the resident could not remember the aide's name, he described what she looked like. The record indicates that the person the resident described was Hendrickson. Thus, in two separate interviews on two successive days, the resident told the same basic story. While the Union avers that the allegation that the resident made against Hendrickson in these interviews (i.e. that she struck him in the eye) may have been suggested to him by the Employer's officials when they interviewed him, there is no factual basis in the record to support that inference. As a result, the undersigned declines to accept the proffered inference. Second, no evidence was offered why the resident would make up her charge against Hendrickson. Insofar as the record shows, there is no history of animosity between the resident and Hendrickson. That being so, there is no apparent reason for the resident to make up the charge against Hendrickson or relate an incident that did not take place. Additionally, the resident had nothing to gain by making a false charge. In other words, the resident had nothing at stake. In contrast though, Hendrickson has a lot at stake in this matter. Third, the resident's story was corroborated in part by physical evidence – namely the red mark from an abrasion above his eyelid. Insofar as the Employer's records show, that red mark was not there before the night of October 18, 2006. That means that the resident got the red mark above his eyelid that night. While the red mark was not large, it was big enough that both Reyes and Paulson saw it when they interviewed him. Also, the resident told Paulson that the red mark hurt. While Hendrickson implied at the hearing that the resident inflicted the red mark on himself by hitting himself, there is no factual basis in the record to support that inference. It is noted in this regard that the resident does not have a history of inflicting harm on himself. As a result, the undersigned declines to accept the proffered inference that the resident made the red mark on himself by hitting himself. Fourth, while the resident's story was corroborated in part by the physical evidence just noted, Hendrickson's assertion that she did not hit the resident in the eye was not corroborated by any physical evidence or supporting testimony. With regard to the latter, it has already been noted that co-worker Burdick could have corroborated Hendrickson's account of what happened because she was there. Under the circumstances, I draw an adverse inference from Burdick's failure to testify at the hearing in Hendrickson's defense. Fifth, when Hendrickson was interviewed the day after the incident by Kroda, Hendrickson made inconsistent statements about what happened. The following shows this. She initially told Kroda that she did not hit or poke C.M. in his eye (like C.M. said she did). Thus, she initially denied the charge made against her by C.M. However, when Hendrickson was asked about the red mark above C.M.'s eyelid, Hendrickson said that she may have accidentally hit his eye, but did not remember doing so. Having made that critical and self-incriminating admission to Kroda, one would think that she would stick with it for the

purpose of consistency. That's not what happened. Specifically, Hendrickson did not repeat that admission in her subsequent written statement, nor did she make it again at the hearing. It would be one thing if Hendrickson had admitted at the hearing – just like she did to Kroda in her interview – that she accidentally hit the resident (while pulling his bed away from the wall). However, she chose not to do that. Instead, at the hearing she simply denied hitting the resident in the eye. After weighing her blanket denial against the evidence outlined above, I reach the same conclusion as the Employer did, and find that notwithstanding Hendrickson's denial, she did indeed hit/poke C.M. above the eyelid on October 18, 2006.

The Union asserts that in order to prove patient abuse, the Employer has to establish that Hendrickson acted with an intent to cause harm (i.e. that her actions toward C.M. had to be intentional to be patient abuse). Certainly Hendrickson's intent would be an issue in this case if she had testified at the hearing that she accidentally or inadvertently hit/poked C.M. above the eye. Had she so testified, then her intent would have been raised as an issue and/or mitigating factor. However, as was previously noted, that's not what happened. Specifically, she did not testify that she accidentally or inadvertently hit/poked C.M. above the eye. Instead, she simply said it didn't happen. For the reasons noted above though, I found that it did happen. Under these circumstances, I don't need to determine Hendrickson's intent; just whether the incident occurred.

Having concluded that the incident occurred as alleged by the Employer, the next question is whether this conduct warranted discipline. The answer to that question is yes. As was noted earlier, the Employer has a policy prohibiting abuse of a resident. Violation of that policy is grounds for disciplinary action. Hendrickson violated that policy on October 18, 2006 when she poked a resident above the eyelid. The fact that the resident had just unsuccessfully tried to hit Hendrickson did not give Hendrickson an excuse to hit back. It is the responsibility of all caregivers to ensure that their conduct toward residents is appropriate. On October 18, 2006, Hendrickson's conduct toward C.M. was not appropriate; it therefore constituted misconduct warranting discipline.

In light of the conclusion that just cause existed for disciplining Hendrickson for patient abuse, the next part of the just cause analysis being used here requires that the Employer establish that the penalty imposed for the employee's misconduct was commensurate with the offense given all the circumstances. I find that it was for the following reasons. The Employer averred at the hearing that it considers the offense of patient abuse to be so serious that the discipline it imposes in all abuse situations is discharge, even if the employee has not been previously disciplined. There is nothing in the collective bargaining agreement that precludes the Employer from taking that position (subject to the caveat that any discharge has to satisfy the just cause standard). Having taken that position, the principle of equal treatment dictates that an employer must enforce rules and assess discipline in a consistent manner; employees who engage in the same type of misconduct are to be treated the same unless a reasonable basis exists for variations in the assessment of punishment. There is nothing in this record to indicate that the Employer has been lax in enforcing its rule prohibiting patient abuse in the past or not applied it uniformly to all employees. In this case, the Employer acted

consistent with its practice of discharging employees who engage in patient abuse. That being so, it does not appear that Hendrickson was subjected to any disparate or arbitrary treatment in terms of the punishment imposed. Accordingly, then, it is held that the severity of the discipline imposed here (i.e. discharge) was neither disproportionate to the offense, nor an abuse of management discretion, but rather was reasonably related to the seriousness of Hendrickson's proven misconduct. The Employer therefore had just cause within the meaning of Article 14 to discharge her.

In light of the above, it is my

AWARD

That the Employer did not violate Article 14 of the parties' 2004-2007 collective bargaining agreement when it terminated Michelle Hendrickson in October, 2006. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 19th day of December, 2007.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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