

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

**KENOSHA COUNTY INSTITUTIONS EMPLOYEES,
LOCAL 1392, AFSCME, AFL-CIO**

Case 285

No. 69349

MA-14574

Appearances:

Nicholas Kasmer, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin, appeared on behalf of the Union

Lorette Pionke, Senior Assistant Corporation Counsel, Kenosha County, 912 56th Street, Kenosha, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Kenosha County Institutions Employees, Local 1392, AFSCME, AFL-CIO, herein referred to as the "Union," and Kenosha County, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Kenosha, Wisconsin, on May 3, 2010.

ISSUES

The parties agreed that I might phrase the issues. I state them as follows:

1. Did the Employer violate the collective bargaining agreement when it discharged Grievant Priscilla Guzman?
2. If not, what is the appropriate remedy?

DISCUSSION

At the conclusion of the Employer's case, I granted the Union's motion to sustain the grievance. This award summarizes the reasoning given in a bench decision at that time.

As noted at the time of hearing, the Employer has a heavy responsibility to protect residents from theft. They are a very vulnerable population. The failure to correct a true theft situation creates a serious risk that residents could be repeatedly victimized. The reason that this matter was dismissed on motion at the end of the Employer's case is that the evidence presented is insufficient to prove by even a preponderance of the evidence that a theft occurred. The evidence of theft consisted of hearsay testimony from management employees about their investigation. The use of hearsay is common in nursing home cases because neither side wishes to involve residents in disciplinary issues.

The facts most favorable to the Employer are that resident HH lived in a room with a shared bathroom with another resident in a room adjoining through the bathroom. HH has a lockable drawer in her bed stand to keep valuables. Resident HH operates the home's store and regularly handles money. Resident HH was lucid at the time of the incident, but no longer is. Resident HH reported on June 28, 2009, that she had a red change purse with \$8-9 in the upper drawer of her bureau which was missing. It had been missing since the day before. The upper drawer is not a lockable drawer. Upon investigation, the Employer confirmed that the red change purse had been in HH's room on June 26. Resident HH left her room on June 27, and met a family member at the door to the facility. From there she went with her daughter to receive hair treatment and then to a family event. She returned that evening. The alleged theft occurred while she was gone.

The Employer has a surveillance video system. The system did not show HH leaving with the change purse and the Employer's investigation with a family member indicated that the family member did not believe HH had the red change purse with her. Employer representatives reviewed the surveillance and observed that on June 27, 2009, after HH had left, CNA Guzman entered the room of HH and closed the door. At some time she went through the bathroom, put the adjoining resident in a wheel chair, and was seen wheeling her out about two minutes after entering HH's room. Guzman was not assigned to HH's room. Guzman was not paged to go to the adjoining room, but that resident in the other room was scheduled for an activity at that time. The Employer viewed this conduct as highly suspicious. Its representatives met with Guzman in the investigation and without showing her the video asked her to explain why she went in the room. Guzman ultimately gave conflicting reasons which added to the suspicion. From this the Employer concluded that there had been a theft and that Guzman took the item.

In order to survive a motion to dismiss the Employer must demonstrate by reasonably credible evidence that a theft occurred. Even lucid, younger people make mistakes. It is as likely, if not more likely, that HH took the purse with her to a family event. She regularly handles money and it would be normal to take some with her. It is possible that HH took the

purse and set it down before being observed on video. It is entirely incredible that the Employer could verify by video that she did not have it with her when she left the facility. Other evidence makes the hearsay report by HH and by her family not worthy of any credence. There were numerous incidents of missing money for HH. One incident stands out. HH had reported her valuable diamond ring missing. The Employer's review of the surveillance video demonstrated that HH wore it out of the building on a day when she was in the company of her family for the full day and returned without it. This incident is so out of the ordinary that I conclude from that incident and totality of the circumstances that HH and her family are not sufficiently credible to conclude that the red coin purse was stolen.

The appropriate remedy is to order Guzman to be reinstated and to be made whole for all lost wages and benefits. The parties agreed that I might reserve jurisdiction over the specification of remedy if either party requested in writing, copy to opposing party, that I do so within sixty (60) days of the date of this award.

AWARD

The grievance filed by CNA Guzman is sustained. She shall be reinstated to her former or substantially equivalent position immediately and made whole for all lost wages and benefits. I reserve jurisdiction as specified above.

Dated at Madison, Wisconsin, this 4th day of May, 2010.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator