

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
OAKWOOD LUTHERAN HOME ASSOCIATION, INC.

and

**SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) HEALTHCARE
WISCONSIN CTW, CLC**

Case 14
No. 70279
A-6430

Appearances:

Nicholas E. Fairweather, Hawks, Quindel, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 450, Madison, Wisconsin, appeared on behalf of the Union.

Michael J. Westcott, Axley Brynson, LLP, Attorneys at Law, 2 East Mifflin Street, Suite 200, Madison, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Oakwood Lutheran Home Association, Inc., hereinafter "Employer," and Service Employees International Union (SEIU) Healthcare Wisconsin CTW, CLC, hereinafter "Union," 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 Madison, Wisconsin, on January 12, 2012. Each party filed a post-hearing brief, the last of which was received January 30, 2012, and the record was closed as of that date.

ISSUES

The parties agreed to the following statement of the issues:

1. Did the Employer have just cause to discharge the Grievant?
2. If not, what is the appropriate remedy?

FACTS

The Employer is a faith-based full-provider of care for seniors. The Union represents various employees of the Employer including various food service workers. Grievant McKinley Beyer was hired in November, 2008 as a Dietary Aide I and worked in that position continuously until he was terminated in June, 2010.

The Employer prepares food in its kitchens for elderly residents and others. The residents are a population which is particularly susceptible to food borne contagion. In this regard the State of Wisconsin and U.S. Government have regulations regarding food preparation and handling which require very strict procedures to avoid the contamination of food. Dietary Aides perform work supporting the preparation of meals, distribution of food and maintaining sanitary conditions.

Under the Wisconsin Administrative Code, employees who handle food are required to follow various procedures and also to use disposable gloves to protect residents from food contamination. Employees are forbidden from eating or drinking while serving food. They are also required to wash their hands and don new disposable gloves every time they take a break between tasks or when they eat or drink. There is a dispute in the record as to whether dietary aides were then allowed to substitute using hand sanitizer in lieu of washing under certain circumstances.

On May 31, 2010, Grievant Beyer and Vesar Visali were assigned to respectively deliver food by cart (one hot food cart and one cold food cart) to the third wing south of Hebron, a skilled nursing facility, where the incident in dispute occurred. Ms. Cheryl McKinnon is a night Nurse-Supervisor. She is not in the supervisory chain of the Dietary Aides. She is the person who reported the events leading to Grievant's termination as follows.

She was in the process of doing an audit of the food service procedures of the CNA's at that location at the time in dispute. She proceeded to the south wing of Hebron. The dining room is located at the end of the hall. As she approached in the hall, she saw the hot food cart attended by Mr. Beyer and the cold food cart attended by Dietary Aide Visali positioned along the wall. Both Mr. Beyer and Mr. Visali were positioned about 13 feet away from the carts sitting in chairs in the dining room waiting for the CNA's to arrive. Mr. Beyer had food service disposable gloves on. She observed that Mr. Beyer never changed his gloves during the period in dispute. She positioned herself in a corner near the entrance to the dining room and watched as the CNA's approached to obtain food. She observed that Mr. Beyer came to his cart, removed a bottle of water placed underneath the cart and drank from it. He then proceeded to replace the bottle and serve food without removing the gloves, washing his hands and putting on new gloves.

The Employer maintains a four-step disciplinary process for discipline other than parking violations and attendance violations. The four steps are verbal notice of concern, written warning of concern, a second written warning and dismissal. The written policy calls

for a disciplinary suspension at the third step, but the Employer asserts that it has historically only used a second written warning. Mr. Beyer had progressed to the fourth step in this policy. He had prior discipline as follows:

March 17, 2009	personal cell phone use	verbal warning
July 26, 2009	Insubordination	written warning
March 5, 2010	hostile work environment	2d written warning

The Employer concluded that discharge was the appropriate remedy on the basis of Grievant's prior record.

The Union filed the grievance herein and the same was properly processed to arbitration.

RELEVANT AGREEMENT PROVISIONS¹

ARTICLE 5 – MANAGEMENT RIGHTS

5.1 Scope. The parties recognize that this Agreement addresses the employer-Staff member relationship existing between the Employer and its Staff members in the collective bargaining unit represented by the Union, and that the rights and duties between them in their relationship are those of Employer and Staff member. It is agreed that, except as otherwise expressly limited by this Agreement, the management of the Employer and the direction of the work force including, by way of example and not by way of limitation, the right to select, hire and assign Staff members, promulgate and enforce reasonable rules and regulations it considers necessary or advisable for the safe, orderly and efficient operation of the Employer, direct and assign work, determine work schedules, transfer Staff members between jobs or departments or sites, fairly evaluate relative skill, ability, performance or other job qualifications, introduce new work methods, equipment and processes, determine and establish fair and equitable work standards, select and implement the manner by which the Employer's goals and objectives are to be attained, and to discharge Staff members for just cause or relieve Staff members from duty for lack of work or other legitimate reasons are vested exclusively with the Employer, but this provision shall be construed to harmonize with and not to violate other provisions of this Agreement. It is further understood that all functions of management not

¹ The provisions here in are from the 2011-2013, collective bargaining agreement. There are minor differences between this and the prior agreement which are not relevant to this dispute. The prior agreement applies to this specific dispute.

specifically relinquished or limited in this Agreement shall remain vested in the Employer.

ARTICLE 6 – NON-DISCRIMINATION

Neither the Employer nor the Union will discriminate against any Staff member on the basis of race, color, religion, sex, age, political belief, physical handicap, national origin, marital status, veteran status, sexual orientation, membership in the Union or any other protected class provided by any governmental body having jurisdiction, in regard to hiring, firing, promotion, or any other term or condition of employment. This provision shall not be subject to grievance/arbitration procedure.

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ARTICLE 9 – EMPLOYMENT

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9.3 Compliance with Work Rules. Staff members shall be required to comply with rules as prescribed by federal, state and city agencies governing the regulations of Continuing Care Retirement Communities (CCRC), Residential Care Apartment Complex Programs (RCAC), Community Based Residential Facilities (CBRF), Nursing Homes and Home Health Agencies, as well as the rules prescribed by the Employer.

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ARTICLE 34 – DISCHARGE AND CORRECTIVE ACTION

34.1 Just Cause. The Employer may discharge or suspend a Staff member for just cause. If requested, a Work Site Leader will be called in when a Staff member meeting may result in disciplinary action up to and including discharge.

34.2 Corrective Actions. When a Staff member has worked twelve (12) consecutive months without receiving a formal documented corrective action notice, with the exception of physical, verbal or emotional abuse, neglect or altercations, such notice or prior notices shall not be used in any further disciplinary action, evaluation, suspension, or discharge.

34.3 Timeliness. All corrective action notices shall be given within seven (7) calendar days, excluding Saturdays, Sundays and holidays from when the department head (in the department in which the Staff member works)

completed his/her investigation of the infraction. If notices are not given within this time frame, they shall be dismissed.

- 34.4 Union Notification. A copy of all corrective action notices shall be forwarded to the Union Coordinator within five (5) calendar days of the Staff member receiving the corrective action and to the Union via facsimile to the SEIU Local 150 Milwaukee Office.

ARTICLE 35 – IN-SERVICE TRAINING

Management will provide in-service education. In-service training shall be mandatory for all Staff members governed by the requirements established by the Employer and subject to the discharge section of this Agreement. All Staff members shall comply with federal and state registry in-service requirements provided by the Employer. In those cases where classroom attendance is required by said regulations, the Employer shall make every reasonable effort to assure accessibility for staff that works evenings, nights and weekends.

Unless attendance is required by state or federal regulations, in-service will be video taped and provided by the Employer. All inservice trainings shall be posted for seven (7) calendar days, excluding Saturdays, Sundays and HTSDs, except in an emergency.

The Employer will allow staff members to complete in-service requirements during regular working hours. Staff members must request permission from their direct supervisor before leaving the floor or unit.

. . . .”

RELEVANT WORK RULES

Oakwood Village has established a set of general work rules to protect both the interests of its staff as well as Oakwood. These rules are intended to ensure a favorable working environment for all staff.

To be an effective member of the Oakwood team, it is expected that all staff be aware of and committed to Oakwood’s mission statement and the Resident Rights policy, as well as consistently exhibiting the following standards of professional conduct and performance.

1. Demonstrates respect for the fellow residents, fellow staff and visitors.

2. Adheres to strong ethical values and professional standards which will result in the highest quality of services to the residents. This includes such qualities as: honesty, integrity, reliability, confidentiality, dependability, responsibility and loyalty.
3. Demonstrates a commitment to the development/partnership employment culture which encourages openness, honesty, accountability and creativity.
4. Demonstrates an understanding and acceptance of each staff person's role in working to make Oakwood the best possible working and living environment.
5. Demonstrates a respect for and a sensitivity to Oakwood's Christian ministry.

Listed below are examples of basic areas of concern which may be considered staff misconduct.

The following are staff actions which will result in minor corrective steps being put into place:

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11. Disregard of one's appearance, uniform or personal hygiene.

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16. Failure to follow established organizational/departmental policies and procedures.
17. Being disrespectful of any staff member, resident, visitor or any public contact.

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When minor corrective action steps need to be taken, Oakwood shall utilize progressive corrective action through which staff may be made aware of issues concerning their actions or performance, as well as required changes needed and a time frame for accomplishing these changes. These actions will be documented utilizing a Corrective Action Form. (The Corrective Action form allows for the staff member to include comments in response to the action and to

indicate whether or not the staff member understands and agrees with the action.) Following are the progressive corrective action steps that will generally be used:

1. Verbal notice of concern
2. Written notice of concern
3. Suspension
4. Dismissal

Following are certain actions that are considered “serious or gross misconduct”.

The following are staff actions which are considered serious and gross misconduct which will result in the major corrective action steps being put into place.

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4. Dishonesty or theft.

POSITIONS OF THE PARTIES

Employer

The Employer had just cause to discharge Mr. Beyer for violating its work rules concerning food handling, namely hand-washing requirements. The Employer is required to follow the Wisconsin Food Code and federal regulations concerning the safe handling of food. It has adopted rules which govern employees' handling of food. In that regard, it has a vigorous training program. It provided that training to Mr. Beyer.

Nurse Educator Cheryl McKinnon on May 31, 2010, saw Mr. Beyer and another Dietary Aide deliver food to the third floor south wing of Hebron. The two took a break in the “dining room” at the end of the hall. Mr. Beyer did not remove his gloves when he took the break as required by the Employer's rules. When he returned to the cart he had the same gloves on. While Mr. Beyer was at the cart with the food on it, he took a bottle of water and drank from it. He did not wash his hands or use hand sanitizer before he distributed the food to the CNA's. The other Dietary Aide started delivering food without gloves. He then asked Mr. Beyer to give him gloves. He put them out without washing his hands or using hand sanitizer. He then delivered food.

The main issue in this matter is Mr. Beyer's credibility. Mr. Beyer denied that Ms. McKinnon was present. However, Ms. McKinnon could not have known about this situation had she not been there.

Mr. Beyer violated the Employer's rules and the Wisconsin Food Code by drinking water while delivering food. He also violated the food code by not taking off his gloves when he left the cart and applying the proper procedure to re-glove when he returned to the cart. Mr. Beyer's story is also inconsistent with what he told Ms. DeCoster when she met with him to investigate the matter. His testimony is also inconsistent with his supervisor's testimony, Ms. Cabral. He denied that he was given regular training on this subject. She testified that she did regularly train him.

Termination was the appropriate remedy for Mr. Beyer because he had reached the final step of the established progressive disciplinary policy. He had received a second written warning on March 5, 2010. Mr. Beyer was aware that the foregoing conduct violated the Employer's policies and chose to deliberately ignore them. The Employer asks that the grievance be denied in its entirety.

Union

The Employer did not have just cause to discharge Grievant Beyer. The person who observed the conduct, Ms. McKinnon, was unsure about the events. She was unsure about whether he washed his hands or whether he washed his hands before donning gloves. She made some mention of a water bottle. Mr. Beyer testified that when he and his fellow Dietary Aide arrived on the floor, they started setting up the dining room at the end of the hall because the CNA's were ordinarily short-staffed. They sanitized their hands in the dining room and then re-gloved there. He testified that he was allowed to keep water underneath the steam table and drink the same if he stepped away from the cart. If they took a break they washed their hands and re-gloved. On May 31, after he took the drink of water from the water bottle under the cart, he went back to the dining room to get hand sanitizer. He did not wash his hands because it was difficult to don gloves with wet hands. He then walked back to the cart and re-gloved. Ms. McKinnon's contemporaneous audit notes state that she was unsure whether Mr. Beyer washed his hands before donning gloves and before handling resident food. There is nothing in the record to indicate that Beyer had any history of unsanitary actions. It is more likely that Ms. McKinnon's recollection was unclear.

While Oakwood asserts that hand sanitizing is not a substitute for hand washing, Employer's exhibit 7 which sets out that policy is ambiguous in circumstances when there is no visible dirt on the hands. Any confusion about this policy should not be held against Mr. Beyer. He was not adequately trained.

Even should the Arbitrator conclude that there was just cause for discipline, the penalty of discharge is too severe. Mr. Beyer's training was deficient. Mr. Beyer testified that his training was to "change your gloves every time you move your cart or touch something you're not supposed to touch." Mr. Beyer acknowledged receiving the Employer handbook and staff policies, but did not receive the relevant in-service training about hand-washing. Further, the Employer did not comply with its own progressive discipline policy. It should have suspended

him rather than terminating him. The Union requests that the grievance be sustained and that the Mr. Beyer be made whole for all lost wages and benefits.

DISCUSSION

The determinative factual issue in this matter is the credibility of Mr. Beyer. Mr. Beyer testified in this proceeding that he had been trained in proper food handling procedure including how and when to wash his hands and when to don or change his disposable gloves. He denied, however, having been trained using the same training materials as presented in the hearing. He testified that he had been trained that he could substitute the use of hand sanitizer for hand washing under some circumstances. He remembered the events. He stated that he was seated as indicated and that he returned to the cart. He did remove a bottle of water, but he stepped away from the cart and drank from the water. He did remove his gloves and went to the bottle of hand sanitizer kept in the dining room. After he used the hand sanitizer he then returned to the cart, donned new disposable gloves and served the meal. He denied that he was ever interviewed by the Employer about this incident prior to being terminated.

However, in fact, he had been interviewed by Ms. Sue DeCoster of the Human Resources Department on June 9, 2010, almost a week after the incident in dispute. Ms. DeCoster testified and presented her notes of that interview. In essence, Ms. DeCoster testified that Mr. Beyer told her that he never drank or ate when delivering food, but would always wait until he was between wings. He washed his hands with sanitizer and donned new gloves prior to serving food on the south wing.

I conclude that Mr. Beyer's explanation of the events was fabricated. It is highly unlikely that he would have any recollection of the events in dispute. It is even more unlikely that he would recall them, but would not recall the interview.

The interview of June 9 indicates that Mr. Beyer knew that he was not supposed to eat or drink while in the process of serving food. Thus, the only conclusion is that by having the water bottle with him and using it as described, he knowingly violated the policy against eating or drinking while serving food. I also find it unbelievable that he did sanitize his hands and don new gloves after drinking water.

The only proper conclusions are that he knew the policy at the time, that he set out to intentionally violate it when he believed he was out of observation of his supervisors and did do so. The severity of this conduct outweighs any procedural violations. Specifically, it would have been better that he would have been confronted at the time of the incident. Nonetheless, it is Grievant's own conduct which contributed to the situation. He intended to violate the policy only when he was in a position where his own supervisors were not present. Thus, it is his conduct which made it likely that if he were to be reported, it would be by someone other than his supervisors.

A review of Grievant's prior discipline includes other situations in which he intentionally engaged in behavior which pushed the limits of the employment relationships. One incident was for direct insubordination on July 28, 2009. Another was on March 5, 2010, for sexual harassment.² A third was for cell phone use at a time not allowed a few days later, March 12, 2009. Thus, in Mr. Beyer's short work history, he has demonstrated a pattern of behavior of disregarding the limits and rules of the employment relationship. This is conduct which this employer cannot tolerate and which further corrective action is not likely to correct. Taking into account Grievant's short work history, discharge is the only appropriate remedy. I conclude that the Employer had just cause to discharge Mr. Beyer.

AWARD

The Employer had just cause to discharge Mr. Beyer. The grievance is denied.

Dated at Madison, Wisconsin, this 8th day of May, 2012

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

² It is possible that this was not intentional misbehavior.