

BEFORE THE ARBITRATOR

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In the Matter of a Dispute Between

SEIU HEALTHCARE WISCONSIN

and

OAKWOOD LUTHERAN HOMES ASSOCIATION, INC.

Case ID: 440.0002

Case Type: A

AWARD NO. 7925

(Bertha Concepcion Grievance)

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**Appearances:**

Attorney Nicholas E. Fairweather, Hawks Quindel, S.C., 222 W. Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of SEIU Healthcare Wisconsin.

Attorney Michael J. Westcott, Axley Bryneslon, LLP, 2 E. Mifflin Street, Suite 200, P.O. Box 1767, Madison, Wisconsin, appearing on behalf of Oakwood Lutheran Homes Association, Inc.

**ARBITRATION AWARD**

SEIU Healthcare Wisconsin (hereinafter referred to as “Union”) and Oakwood Lutheran Homes Association, Inc. (hereinafter referred to as “Employer”) are parties to a collective bargaining agreement that provides for final and binding arbitration of unresolved grievances. Pursuant to the parties’ request, the Wisconsin Employment Relations Commission provided a panel of arbitrators from which the undersigned was selected to decide the instant grievance. A hearing on that grievance was held in Madison, Wisconsin, on November 10, 2015. The hearing was not transcribed. The parties filed briefs whereupon the record was closed on December 21, 2015. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

### ISSUE

The parties agreed there were no procedural issues in dispute and framed the substantive issues as:

Whether the Employer had just cause to terminate the Grievant?  
If not, what is the appropriate remedy?

### RELEVANT CONTRACT LANGUAGE

#### **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. If a bargaining unit member is denied a Union representative for an investigatory meeting in which he or she is entitled to Weingarten rights, no discipline will be issued regarding that incident.

### DISCUSSION

The Grievant, Bertha Concepcion, was hired by the Employer on January 13, 2014, to a Resident Assistant I position and continuously held that position until her termination on January 29, 2015. Concepcion typically worked third shift and Allan Watts was her supervisor. Concepcion is challenging her termination.

It is undisputed that Concepcion was working second shift on January 25, 2015, and provided care to Resident R. Resident Assistant Nikkia Wilson was present. The following day, Resident R reported an incident to LPN Shift Supervisor Susan Line claiming that Concepcion hurt her.

As a result of Resident R's accusation, the Employer initiated an investigation. Line and Watts met with Concepcion on January 26, 2015.<sup>1</sup> Line and Watts directed Concepcion to prepare a written statement which she submitted by email at 12:04 a.m. on January 27, 2014. Concepcion's statement read:

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<sup>1</sup> Concepcion did not ask for a union representative during the investigatory meeting with Line and Watts.

Bertha Concepcion

NOC Shift RA

On Sunday 1/25/2015 @ 2400 I went to [Resident R's] room to administer her schedule[d] medication and to do rounds. After I gave [Resident R] her meds I checked to find that she was wet and needed a clean pair of depends while I was getting things together [Resident R] mention[ed] that she was set under her arm the same arm she is complaining that I hurt. The other RA Nikkia Wilson and I found that she was wet all the way up her back and also her gown everything down to the chuck needed to be changed.

We began changing her she rolled towards Nikkia I roll[ed] up the wet chucks and tucked a clean depends on top of that, than [sic] she roll toward [N]ikkia and she pulled the wet chuck out along with the tab to close the depends. After that we needed to change her gown and we did. First I graded [sic] her elbow and lifts slightly up enough to tuck the grown [sic] under it but not so that it was tight because she doesn't like when it [is] tight around her back and neck. When I grad [sic] the elbow I place[d] it back down on the bed and continued to fix the gown when [Resident R] said her shoulder hurt again the same side that she stating I hurt the other RA asked if she would like some Bengay on it she said yes RA administer the bengay on the affected area and we continued to clean up and left the room. She never stated anything else to me about her pain nor her elbow.

At no time did she state to me nor did I hear her say that (I) hurt her in anyway. I was only schedule[d] until 3am so after that I left and from the knowledge that I have after I left there was nothing stated about me hurting her in anyway.

Bertha Concepcion

The Employer terminated Concepcion that same day, January 29, 2015 for:

As a result of resident concern management was conducting an investigation that involved Berth. During the investigation statements were obtained. Management received statements from resident, Bertha, staff member who witnessed the incident and supervisor who spoke to Bertha about incident. Supervisor,

resident and 2nd staff member all reported the same facts and Bertha's statement did not match the others. Bertha denied knowing that resident reported pain as a result of her actions. Due to evidence gathered we find that Bertha's statement is misleading and untrue.

Also, on 1-27-15 Bertha did not come to work for her scheduled shift and she did not call in to notify that she would not be coming to work. Bertha also did not call in or show up for scheduled shift on June 1, 2014.

At hearing, the Employer abandoned the January 27, 2015 attendance charge, and I find that the June 1, 2014 attendance charge was waived since the Employer failed to address it for over six months; therefore, I will focus solely on the charge that Concepcion provided "misleading and untrue" information.

Line testified that when she met with Concepcion on January 26, 2015, Concepcion admitted that Resident R said "ow," you are "hurting me," and that Concepcion said she apologized to Resident R for hurting her. Watts did not testify.

Wilson, who witnessed the interaction between Concepcion and Resident R, prepared a statement on January 27, 2015, which included confirmation that she heard Resident R tell Concepcion "ouch you hurt my arm."

Looking to Concepcion's written statement, the first paragraph states "she is complaining that I hurt," but in the last paragraph she emphatically denies that Resident R said, or that she heard Resident R say, that Concepcion had hurt Resident R. At hearing, Concepcion testified that she did not hear any complaints directly from Resident R accusing her (Concepcion) of hurting Resident R, but this testimony was impeached on cross-examination. Additionally, Concepcion first admitted to having apologized to Resident R but later denied having apologized for hurting Resident R.

Ultimately, the record supports a finding that Concepcion was "misleading and untrue." Concepcion offered one version verbally to Line and Watts, which harmonized with the witness's observation, and then offered a contradictory version in her written statement. At hearing, her testimony was inconsistent. Concepcion either heard or she did not hear Resident R accuse Concepcion of hurting her. Resident R either said that Concepcion hurt her or she did not. Concepcion either apologized or she did not. Concepcion cannot offer two divergent responses to the same questions and claim she was truthful.

Concepcion testified that she "felt that they were trying to gear it towards abuse." Further, she believed the Employer would try to accuse her of causing actual harm or intentional harm to the resident since she had already given a verbal statement. Given this

suspicion, it would appear Concepcion drafted her written statement with the intent to protect herself from a charge of resident abuse. While this was accomplished, it also resulted in conflicting “stories” and ultimately was the basis for her termination.

This was not Concepcion’s first discipline. Concepcion was disciplined five times including: a written warning on June 5, 2014 for attendance; a verbal warning on September 9, 2014 for excessive absences; a verbal warning on September 18, 2014 for failure to perform all required duties; a written warning on October 29, 2014 for a negative interaction with a resident; and a second warning on January 27, 2015 for failing to perform all required duties. In addition to the discipline, Concepcion was warned on April 30, 2014 for refusing to perform all required tasks; on May 20, 2014 for listening to inappropriate music while giving care to a resident; on July 2, 2014 reminding her to check for bed change; and on July 3, 2014 for leaving work without completing tasks.

Concepcion explained that Resident R had a history of making racially inappropriate comments to her when she was giving care to Resident R and further that her supervisor was indifferent after she told him. While Concepcion’s supervisor’s response was less than stellar, there is no evidence to suggest that Resident R’s alleged race-based comments and/or opinions were factors in Concepcion’s termination.

### AWARD

Yes, the Employer had just cause to terminate Concepcion. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 4th day of May 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Lauri A. Millot, Arbitrator