

STATE OF WISCONSIN
BEFORE THE PERSONNEL BOARD

Lillian Gutierrez,)
Appellant,)
vs.)
Wilbur J. Schmidt, Secretary)
Department of Health & Social Services,)
#484 Respondent.)

MEMORANDUM DECISION

The Appellant, prior to January 7, 1972, was a permanent employe in the classified service of the State of Wisconsin. She was an Aid 2 at Central Colony.

On January 7, 1972, she was discharged. The first paragraph of the letter of discharge reads:

"In May of last year you were disciplined for an act of resident abuse. On Friday, this January 7, you again committed an act of resident abuse. . . Accordingly, your employment at Central Wisconsin Colony is terminated."

The burden of proof is on the Respondent to show to a reasonable degree of certainty by the greater weight of credible evidence that the act of abuse specified in the letter of discharge occurred.

The Respondent's proof was the testimony of Marlene J. Mercer, Registered Nurse. Mrs. Mercer's testimony was not corroborated by any other testimony nor by any physical evidence.

Mrs. Mercer testified that she was in the nursing station overlooking the dayroom of Ward B. About 45 feet away were two of the children residents, Debbie L. and Beth M. near the door to the dormitory. She stated that the children were "picking" at each other. Mrs. Mercer said that the Appellant walked over to the children and with her right hand, made into a fist, hit

Beth M. on the head with a sharp blow that caused the child to grimace and cower back. She testified that Appellant then backed Beth M. away into a corner and within two minutes after the episode, came into the dayroom and discussed the matter with her, Mercer, but never admitted striking the child. Mrs. Mercer stated that she did not leave the dayroom to go to the scene of the episode, nor did she check out Beth M. to ascertain if she had been injured.

The Appellant testified in her own behalf. She stated that Beth M. was scratching at Debbie L. and that when she got to the children, Beth M's hand, in a claw position, was on Debbie L's face; that with her right hand she grabbed Beth M's hand in a downward motion and took it away from Debbie L's face. She said that she then backed Beth M. away from Debbie L. and then went into the dayroom to explain the episode to Mrs. Mercer. Appellant denies striking Beth M. Appellant's testimony is also uncorroborated.

This Board appreciates that Appellant has greater interest in the outcome of this proceeding than does Mrs. Mercer. This detracts from the credibility of her testimony, although there are no apparent inconsistencies in her statement of what happened.

The credibility of Mrs. Mercer's testimony is to a degree to be questioned because she was 45 feet distant from the scene and because she may have been partially screened off. This raises the possibility of her misinterpreting the nature of the Appellant's actions. The fact that as a supervising nurse, she did not react immediately and affirmatively to what she has labeled "abuse" detracts from her testimony. The fact that Mrs.

was not acted on, may have made Mrs. Mercer slightly less than objective
in this occasion.

It is this Board's conclusion that from the record and demeanor
of the witnesses that it cannot accord greater weight to the testimony of
Mrs. Mercer than to the testimony of the Appellant.

For that reason Respondent has not sustained its burden of proof
that the act specified as just cause for the discharge actually happened.

Appellant should be reinstated and her counsel shall prepare
Findings of Fact and Conclusions of Law consonant with this decision.

Dated this 15th day of May, 1972.

STATE PERSONNEL BOARD

BY

James H. Hines
For Clerk
William Adams

Members Brecher and Serpe did not
participate in this hearing.