

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 SERVICE EMPLOYEES INTERNATIONAL : Case 15  
 UNION, LOCAL 150, AFL-CIO : No. 46476  
 : A-4855  
 and :  
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 UNICARE HEALTH FACILITIES, INC., :  
 d/b/a JACKSON CENTER :  
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Appearances:

Mr. Thadd M. Hryniewiecki, Representative, appearing on behalf of the Union.  
Mr. C. William Isaacson, Corporation Labor Counsel, appearing on behalf of the Employer.

ARBITRATION AWARD

Service Employees International Union, Local 150, AFL-CIO, hereinafter referred to as the Union, and Unicare Health Facilities, Inc., d/b/a Jackson Center, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Milwaukee, Wisconsin on January 14, 1992. The hearing was not transcribed and the parties orally argued their respective positions.

BACKGROUND

The Employer operates a nursing home in Milwaukee, Wisconsin where the grievant, Carolyn Colbert, was employed as a Resident Living Aide (RLA) for approximately two years until her discharge on September 16, 1991. The parties stipulated to the following:

1. The parties negotiated a Census Policy which provides, in pertinent part, as follows:

HOURLY BUILDING CENSUS

Policy

To ensure systematic accountability and safety of Jackson Center's resident population on a 24 hour basis.

Procedure

1. Shift Manager will assign building census to (2) two RLA's at the beginning of each shift.
2. Each RLA will be responsible for the census of the entire facility.
3. The census clipboard will be issued to the assigned RLA with the hourly census check list.
4. Assigned RLA will make a visual spot check of each resident in the building and mark the appropriate box using proper codes.
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10. In the event that assigned RLA is unsure of the whereabouts of a resident, the RLA is to report this to the Shift Manager after making a thorough check of the building.
11. If something is preventing the RLA from taking census, this is to be immediately reported to the Shift Manager.
12. If the RLA is uncertain as to the identify (sic) of a resident, do not guess or mark the checklist incorrectly, report this immediately to the Shift Manager.
13. One inaccurate resident hourly check will be interpreted as a documentation error, resulting in suspension. Two or more incorrect resident checks will be interpreted as deliberate false documentation. This will result in termination. 1/

2. On June 4, 1991, the grievant signed a statement that she had reviewed, discussed and understood the Hourly Building Census Policy. 2/

3. On September 7, 1991, the grievant was assigned to the hourly census on the third shift. The grievant checked a resident as being present at 1:00 a.m., 2:00 a.m., 3:00 a.m., 4:00 a.m., 5:00 a.m. and 6:00 a.m. when the resident had previously been discharged from Jackson Center and was not present on September 7, 1991. 3/

4. On June 17, 1991, the grievant was given a final warning for failing to document a resident present at 6:00 a.m. and another resident present at 1:00 a.m., 2:00 a.m., 3:00 a.m., 4:00 a.m., 5:00 a.m.

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- 1/ Ex - 6.
  - 2/ Ex - 5.
  - 3/ Ex - 9.

and 6:00 a.m.. 4/

5. Pursuant to item 13. of the agreed upon Hourly Building Census Policy, two or more incorrect resident checks will be interpreted as deliberate false documentation and will result in termination.

6. On September 16, 1991, the grievant was terminated in accordance with item 13. 5/

The grievant testified she knew that the resident had checked out of Jackson Center and admitted that she checked her present but did not know how she did it. The grievant indicated that it was a mistake and was not a deliberate thing and she never endangered the resident. The grievant reiterated that she knew the resident was not there but marked her present and could not explain why.

ISSUE:

The parties stipulated to the following:

Was Carolyn Colbert discharged for just cause?

If not, what is the appropriate remedy?

EMPLOYER'S POSITION

The Employer contends that the issue in this matter is very simple. It submits that the Rules of the Road provide that if an individual makes two or more incorrect checks, it is considered deliberate false documentation and the penalty is discharge. The Employer points out that this policy was agreed to by the Employer and the Union because of the seriousness of checking a resident present when that resident is not there because the consequences are so great should a resident wander away. It argues that the evidence establishes that the grievant made a number of erroneous entries and as regrettable as it is, it is so important to properly check residents that discharge is a must. The Employer

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4/ Exs - 4, 8 and 11.

5/ Ex - 3.

concludes that the overriding consideration is the safety of residents and the rules agreed to by the parties require that the discharge based on the row of checks must stand.

#### UNION'S POSITION

The Union contends that the punishment must fit the crime. It points out that there was no endangerment of residents here. It submits that the grievant doesn't even know that she checked the resident present, doesn't recall it and can't explain it. The Union insists that as no harm was done, the grievant should not be discharged and at most given a suspension.

It asks for reinstatement, back pay and benefits with the restoration of seniority.

#### DISCUSSION

The evidence established that the grievant checked a resident present for six straight hours when that resident was not in fact present. It is undisputed that checking a resident present when that resident is not is very serious because the resident could leave the facility, and be gone for a long period of time before the resident's absence was noted. The resident could suffer injury and the Employer could suffer adverse economic consequences and perhaps administrative penalties. Generally, just cause involves two questions, namely, is the grievant guilty of the misconduct, and if so, was the penalty appropriate under the circumstances. However, in this case, the parties have agreed that two or more incorrect resident checks constitutes deliberate false documentation for which the penalty is immediate discharge. Thus, it would appear that the questions to be answered are did the grievant make two or more incorrect resident checks and if so, the penalty is automatic and discharge must follow. This appears to be an extremely harsh and mechanical approach which would not allow for exceptional cases where discharge would be unfair and may be at odds with the just cause standard.

A review of the Employer's policy with respect to two or more erroneous checks appears reasonable on its face. The policy provides that the RLA will visually spot check each resident each hour and mark the appropriate box. If the first check is wrong or misplaced it should be caught the second hour. Thus, the rule of two or more seems reasonable. Here, the grievant made six erroneous checks in a row and knew that the resident had checked out. She couldn't explain how that could happen or why she made the checks. It must be concluded that the grievant wasn't properly performing the census as she should have caught it before making six errors in a row. Thus, the grievant violated the rule.

As to the penalty, the Union has argued that there was no harm and hence no foul. Six erroneous checks indicates that the grievant wasn't doing her job. Additionally, the grievant had been given a final warning in June, 1991 for not properly following the Census Policy. The undersigned finds that the policy is proper and reasonable and was violated by the grievant. The grievant was aware of the policy and had been given a final warning for violating it. The six erroneous entries which cannot be explained by the grievant provide justification for the agreed upon penalty of discharge. There is nothing in this case which demonstrates an exception to the rule is warranted or that its application is unfair. Although no harm was done in this case, the application of the rule does not require that harm come to a resident before the rule can be enforced. It is simply not a defense.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievant was discharged for just cause, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 5th day of February, 1992.

By \_\_\_\_\_  
Lionel L. Crowley, Arbitrator