

IN THE MATTER OF ARBITRATION BETWEEN

United Steelworkers, Local Union 9230

[Susan Cyrus]

And

Opinion and Award

FMCS Case No. 131102-50959-3

Lutheran Care Center (LCC)

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of United Steelworkers, Local 9230

George Dubovich, Organizing Coordinator

United Steelworkers District 11

Minneapolis, Minnesota

On behalf of Lutheran Care Center

Rebecca K. Kuffin, Esq.

Voigt, Rode & Boxheth, LLC

St. Paul, Minnesota

JURISDICTION

In accordance with the Collective Bargaining Agreement between Lutheran Care Center-Bridgeway Estates, and United Steelworkers, AFL-CIO, CLC, Local 9230, August 1, 2009 to July 31, 2011; and under the jurisdiction of the United States Federal Mediation and Conciliation Services, the above grievance arbitration was submitted to Joseph L. Daly on February 15, 2013, in Little Falls, Minnesota. The parties submitted post-hearing briefs on March 15, 2013. The decision was rendered by the arbitrator on April 8, 2013.

ISSUES AT IMPASSE

The United Steelworkers Union, Local 9230, states the issues as:

1. Was the discipline [Ms.] Cyrus received accusing her of job performance issues – a verbal documented warning dated 12-29-11— warranted? If the arbitrator does find that this verbal documented warning was not warranted to any or some extent, should this discipline be used a step in the progressive discipline procedure?
2. Was the discipline [Ms.] Cyrus received accusing her of unprofessional behavior – a final written warning dated 6-19-12 – warranted? If the arbitrator does find that this discipline was warranted to any or some extent, should the final written warning be reduced to a lower step in the progressive discipline procedure?
3. Was the discipline [Ms.] Cyrus received accusing her of unprofessional conduct – terminated dated 6-26-12 – warranted? If the arbitrator does find that the discipline was warranted to any or some extent, should the discipline be reduced to a level below termination? [Post-hearing brief of Union at 1-2].

Lutheran Care Centers (LCC) states the issues as:

1. Did the employer LCC, comply with its collective bargaining agreement and personnel policy handbook when it issued [Ms.] Cyrus a final written warning on June 19, 2012, for her unprofessional conduct in a public resident area?
2. Did the employer LCC, comply with its collective bargaining agreement and handbook, when it terminated Ms. Cyrus on June 26, 2012, for her unprofessional conduct in a public resident area just nine days after her previous disciplinary incident? [Post-hearing brief of employer at 1-2].

RELEVANT CONTRACT LANGUAGE

ARTICLE IV

MANAGEMENT RIGHTS AND VOLUNTEER ORGANIZATIONS

A. MANAGEMENT RIGHTS

The management and operation of this facility and the direction of the working forces, including but not limited the right to direct, plan and control the Employer operations and activities; to establish reasonable policies, procedures and work rules; to determine the type and scope of services to be furnished to patients/residents and the nature of the facilities to be operated; to

establish work schedules of operation and to determine the methods, procedures and means of providing service to residents; to determine the type, amount, occasion and use of the equipment machinery and supplies; to decide the number of employees to hire, recall, assign, transfer promote, demote, suspend for cause, discipline and discharge employees for cause; to lay off employees because of lack of work or for other legitimate reasons; and to maintain discipline and efficiency among employees; to introduce new or improved operating methods and/or facilities, and to change existing operating methods and/or facilities; and to manage in the traditional manner, are vested exclusively in Employer, provided that, in the exercise of these prerogatives, the Employer shall not violate the specific provisions of this Agreement.

ARTICLE VII SENIORITY

C. CONTINUOUS SERVICE

3. All seniority shall be terminated:
 - a. When an employee is discharged for just cause.

ARTICLE XXIII DISCIPLINE

A. The Employer may establish and publish reasonable rules and regulations governing the conduct of employees, as are necessary for the proper operation of the facilities and the proper care of residents.

1. Any discipline imposed for infractions of these rules and regulations will be corrective and progressive in nature with the objective of helping the employee improve.

G. If written warning notices are issues to employees covered by this Agreement, a copy of the notice is to go to the Local Union President and the Department Grievance Person.

If there is no repeat of the condition or offense for which the employee is warned within a six (6) month period, the warning notice will be considered void and be removed from the employee's personnel file.

RELEVANT PERSONNEL POLICY HANDBOOK SPRING 2009

PROGRESSIVE DISCIPLINE

The purpose of this policy is to state the LCC/BWE's position on administering equitable and consistent discipline for unsatisfactory conduct in the workplace. The best disciplinary measure is the one that does not have to be enforced and comes from good leadership and fair supervision at all employment levels.

LCC/BWE's own best interest lies in ensuring fair treatment of all employees and in making certain that disciplinary actions are prompt, uniform, and impartial. The major purpose of any disciplinary action is to correct the problem prevent recurrence, and prepare the employee for satisfactory service in the future.

Although employment with LCC/BWE is based on mutual consent and both the employee and LCC/BWE have the right to terminate employment at will, with or without cause or advance notice, LCC/BWE may use progressive discipline at its discretion.

Disciplinary action may call for any of four steps – verbal warning, written warning, suspension with or without pay, or terminations of employment – depending on the severity of the problem and the number of occurrences. There may be circumstances when one or more steps are bypassed.

Progressive discipline means that, with respect to most disciplinary problems, these steps will normally be followed: a first offense may call for a verbal warning; a next offense may be followed by a written warning; another offense may lead to a suspension; and, still another offense may then lead to termination of employment.

LCC/BWE recognizes that there are certain types of employee problems that are serious enough to justify either a suspension, or, in extreme situations, termination of employment, without going through the usual progressive discipline steps.

The Employee Conduct and Work Rules policy includes examples of problems that may result in immediate suspension or termination of employment. However, the problems listed are not all necessarily serious offenses, but may be examples of unsatisfactory conduct that will trigger progressive discipline.

By using progressive discipline, we hope that most employee problems can be corrected at an early stage, benefiting both the employee and LCC/BWE.

EMPLOYEE CONDUCT AND WORK RULES

To ensure orderly operations and provide the best possible work environment, LCC/BWE expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization.

It is not possible to list all the forms of behavior that are considered unacceptable in the workplace. The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment:

- Theft or inappropriate removal or possession of property
- Falsification of timekeeping records, failing to punch in or out, punching in before ready to work, leaving work station before end of shift but not punching out, etc.
- Working under the influence of alcohol or illegal drugs
- Possession, distribution, sale, transfer, or use of alcohol or illegal drugs in the workplace, while on duty, or while operating employer-owned vehicles or equipment
- Fighting or threatening violence in the workplace
- Boisterous or disruptive activity in the workplace
- Negligence or improper conduct leading to damage of employer or customer-owned property
- Insubordination or other disrespectful conduct
- Violation of safety or health rules
- Gossiping, discourteous behavior to coworkers, visitors, residents and others

- Smoking in prohibited areas
- Sexual or other unlawful or unwelcome harassment such as bullying
- Possession of firearms, explosives or other dangerous or unauthorized materials, in the workplace or while working off company property. (The prohibition on carrying firearms while working applies even if the employee has a legal permit to carry such weapon.)
- Excessive absenteeism or any absence without notice
- Unauthorized absence from work station during the workday
- Unauthorized use of telephones, mail system, or other employer-owned equipment
- Unauthorized disclosure of business “secrets” or confidential information
- Violation of personnel policies
- Unsatisfactory performance or conduct
- Violation of gift, gratuities or payments policy

Employment with LCC/BWE is at the mutual consent of LCC/BWE and the employee, and either party may terminate that relationship at any time, with or without cause, and with or without advance notice.

RELEVANT RESIDENTS BILL OF RIGHTS

Policy Statement

To care for residents in a manner and environment that promotes and enhances dignity and quality of life.

INTRODUCTION

On June 28, 2012, the union on behalf of Ms. Susan Cyrus, a 17-year Certified Nursing Assistant employee of Lutheran Care Center, filed a grievance report stating the nature of the grievance as “unjust termination”. She requested “to return to work, return to position and seniority and make whole for all losses of moneys, benefits plus interest.” She alleged violation of “Article XIII and any other article in the contract that pertains to this grievance.” [Employer exhibit #3].

Ms. Cyrus’ disciplinary history includes a verbal documented warning for unprofessional performance during her shift on December 24, 2011. In the December 24, 2011 incident the

employer alleged that Ms. Cyrus “swore in a public resident area and 3-days later ignored a resident’s call light.” [Post-hearing brief of employer at 3] Ms. Cyrus was upset about being mandated to stay at work after her shift. The employer alleged that she “acted unprofessionally by yelling and swearing in a public resident area.” [Id].

The employer also alleges that Ms. Cyrus had several coaching sessions with the Director of Nursing, but was not disciplined for those coaching sessions. For example, the employer alleged that on May 12, 2012, a licensed practical nurse asked for help from Ms. Cyrus, a certified nursing assistant, to lay a resident down. The employer alleged that Ms. Cyrus started arguing with the licensed practical nurse “in an unprofessional manner about being busy and acting as though [the license practical nurse] was being bossy, despite the fact that, as an LPN [the LPN] routinely and according to her job description and authority, asked CNAs, such as Ms. Cyrus, for assistance.” [Id at 4].

On June 19, 2012, the Director of Nursing issued a “final written warning... for [Ms. Cyrus’s] unprofessional behavior and for losing ‘verbal control’.” [Id at 5].

On June 24, 2012, Ms. Cyrus was issued a final written warning for unprofessional behavior for yelling “at a staff member in front of several residents and acting inappropriately based on the circumstances.” [Id at 6].

On June 26, 2012, Mr. Scott Allen, Administrator of Lutheran Care Center, decided to terminate Ms. Cyrus “based on her unprofessional conduct on June 24, 2012.” [Id at 7].

Prior to the new management and supervision that came on board at Lutheran Care Center in October 2011, Ms. Cyrus had not had any record of poor job performance, nor had she received discipline for any actions. Ms. Cyrus and other union witnesses testified that relationships and employer had deteriorated in recent times. [Post-hearing brief of union at 7].

POSITION OF UNITED STEELWORKERS, LOCAL UNION 9230 AND MS. CYRUS

The union contends that it has filed two grievances contesting the employer’s issuance of unjust discipline to a long-term 17-year employee, Susan Cyrus. In each case the union asks that the employer remove the disciplines from the employee’s file. The union alleges that the verbal documented warning dated December 29, 2011, was unwarranted. It further alleges that the final written warning dated June 19, 2012, was also unwarranted. And finally the union alleges that the discipline Ms. Cyrus received for her “unprofessional conduct” on June 24, 2012, and the

termination she received on June 26, 2012, was also unwarranted. The union requests that Ms. Cyrus' file be purged of all improper disciplines and that she be reinstated to her former position and reimbursed for all lost wages and benefits, with interest, including the cost of health care and pension contributions. With respect to the December 29, 2011 discipline, Ms. Cyrus had been informed on December 24, 2011, that she would be forced to stay after her normal shift on Christmas Eve. Ms. Cyrus did not agree with the RN's decision to force her to stay. She alleges she did not use inappropriate language. She also alleges she did not have any inappropriate interaction with a coworker on December 24, 2011. She testified that she asked her coworker to "leave her alone three times." [Id at 4]. She also testified that "as to the accusation that she did not answer her call light, she provided testimony that she was innocent of any work performance issues. Her testimony was supported by another union witness" [Id at 4], i.e. Donna Kalis, a 22-year LPN, that there was "no call light on when they went into an empty room to talk." [Testimony of Ms. Kalis at arbitration hearing].

As to the June 19, 2012, discipline for alleged "unprofessional behavior" on June 15, 2012, Ms. Cyrus and another employee were informed that they would have to stay one hour past their normal shift, which ended at 2 p.m. Around 2:40 p.m., 40 minutes past the end of their regular shift, they were informed by an RN that they had to stay past 3 p.m. "and past the two hour limit (4:00 P.M.) set in the Collective Bargaining Agreement." [Id at 4]. Ms. Cyrus and the other employee disagreed with the RN, pointing out that they had already worked a difficult full shift due to short staffing and that the Collective Bargaining Agreement limited the mandating to two hours. The disagreement ended with Ms. Cyrus and the other employee agreeing to stay until 4:30 p.m. Management argues that Ms. Cyrus's voice was raised and she was shouting during the disagreement. Both Ms. Cyrus and the other employee testified that Ms. Cyrus may have a loud voice, but she was not yelling or screaming, as some employer witnesses testified. She was not cursing or swearing. There was evidence showing that the employer had not attempted to contact all employees available to see if they would volunteer to work in place of Ms. Cyrus. Related to the June 26, 2012 termination, Ms. Cyrus disagreed with the LPN who demanded that Ms. Cyrus move a resident. Ms. Cyrus pointed out that "it was clearly not the normal routine." [Id at 6]. The LPN "was still a fairly new hire at this point and had already established a history of confrontations with CNAs." [Id]. "[The] [e]mployer and union witnesses testified that [the LPN] was not communicating well with her coworkers. [The LPN's]

testimony indicated that she was still not clear on what her level of direction is toward CNAs. Further it should be pointed out that the RN-the supervisor in charge that supposedly overheard the conversation- did not instruct [Ms.] Cyrus to move the resident back to her room. The routine of residents not being brought back to their rooms after medications continued after the June 24 incident.” [Id].

Ms. Cyrus worked as a CNA for Lutheran Care Center for 17 years. Ms. Cyrus testified that, prior to the new management/supervision that came on board in October 2011, she had not had any record of not performing her job, nor had she received any discipline for any of her actions. Ms. Cyrus and other union witnesses testified that the relations between the union and employer had deteriorated in recent times. The employer and the union were not able to come to terms on a new contract since it expired in August 2011. The employer had hired new management personnel in October 2011 and employees who regularly attend the union meetings were being targeted. In fact, the local union president and vice president, both very long term employees, were being disciplined and eventually were terminated. The president has been reinstated by an arbitrator and the vice president’s arbitration was on March 7, 2013. The number of grievances went from a few per year to over 60 in a year and a half – many dealing with disciplining of long-term employees who were public union supporters. Ms. Cyrus was a strong union supporter who attended union meetings. In each instance that Ms. Cyrus was accused of wrong-doing, it involved management or co-workers confronting her with issues that were hostile toward her or inappropriate. At no time did Ms. Cyrus refuse an order from supervision. She did disagree with the issues being presented to her, but she had a legitimate reason for disagreeing and expressing those reasons. Management claims that she was unprofessional because she was using an excessively loud voice to express her reasons. Ms. Cyrus denies that she yelled, screamed or swore. The new management did not like the way Ms. Cyrus was disagreeing with them, so they proceeded to exaggerate the volume of her discussions, accuse her of being unprofessional, and use this reason to discipline her. Further the union president and vice-president both testified that during meetings in the steps of the grievance procedure, they had requested all information relevant to the disciplines, including all notes and investigations, be provided to the union which is their standard practice. They both testified that prior to the arbitration hearing they had not received employer exhibit #9, dealing with accusations not answering a call light; employer exhibit #10, dealing with the LPNs

complaints about CNAs; employer exhibit #12, dealing with the June 15th incident; employer exhibit #13, dealing with the June 15th incident; employer exhibit #14, dealing with the June 15th incident; employer exhibit #16, dealing with the June 24th incident; employer exhibit #17, dealing with the June 24th incident; employer exhibit #18, dealing with the June 24th incident; and, employer exhibit #19, also dealing with the June 24th incident. The union alleges that “the employer either withheld all these documents during the grievance procedure or created them after step 4 of the procedure.” [Id at 8] The union contends that there is a just cause provision in the contract and that in each case Ms. Cyrus was “simply responding to the hostile treatment that others were initiating.” [Id at 9]. Further, the employer failed to provide substantial proof that Ms. Cyrus committed the acts she was accused of doing. Her demeanor is not a person who yells and screams in public. Basically, the union contends that because of Ms. Cyrus’ support of the union, she was being targeted as an employee to terminate. [Id at 9] Further, the union contends that the employer has violated the “corrective and progressive in nature [policy] with the objective of helping the employee improve” provision of the collective bargaining agreement. On December 29, 2011, Ms. Cyrus received the verbal documented warning. Skipping the “written warning” step in the progressive discipline policy on June 19, 2012, she received a “final written warning”. The four steps of progressive discipline include 1st) verbal documented warning; 2nd) written warning; 3rd) suspension; 4th) termination. In this case the employer skipped the written warning step of the progressive discipline. Finally, at the June 26, 2012, disciplinary conference, Ms. Cyrus was told by Mr. Allen that she would be given a suspension, but later it was decided to terminate her without any reason provided.

POSITION OF LUTHERAN CARE CENTER

The parties’ collective bargaining agreement allows and directs the Lutheran Care Center to “establish and publish reasonable rules and regulations governing the conduct of employees, as are necessary for the proper operation of the facilities and the proper care of residents.” The handbook lists examples of infractions of rules of conduct that may result in disciplinary action up to and including termination. Specifically, among them are 1) boisterous or disruptive activity in the workplace; 2) insubordination or other disrespectful conduct; 3) gossiping, discourteous behavior to coworkers, visitors, residents, and others; and 4) unsatisfactory performance or conduct. The handbook also reiterates that the Lutheran Care Center may

terminate the relationship “at anytime, with or without cause, and with or without advance notice.” Neither the collective bargaining agreement nor the handbook require the Lutheran Care Center to discipline or terminate an employee for “just cause” and nowhere in the collective bargaining agreement or handbook is “just cause” defined. [Post-hearing brief of employer at 2].

With respect to the December 24, 2011, incident, Ms. Cyrus was upset about being mandated to stay and acted unprofessionally by yelling and swearing in a public resident area. Laura Hartwig, an RN, testified that she was working with Ms. Cyrus on December 24, 2011 and had to mandate that Ms. Cyrus stay. Ms. Hartwig testified, “[Ms Cyrus] was yelling and she was angry.” Ms. Hartwig testified that she and Ms. Cyrus were standing at the nursing station and there were at least two residents nearby. She testified that Ms. Cyrus called Mr. Patrick Collins, Director of Nursing, on the phone and she heard Ms. Cyrus “yelling and screaming” at Mr. Collins on the phone. Mr. Collins testified that Ms. Cyrus swore at him and said in a loud voice “you can’t make me do this shit, I will fucking quit” [Testimony of Mr. Collins at Arbitration Hearing]. Ms. Hartwig testified this was said at the nursing station where residents were nearby. Mr. Collins further testified that on December 26, 2011, Ms. Cyrus said to him in his office “They ought to know what I am like. If they don’t, they should get the hell away from me.” Ms. Cyrus testified that when she was mandated to work, she was angry, but when she had the discussion with Mr. Collins on the phone on December 24, 2011, it was “in the break room and not at the nursing station.”

The employer also alleges that on December 27, 2011, Mr. Brad Peterschick, Lutheran Care Center’s Environmental Services Manager, testified he noticed a resident’s call light had been on for sometime. Mr. Peterschick notified Ms. Cyrus “but Ms. Cyrus ignored the call light.” [Post-hearing brief of employer at 3]. Instead, Mr. Peterschick testified that instead of responding to the call light Ms. Cyrus instead walked into an empty room with another staff member. Mr. Peterschick testified he told Mr. Collins, the director of Nursing, about the call light. Mr. Collins testified he went to speak with Ms. Cyrus about answering the resident’s call light. Consequently on December 29, 2011, Mr. Collins testified he issued a verbal documented warning to Ms. Cyrus for unprofessional conduct based on her “inappropriate language, loud voice, and hostile tone in areas accessible to residents and families on December 24, 2011, and for failing to answer a resident’s call light on December 27, 2011.” [Id at 4].

The employer also alleges that Mr. Collins had several coaching sessions with Ms. Cyrus regarding her unprofessional conduct. While these coaching sessions were not discipline, Mr. Collins testified they did lead up to his decision to issue a final written warning for her unprofessional conduct on June 15, 2012. On that date, Ms. Cyrus and another employee were required to work past their shifts because two other CNAs had called in that day and were unable to come to work. Mickie Gocken, RN at Lutheran Care Center testified that she had informed Ms. Cyrus and the other employee that on June 15, 2012 they were mandated to work past their shifts. This took place at about 12:30-1:00 p.m. while Ms. Cyrus was standing at the nursing station. Ms. Gocken testified there were at least three residents in the area, as well as other staff members. Ms. Gocken testified that Ms. Cyrus started yelling “quite loudly” in response to being mandated to stay. Ms. Gocken also testified that Ms. Cyrus became “verbally aggressive” and was “leaning in” to Ms. Gocken. [Post-hearing brief of employer at 5]. Mr. Petershick heard Ms. Cyrus yelling at Ms. Gocken and went to get Ms. Litke, Business Office Assistant and HR Coordinator, in her office. Mr. Petershick testified he heard Ms. Cyrus say in a “very loud voice” to him when he asked Ms. Cyrus to lower her voice “Shut the fuck up and do your job.” [Post-hearing brief of employer at 5]. Ms. Litke testified that while her office was approximately 150 feet away from the nursing station she “heard the yelling”. She also heard Ms. Cyrus say to Mr. Petershick “this is none of your business, you’re not part of the nursing staff so shut the fuck up.” Ms. Litke testified that there were family members of residents standing in the hall. Ms. Litke testified that when she got to the nursing station, she asked Ms. Cyrus to lower her voice and to go to her office. Ms. Cyrus said to Ms. Litke in a loud voice “I’m not going anywhere with you.” Mr. Collins testified that based on this June 15, 2012, incident he decided that on June 19, 2012, he would issue Ms. Cyrus a final written warning for her unprofessional behavior and for losing verbal control. Mr. Collins testified he reviewed the Collective Bargaining Agreement and the Handbook which allows the Lutheran Care Center to “bypass steps of progressive discipline.” [“Disciplinary action may call for any of 4 steps—verbal warning, written warning, suspension with or without pay, or terminations of employment – depending on the severity of the problem and the number of occurrences. There may be circumstances when one or more steps are bypassed.”] The employer contends that both the Collective Bargaining Agreement and the Handbook allow Lutheran Care Center to issue a final written warning

without a previous written warning because it was appropriate for the severity of the situation. [Post-hearing brief of employer at 6].

On June 24, 2012, only nine days after the Lutheran Care Center issued Ms. Cyrus a final written warning for unprofessional behavior, Ms. Cyrus yelled again at a staff member in front of several residents and acted inappropriately based on the circumstances. On June 24, 2012, LPN Dawn Dickey testified that before the residents' lunch, she asked Ms. Cyrus to take a resident back to her room until it was closer to the actual lunch time. Ms. Dickey was busy doing her medication pass at this time. There were several residents in the area. The resident had also asked Ms. Dickey if she could return to her room. When Ms. Dickey asked Ms. Cyrus to take the resident back to her room, Ms. Dickey testified that Ms. Cyrus "started yelling" that she, Ms. Dickey, was "too bossy, too demanding." Ms. Dickey testified that Ms. Cyrus was "shaking her finger at me". Ms. Dickey testified that there were 7-10 residents around the nursing station who had "looks of shock, were taken aback." Ms. Dickey testified that she found Ms. Cyrus' behavior to be "threatening." Ms. Hartwig, the RN, was at the station, but said nothing. However, later Ms. Hartwig told Ms. Dickey to "write it up" regarding Ms. Cyrus' behavior. Ms. Hartwig testified at the arbitration hearing that Ms. Dickey was visibly shaking over this, that Ms. Dickey was in tears, and that she told Ms. Dickey to take a break from her medication pass. Ms. Hartwig testified that based on what she saw, Ms. Cyrus' behavior "was inappropriate for the workplace" [Post-hearing brief of employer at 7]. Based on the June 24, 2012, incident and the June 15, 2012, incident, Mr. Allen determined that at the meeting on June 26, 2012, Ms. Cyrus should be terminated. Although evidence showed that Mr. Allen did tell Ms. Cyrus on June 26, 2012 that he was going to suspend her, Mr. Allen testified that upon further reflection he determined that termination was in order.

The employer also contends that the "union attempted to confuse the issues surrounding Ms. Cyrus' disciplinary actions and termination" [Post-hearing brief at 8]. For example, the union tried to place the blame on Ms. Dickey by arguing her management style was not appropriate. The union also argued that usually residents do not go to their rooms right after lunch and that Ms. Dickey's request for Ms. Cyrus to take the resident to her room was unreasonable. The employer argues that even if these were true, it does not excuse Ms. Cyrus from yelling and swearing at another staff member; nor does it excuse Ms. Cyrus from how she handled the situations. The employer contends that the union tried to confuse the issue about the

June 15, 2012 incident in which Ms. Cyrus was mandated to stay by arguing that the Lutheran Care Center did not call every other potential employee who could not take over the shift. Even if the Lutheran Care Center did not contact every employee, which it is not required to do under the Collective Bargaining Agreement, it is no excuse for Ms. Cyrus to yell and swear at the staff in front of residents. Her loud voice could be heard 150 feet away. The employer also argues that the union attempts to excuse Ms. Cyrus' behavior by placing blame on Lutheran Care Center Management by arguing that there have been many more grievances filed in the past few years since new management was hired. But these arguments avoid the factual issues surrounding Ms. Cyrus' disciplinary actions and the sole reason for her disciplinary actions and terminations: unprofessional behavior. [Post-hearing brief of the union at 8] The union's blame placing on LCC management has no merit. The Lutheran Care Center acted within the terms of the Collective Bargaining Agreement and the Handbook and appropriately decided to discipline and terminate Ms. Cyrus for her outrageous behavior.

DECISION AND RATIONALE

Ms. Cyrus denies that she yelled and swore at the nursing station on June 15, 2012. She denies that she yelled and swore on June 24, 2012. She and the union contend that she has not received progressive discipline since the employer skipped a step in the progressive discipline policy, i.e., the Employer went from final written warning to termination, skipping suspension. The union contends that by the employer not handing over exhibits 9, 10, 12, 13, 14, 16, 17, 18, and 19 prior to the arbitration hearing, the union had to deal with these exhibits by surprise rather than on the merits of the grievance. Finally, the union argues that at the June 26, 2012, disciplinary conference because Mr. Allen told Ms. Cyrus she would be given a suspension, he cannot later decide to terminate her.

On December 29, 2011, Ms. Cyrus received a verbal documented warning for unprofessional conduct based on her "inappropriate language, loud voice and hostile tone in areas accessible to residents and families" on December 24, 2011, and for failing to answer a resident's call light on December 27, 2011. [Employer exhibit #8]. Ms. Cyrus told Mr. Collins over the phone "you can't make me do this shit", and "I will fucking quit."

On December 27, 2011, Mr. Brad Peterschick, LCC's Environmental Services Manager, testified he noticed a resident's call light had been on for sometime. Mr. Peterschick notified

Ms. Cyrus, but Ms. Cyrus ignored him and the call light. Mr. Peterschick testified that instead of responding to the call light she walked into an empty room with another staff member.

On June 15, 2012, when Ms. Cyrus was again mandated to work overtime, she became upset. At the nursing station, according to the testimony of Mickie Gocken, RN, Mr. Peterschick, and Ms. Litke, Ms. Cyrus yelled in a loud voice when Mr. Peterschick asked her to lower her voice, she told him to “Shut the fuck up and do your job” [Testimony of Mr. Peterschick] or “shut the hell up you’re not even in nursing, get the fuck out of here” [Testimony of Mickie Gocken, RN, NDS/Coordinator/Educator]. Ms. Cyrus denies yelling and denies swearing. These two witnesses heard her use the harsh language and testified she was speaking loudly. Ms. Gocken testified this was spoken by Ms. Cyrus at the nursing station and that there were at least three residents in the area as well as other staff members. Ms. Gocken also testified that Ms. Cyrus was yelling “quite loudly”. Ms. Litke testified that she would hear Ms. Cyrus in her office which is about 150 feet away in another part of the nursing home. Mr. Collins issued Ms. Cyrus a “final written warning on June 19, 2012, for her unprofessional behavior and for losing verbal control on June 15, 2012.” The use of such strong language delivered at a nursing station with residents nearby and in hearing distance delivered in a loud/yelling manner is one of those circumstances. Certainly this behavior and language in a nursing home is unprofessional behavior. It was “boisterous”, “disruptive”, “disrespectful”, and “discourteous behavior to coworkers, visitors, residents, and others.” It might have been proper at that moment to even terminate Ms. Cyrus for the use of such language in the presence of coworkers, visitors, residents, and others. However, Mr. Collins, the director of nursing, decided not to suspend or terminate, but rather to issue a final written warning in order to get Ms. Cyrus’ attention. Progressive discipline does not require that the discipline move in a lock step [See, Handbook, “there may be circumstances where one or more steps are bypassed”] if an offence is so serious – which this was—which could lead immediately to suspension or termination.

Just nine days later, on June 24, 2012, Ms. Cyrus again was disciplined for unprofessional behavior. She yelled at a staff member in front of several residents and again acted inappropriately based on the circumstances. LPN Ms. Dickey was within her rights to request CNA Ms. Cyrus to escort the resident back to her room, especially since the resident had asked to be taken back to her room, despite the fact that this was not typical just before lunch. Ms. Cyrus began yelling at Ms. Dickey, pointing her finger, and shaking it at Ms. Dickey. Ms.

Dickey's request of CNA Cyrus was proper. Ms. Cyrus' response was unacceptable workplace behavior. After this incident, a resident approached Laura Hartwig, the RN on duty that day, to voice her concerns about what happened between Ms. Cyrus and Ms. Dickey. The resident told Ms. Hartwig that she was upset about Ms. Cyrus' behavior. Ms. Hartwig testified that several of the residents who were awaiting their medications from Ms. Dickey appeared to be upset from this incident.

On June, 26, Administrator Scott Allen at the meeting with Ms. Cyrus and union representatives informed Ms. Cyrus that she would be placed on a three day suspension. However, upon reflection, Mr. Allen ultimately decided to terminate Ms. Cyrus based on her unprofessional conduct and on progressive discipline. Mr. Allen determined that termination was appropriate and warranted based on the conduct on June 24, 2012, and on her conduct just nine days earlier on June 15, 2012. [Post-hearing brief of employer at 7]. Taking these two incidences together just nine days apart, progressive discipline under these circumstances was followed. While one of the steps was bypassed, the circumstances permitted the bypass from a final written warning to a termination. These were extreme situations, considering this is a nursing home with elderly residents whose care must be exercised "in a manner and environment that promotes and enhances dignity and quality of life." [Employer exhibit #5 – Residents Bill of Rights]. Yelling and swearing in the presence of residents do not promote an environment that promotes and enhances the dignity and quality of life for these elderly residents. It is boisterous and disruptive activity in the workplace. It is disrespectful conduct not just to residents but also discourteous to coworkers, visitors, residents and others.

Mr. Allen testified that to the best of his knowledge he sent Ms. Cyrus' entire file to the union prior to the arbitration hearing. The union denies receiving a number of important exhibits. The union contends that "the Employer either withheld all of these documents during the grievance procedure or created them after step 4 of the procedure." [Post-hearing brief of union at 8]. But testimony of Mr. Allen indicates that he neither intentionally withheld the documents nor created them after the step 4 procedure. Further, if as the union contends, the present management is attempting to terminate long-term union employees for unjust reasons, either arbitration or unfair labor practice allegations can best deal with these problems. Here the union has not provided by any evidence let alone by a preponderance of evidence, beyond mere allegations, that Ms. Cyrus was terminated because of her union activities. On the other hand,

the employer has provided by a preponderance of the evidence that Ms. Cyrus by the use of loud and inappropriate language was boisterous, disruptive, disrespectful, and discourteous to coworkers, visitors, residents, and others. Such infractions of the rules of conduct “may result in disciplinary action, up to and including termination of employment.” [Employer exhibit #2 – Personnel Policy Handbook].

As an Addendum to the above reasoning, while the employer argues that the Collective Bargaining Agreement does not require “just cause”, it is clear that Article VII states “all seniority shall be terminated: (a) when an employee is discharged for just cause.” Implied, at least, in this language is the idea that an employee who has seniority should not be terminated without just cause. So while Article XXIII – Discipline does not have the term “just cause” written into it, certainly Article VII cloaks the entire contract with the concept of “just cause” for discipline including termination of employment of a long term employee like Ms Cyrus.

In this case, the Lutheran Care Center and Mr. Allen had “just cause” to skip one of the progressive steps and to ultimately terminate the employment of Ms. Cyrus for her unprofessional behavior including boisterous or disruptive activity in the workplace, disrespectful conduct, discourteous behavior to coworkers, visitors, residents, and others. These violations of the employee conduct and work rules gave “just cause” for the termination of Ms. Cyrus’ employment. The grievances are denied.

April 8, 2013
Date

Joseph L. Daly
Arbitrator