

FILE NO. AA92-03-008

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: B. Schwartz

APPEARANCES: A. Rumak, for the Employer  
G. Rodgers, for the Union

GRIEVOR: M. Arnott

DECISION RENDERED: March 27, 1992

EXPEDITED ARBITRATION: Yes

**ISSUE: DISCIPLINARY OFFENCES** - Work performance - abusive conduct;  
**DISCIPLINARY PENALTIES** - Discharge - The Grievor, who was a Psychiatric Nursing Assistant II, had taken 8 residents on a picnic. A worker at a restaurant which the group stopped at alleged that she saw the Grievor throwing french fries to the residents and treating them "like animals". The Grievor denied any wrongdoing. He claimed he distributed the food with a series of rapid sideways arm motions. The Employer informed the Grievor that his treatment of the residents, especially in public, created an unacceptable image. As a result, based on this incident, his "poor judgment" over the use of resident's fund to purchase the food for his own consumption, and taking into account a ten-month suspension in 1989, the Grievor was dismissed from his employment. The Union filed a grievance denying the allegations questioning the restaurant worker's perception and recollection of the incident. It also suggested that the Employer had not reconciled itself with a previous arbitration award in which a discharge had been substituted for the ten-month suspension and it was looking for an opportunity to "toast" the Grievor. It did so by conducting a sloppy investigation.

**AWARD: GRIEVANCE ALLOWED.** The Arbitrator could not conclude that the Grievor had misused the funds because written records to sustain the allegations did not exist. As well, the Arbitrator noted that given the relaxed accounting standards at the time, the Grievor's lack of attention to providing receipts did not provide any real suspicion about his use of the funds. The Arbitrator did not wish to comment on the overall quality of the Employer's investigation, as full account was not given of all the steps taken by various agents of the Employer before arriving at a decision to dismiss the Grievor. He did add that the investigation by the head of the psychiatric centre was diligent and sincere. As to the testimony of the Grievor, the Arbitrator found that his account of the incident was consistent, detailed and plausible. He noted that the witness viewed the distribution of food without any prior experience of seeing severely handicapped persons being fed and without knowing that the residents had already eaten, then a strong possibility existed that she had a negative impression of the Grievor's conduct and misperceived the quick distribution of food as a throwing action. On reviewing all the evidence, the Arbitrator found that the Employer had not been able to prove on the balance of probabilities that the Grievor threw food to the residents. Therefore, he ruled the Grievor did not engage in inappropriate conduct, and ordered him reinstated with full back pay.

AWARD

RE PROVINCE OF MANITOBA, MANITOBA DEVELOPMENT CENTRE  
and  
MANITOBA GOVERNMENT EMPLOYEES ASSOCIATION

Re: Mr. Michael Arnott, Dismissal  
Case No. 62/92/LRA

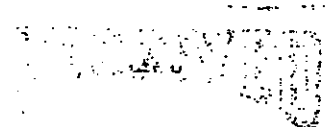
Hearing date: Convened by conference call on February 19, 1992,  
immediately adjourned to March 11, 1992, hearing held and completed  
that day;

Award issued: 27 March, 1992.

Place of hearing: Place Louis Riel, Winnipeg, Manitoba;

Appearance: For the employer: Ms. Andrea Rumak  
For the employee: Mr. Grant Rodgers

Arbitrator: Dr. Bryan Schwartz



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AWARD

PROVINCE OF MANITOBA, MANITOBA DEVELOPMENT CENTRE

and

MANITOBA GOVERNMENT EMPLOYEES' ASSOCIATION

Re: Michael Arnott, Dismissal  
Case No. 62/92/LRA

The Issue

At the beginning of the hearing, both sides agreed that I was properly appointed and had jurisdiction over this matter.

The parties further agree that there is only one issue before me. It is a factual one. Was it proved at the arbitral hearing that the grievor, Mr. Arnott, committed the act for which he was dismissed?

Mr. Arnott denied the allegation of misconduct to his employees and again before this hearing. The union agrees that if the allegation is true, the employer was right to dismiss Mr. Arnott. The misconduct would have occurred shortly after Mr. Arnott's return from a ten-month suspension (the "Camp Sandy Haven incident") and Mr. Arnott would have not only acted improperly, but lied to his employers in denying it. Both sides agree that the burden of proof is on the employer. It must demonstrate, on a balance of probabilities, that the misconduct occurred.

Background: Mr. Arnott's record

By way of background, I will briefly review the previous conduct of Mr. Arnott that has resulted in discipline. In doing so, I have relied on a 1990 arbitral award between the two parties. The award was delivered by Mr. Hamilton in connection with the Camp Sandy Haven incident, and as the parties were exactly the same, both sides have agreed that I may rely on Mr. Hamilton's findings

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of fact.

Mr. Arnott works at the Manitoba Development Centre, as a Psychiatric Nursing Assistant II. His duties include assisting the mentally handicapped people under his care in various ways: escorting them to meals and activities, assisting them with physical movements, maintaining their living environment in a clean and orderly fashion and performing basic nursing duties such as reporting of signs of possible illness. The residents of the centre include people who are mentally handicapped; some to a lesser extent, but many severely or profoundly. At the hearing, both sides agreed that all residents should be treated at all times with dignity and respect.

Mr. Arnott has worked at the Centre for about ten years. Prior to his ten-month suspension in 1989, there was no record whatever of his mistreating patients. Mr. Arnott had devoted his own free time to working with the handicapped, including a long record of service with the Special Olympics.

There were two previous disciplinary episodes prior to the Camp Sandy Haven incident. Mr. Hamilton has characterized these episodes as "minor" and as not involving patient abuse. One episode, of no interest to either side during this dispute, was a one-day suspension for tardiness. The other episode was brought up by the employer during this latest dispute. In a letter of dismissal, Mrs. Tannis Mindell, Assistant Deputy Minister for Family Services, referred to a 1982 episode in which Mr. Arnott had been "consuming liquor on duty while supervising residents on a bus trip". At the hearing before me, Mr. Arnott recalls that he and a number of co-workers, some of them more senior, consumed some alcohol on a bus after the residents had been let off. All involved were reprimanded in one way or another, said Mr. Arnott, and he admitted what he had done.

As a result of the Camp Sandy Haven incident of 1989, the employer attempted to dismiss both Mr. Arnott and a psychiatric nurse for resident abuse. The person who was treated improperly is referred to in Mr. Hamilton's award as "X". She is a "mildly retarded" person who, both sides agreed, could be "difficult to handle" at times. As the incident was recalled by the psychiatric nurse, here is what happened. At the lake, X was involved in a "sponge/water" fight with other residents, and pinching some of the staff members. The psychiatric nurse suggested out loud to Mr. Arnott that they change X's behaviour by removing her swimming suit. At first, the threat was intended "in jest"; as events developed, however, it was actually carried out by the psychiatric nurse and Mr. Arnott. After the two removed the suit without X's consent, the psychiatric nurse threw it several feet away. Mr. Arnott picked it up and threw it somewhat further. The psychiatric nurse told X to retrieve the suit. X had quieted down, but did not move to get the suit. Eventually, a third staff person offered to

return the swimming suit to X, and did so after the psychiatric nurse agreed.

The purpose of removing the suit, according to the psychiatric nurse, was not to embarrass or humiliate X. She was in shoulder-deep water, testified the psychiatric nurse, and he doubted any of the other residents or staff people saw much of the event. The objective was to refocus her attention and control her behaviour.

Mr. Arnott admitted to the employer what he had done. He acknowledged that it was "stupid" and that he should not have acted in such a manner. The employer dismissed both the psychiatric nurse and Mr. Arnott. The psychiatric nurse was reprimanded by his professional association, but withdrew his grievance against the employer after finding new employment. Mr. Arnott proceeded to arbitration.

Mr. Hamilton reduced the penalty to a ten-month suspension. He agreed that the incident amounted to resident abuse. It was embarrassing and upsetting for X to have her suit removed with her consent, and to be left standing in the water unclothed for at least three or four minutes. Mr. Arnott had, through a number of his own actions, contributed to the event. Health care workers are expected to handle the stresses placed upon them by patients or residents, and the difficulties which X caused the psychiatric nurse and Mr. Arnott were not mitigating factors.

Mr. Hamilton concluded, however, that a number of mitigating circumstances did exist, including the following:

- Mr. Arnott's eight-year record of previous employment was unblemished by any previous finding of patient abuse;
- the episode was out of character for Mr. Arnott and not likely to be repeated;
- his extracurricular activities indicated a past and continuing involvement with the mentally handicapped;
- Mr. Arnott had not acted with the malicious intent of embarrassing or humiliating X;
- Mr. Arnott's admission of wrongdoing and of regret were bona fide, and were not merely aimed at creating a favourable impression.

Accordingly, Mr. Hamilton replaced the dismissal with a ten-month suspension.

During closing argument, the union has suggested that the employer did not reconcile itself to Mr. Hamilton's award; that it was looking for any opportunity to "toast" Mr. Arnott, and did so on the basis of a sloppy investigation and without adequately notifying Mr. Arnott of the precise basis on which he was suspended, pending an investigation, and then fired.

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Outline of the Facts that are not in controversy.

Here is an outline of the facts that do not appear to be open to question. I have assembled my account from the documentary record agreed to by both sides, and the evidence of witnesses for both the employer and Mr. Arnott.

On September 23, 1991, Mr. Arnott and a co-worker set out to take eight residents on a van outing for a picnic. The mental handicap of the residents would be technically characterized in all cases as severe or profound. Mr. Arnott was given \$24 from the residents' trust fund to spend on treats and drinks for them. Mr. Arnott and co-worker also took along tuna sandwiches and large quantities of juice.

After a highway drive, Mr. Arnott stopped to feed the residents. He also stopped to pick up some puddings, which he used to help administer pills to four residents. Mr. Arnott and co-worker had not been interested in the tuna sandwiches. They stopped at a fast-food restaurant named "Bopper's" with the primary aim of getting something to eat for themselves. Mr. Arnott bought two "boppers" and a hot-dog, a large drink, an order of onion rings and an order of french fries. Most of the food was in fact consumed by the two group leaders.

Mr. Arnott purchased the food from a Ms. Cousins. Also working in the restaurant was Mrs. Arlene Karlenzig. She believes she saw Mr. Arnott throwing french fries to the residents, and that at least one passenger reached over to pick them up. One or more of the passengers appeared to her to be mentally handicapped, and she felt the passengers were being treated "like animals". She took note of the license number of the van.

The next day, September 24, Mrs. Karlenzig phoned the Carman Community Mental Health Office. She spoke, anonymously, to Ms. Barbara Callum. The latter brought the incident to the attention of the Manitoba Development Centre.

Mr. Brian Flatman, the head of psychiatric nursing at the Centre, began an investigation. On September 25, at the request of Mr. Flatman, Ms. Callum wrote a letter (Exhibit 2) setting forth her recollection of her conversation with Mrs. Karlenzig. Mr. Flatman interviewed Mr. Arnott and his co-worker. Mr. Arnott denied any wrongdoing personally. So did the co-worker. She did not testify at the hearing before me; apparently, she told Mr. Flatman that she herself did not see Mr. Arnott throw food. I understood from Mr. Flatman's testimony that the co-worker never claimed to have seen everything that was going on in the van during the whole stop at Bopper's.

On September 27, Mr. Flatman drove out to Brunkild. He asked employees at Bopper's whether they knew anything about the

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incident. Mrs. Karlenzig identified herself as the one who had made the anonymous call. Mr. Flatman also spoke to Ms. Cousins. Mr. Arnott had not taken the receipt for his food purchase, and Mr. Flatman was able to obtain it (Exhibit 3). Mr. Flatman also wrote out a statement summarizing Mrs. Karlenzig's account (Exhibit 1I). After the phrase "this statement was willingly offered and certified correct" there is the signature of Mrs. Karlenzig. Below that, opposite the word "witness", there is a signature by the second employee.

After his first trip to Brunkild, Mr. Flatman conducted a second interview with Mr. Arnott and the co-worker. Each again denied having done anything wrong. Mr. Flatman returned to the restaurant, and took a supplementary statement from Mrs. Karlenzig (Exhibit 1J). Mr. Flatman prepared a report, and forwarded it to senior officials. Mr. Flatman left it for the latter to determine what the appropriate action should be. In the meantime, Mr. Arnott was "sent home", apparently without a specific explanation of whether his suspension was with or without pay. On October 4, 1991, Ms. Tannis Mindell, the Assistant Deputy Minister of Family Services, sent Mr. Arnott a letter informing him that he had been suspended without pay for ten days "pending an investigation of a van incident". Ms. Mindell followed up on October 17 with a letter (Exhibits ID and IE) informing Mr. Arnott that:

through investigation it was determined that on September 23, 1991, in Brunkild Manitoba, you treated residents in a completely unacceptable manner. Such treatment of residents cannot and will not be tolerated. In a community setting it creates an unacceptable image in the eyes of the public concerning the quality of care and service to mentally handicapped individuals by civil servants. As a result, I received a recommendation that you be dismissed from your employment.

The letter then refers to additional factors. It takes note of the ten-month suspension over the Camp Sandy Haven, refers to the 1982 reprimand over liquor consumption "while supervising residents" and adds that "further evidence gathered through this most recent investigation revealed that you used poor judgment with respect to the use of residents funds". The letter concludes that "taking all of the above facts into consideration" Mr. Arnott was dismissed "immediately".

It is time to turn to the contested facts.

#### Mr. Arnott's use of Residents' Funds

I shall begin with a secondary issue: the mention of "poor judgment" with respect to the use of residents' funds. At the hearing, I asked the employer's representative, Ms. Rumak, the following question: if I found I could not sustain the allegation

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of food throwing, would the alleged "poor judgment" over the use of funds constitute a basis on which I could uphold some measure of discipline against Mr. Arnott? Ms. Rumak, agreed that it could not. The employer was not relying on the alleged misuse of funds as an independent justification for disciplining Mr. Arnott. Ms. Rumak did urge, however, that I consider the testimony over the use of funds in assessing Mr. Arnott's credibility.

Ms. Mindell's reference to "poor judgment" is rather vague. It may be that Ms. Mindell was referring to a possible misappropriation of residents' funds. Mr. Flatman recalls events as follows: during the first interview between the two of them, Mr. Arnott indicated he had bought the Bopper's food for the staff out of the residents' funds; during the second interview, Mr. Arnott changed his story, and said he had paid for the staff's food out of his own cash. Mr. Arnott put a different light on the first interview. He testified that Mr. Flatman asked him how much money he spent; Mr. Arnott responded by listing the total expenditures, without distinguishing between money spent on staff and money spent on residents, but he never meant to imply (even though Mr. Flatman inferred) that the money was all spent out of the original \$24 from the residents' trust funds.

Mr. Porter, a nurse working in the same building as Mr. Arnott, recalls that prior to the Bopper's episode, accounting practices at Mr. Porter's unit did indeed tend to be informal. He was not aware of anyone who would have obtained receipts on an outing such as that conducted by Mr. Arnott. In reviewing my notes, I am not sure whether Mr. Arnott actually was in the same administrative unit as was Mr. Porter; but even if they were in different units, there is no evidence at all that Mr. Arnott's was more exacting in its accounting standards. Mr. Arnott himself specifically recalls not being told to bother with receipts with respect to the \$24. His testimony has not been contradicted in this respect, and I accept it. Accounting practices have since been made more stringent. Given the relaxed practices that were followed at the time, however, Mr. Arnott's lack of attention to gathering and returning receipts, or otherwise maintaining paper records, does not provide any real basis for suspicion about his use of money during the Brunkild outing. There are, of course, no written records to sustain any allegation of misappropriation of funds. Mr. Arnott has provided a plausible explanation of how Mr. Flatman could, in good faith, have become suspicious about the financial end of the Brunkild episode. On the evidence presented at the hearing, I am not able to conclude that Mr. Arnott misused residents' funds on September 23rd, or lied about doing so at any time afterwards.

During closing argument, Ms. Rumak criticized Mr. Arnott for not spending the \$24 he was given to buy treats and drinks for the residents. Mr. Arnott explained that the residents had plenty to eat and drink at the picnic, and he saw no reason to spend all of



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the money, rather than saving it for their use on another day. There is no clear evidence that either the general practice in Mr. Arnott's unit or the specific instructions issued that day required him to spend all of the money, rather than saving what he reasonably could for another day.

Did Mr. Arnott distribute food to residents in an improper manner?

I have no doubt at all that Mrs. Karlenzig was acting honestly and out of the best motives in reporting the episode. She believes she saw vulnerable people being mistreated, and in reporting the episode, acted only out of a concern for them and others in their position. Neither Mr. Arnott or the union questioned Mrs. Karlenzig's honesty or good faith; they question only whether her initial perception and subsequent recollection of the event are accurate.

The union representative, Mr. Rodgers, tried to establish that Mrs. Karlenzig has not been consistent in her recollection of events. The employer called as its first witness Ms. Callum, who received Mrs. Karlenzig's anonymous call. There are, to be sure, differences between Mrs. Karlenzig's written statement (Exhibits 1I and 1J) and Mrs. Callum's recollection of what Mrs. Karlenzig said in her anonymous phone call (exhibit #2):

Exhibit #2

(Mrs. Callum's letter recounting anonymous call from Mrs. Karlenzig

Exhibits 1I and 1J

(Written statements signed by Mrs. Karlenzig herself).

-group leaders purchased food for themselves;

-no mention;

-group leaders "threw food over their shoulders"

-male driver only threw food. Female looked ahead whole time, eating own food.

Reference to "over their shoulders" is scratched out, and replaced with "over to passengers";

-passengers "scrambled for food".

-"a passenger ben[t] over to pick the fries up'.

At the hearing, Mrs. Karlenzig denied that she ever told Ms. Callum that the female was involved in throwing food. I would not be at all surprised if there are some inaccuracies in Ms. Callum's

account of the conversation. Ms. Callum was suddenly confronted with an anonymous call from a very upset person; it would be entirely understandable if Mrs. Callum did not absorb every detail of Mrs. Karlenzig's account. Furthermore, it appears that Ms. Callum did not write down her account of the call until the next day; she may have forgotten some details in the interim. On the issue of how many people threw food, I have not considered Ms. Callum's account as a reason to discount the correctness of Mrs. Karlenzig's recollections.

Similarly, I am not discounting Mrs. Karlenzig's testimony on account of the discrepancies about whether food was thrown "over the shoulder". Again, Ms. Callum might not have gathered or recalled all the details of Mrs. Karlenzig's phone call with absolute precision. As for Exhibit 11 - in which the words "over the shoulder" appear to be scratched out - it must be remembered that it was written out by Mr. Flatman for Mrs. Karlenzig's signature. Mr. Flatman (rather than Mrs. Karlenzig) may have initially drafted the reference to "over the shoulder". At the hearing, Mrs. Karlenzig tried to physically demonstrate what she recalls the driver doing; as I saw it, it involved a sideways, rather than over-the-shoulder, motion.

Ms. Callum's letter states that in her initial call Mrs. Karlenzig expressly mentioned that the group leaders bought the food for themselves. Even if I assume that Mrs. Callum's recollection is not correct in this respect as well, I do think that anyone in Mrs. Karlenzig's position could easily have gotten the impression that Mr. Arnott and his co-worker were very callous and selfish in the way they bought and distributed food. Considering there were a large group of residents on board, it may have appeared intolerable that Mr. Arnott and his co-worker bought very little food, ate most of it themselves, and gave the residents only a few fries. Given that impression, an observer would be liable to see the rest of the action, including the way in Mr. Arnott actually distributed the fries to the residents, in a very negative light. I will return to this point in reviewing the evidence of other witnesses and explaining my overall conclusion.

At the hearing, Mrs. Karlenzig recalled events as follows. Mr. Arnott bought the food Ms. Cousins. Then he returned to the van. The van was parked at a right angle to the front window of the Bopper's. It was possible to look through the front window of the van. At some point, Mrs. Karlenzig looked at the van, and noticed that the driver appeared to be throwing french fries to the passengers. She called over Ms. Cousins, another employee of Bopper's, and asked whether the driver was really throwing french fries. Ms. Cousins agreed that he was. Mrs. Karlenzig then watched the male driver for a period of "three to five minutes". During that period, the distance between Mrs. Karlenzig and the front window was about ten feet, and the distance between the window and the van was about the same. According to Mrs. Karlenzig, the female

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group leader spent the whole time eating her own food, looking ahead. There was no conversation between her and the male driver. The male driver did not converse with the passengers either. Mrs. Karlenzig watched until the van drove off.

Mrs. Karlenzig stuck consistently to the main points of her version of events throughout a thorough cross examination by Mr. Rodgers.

Mr. Flatman was the next witness called by the employer. I have already outlined his activities with respect to the investigation of the incident. I did not have before me a full picture of all the steps taken by various agents of the employer before arriving at a decision to dismiss Mr. Arnott, so I do not wish to offer any comments on the overall quality of the employer's investigation, hearing or decision-making processes. As the union did suggest that the employer was looking for any opportunity to "toast" Mr. Arnott, and Mr. Flatman did testify at the hearing, I would wish to offer a few specific observations with respect to the role of Mr. Flatman only.

Mr. Flatman impressed me as being someone with a strong concern for the proper treatment of residents and for the credibility of his institution in the eyes of the public. I saw no evidence of malice by Mr. Flatman towards Mr. Arnott. I believe that Mr. Flatman was diligent and sincere in his efforts to conduct a proper investigation. He went out to the site of the incident on two occasions, took written statements, and interviewed his own employees on two occasions. Perhaps he could have taken some additional measures, such as obtaining a written statement from Ms. Cousins. Mr. Flatman is a psychiatric nurse, however, and not a police investigator, and it would be unfair to draw any inferences of bad faith merely because the investigation did not include every step conceivable. I would also note in defence of Mr. Flatman, that he may not have anticipated that Ms. Cousins would be unavailable at subsequent proceedings such as this. As far as I can tell, Mr. Flatman accepted Mrs. Karlenzig's version of events, rather than that told by his own employees, simply because, in Mr. Flatman's own words, he considered that there was "no reason to disbelieve" her. He agreed that if the fry throwing were an isolated incident, it would not warrant dismissal, but in view of the past disciplinary episode, it would not be possible to trust Mr. Arnott in the future.

Mr. Flatman's testimony about the physical features of the restaurant and the van confirm that Mrs. Karlenzig would have been able to see at least some of the goings-on in van. He testified that if the van has a tinted window, it is not noticeably so. He recalls that Bopper's is a small building, and it is not far from any vantage point to the window overlooking the parking lot. Mr. Flatman found that because of the angle of the window, it is easy for someone in the restaurant to see things outside, but hard for

outsiders to see in.

On cross-examination, Mr. Flatman initially stated that Mrs. Karlenzig's concern was about Mr. Arnott's activities inside the van; in response to a follow-up question, however, he agreed that it was "entirely possible" that Mrs. Karlenzig was "a little upset" about the fact that the staff had bought the food for themselves, and not for the residents.

The lead-off witness for the union was Mr. Randy Porter, who is a charge nurse at the Manitoba Development Centre. Mr. Porter has thirteen years of experience, and is currently responsible for supervising other nurses and nursing assistants. He works in the same building as Mr. Arnott, but not in the same ward. Mr. Porter is a shop steward for the union, so I had to be on the look-out for any tendency on his part to perceive or report events in a way that would unduly favour Mr. Arnott. On the matters to which I will now refer, I found Mr. Porter's testimony to be credible.

Mr. Porter has had considerable experience in working with people who have a severe or profound mental handicap. He has encountered first-hand the difficulties that may arise in providing them with meals. Residents may be quick and aggressive in trying taking food, both from the person who is distributing it and from each other. A person distributing something like an order of fries might have to clutch the box closely, and distribute individual portions (in Mr. Porter's words) "very quickly". The residents may eat very quickly and some of them may spit or drool; as a result, even staff people may at times "get sick". Mr. Porter noted that it is generally necessary to feed the residents before the staff can eat their own meals. Mr. Porter indicated that to an outside observer, the activities of staff may (again in his words) "look bad", either because of the way in which food is distributed, or because the observer may come along at a time when the staff is eating and the residents are not.

On cross-examination, Mr. Porter agreed that while the quick distribution of food may be necessary, it is not proper to throw food to residents.

The final witness was Mr. Arnott himself. He gave a thorough account of the whole day's activities. He testified that he was at Bopper's for about half an hour altogether. During this time, he bought the meals, distributed some to the residents, and he and his co-worker ate their own meals. Throughout, the residents remained in their seats, belted in. While Mr. Arnott stayed in his front seat, he turned to the side, and quickly distributed french fries to the residents in the front row. He denies throwing any food. Mr. Arnott physically demonstrated the way in which he distributed food; it was a series of rapid sideways motions. After distributing food to the residents in the front row, said Mr. Arnott, he got up, moved along a side aisle, and reached over and distributed food to

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residents in the next two rows. Then he returned to his seat.

Mr. Arnott was thoroughly cross-examined by Ms. Rumak. Like Mrs. Karlenzig, he stuck to his story consistently. I watched Mr. Arnott carefully throughout his testimony. I was well aware that someone in Mr. Arnott's position might be tempted to deliberately distort his account. While Mr. Arnott has "owned up" to his mistakes in the past, he must have realized he was on very "thin ice" as a result of them; it is possible that someone in such jeopardy would untruthfully deny any suggestion of wrongdoing, both to the employer and at an arbitral hearing. I found, however, that Mr. Arnott's testimony set out a story that was internally consistent, detailed, and plausible. I was unable to detect any indications - such as evasive answers to Ms. Rumak's questions or hesitations at difficult points - that Mr. Arnott was lying.

On reviewing all the evidence, I have come to the conclusion that the employer has not been able to prove on the balance of probabilities that Mr. Arnott threw food to the persons under this care. While Mrs. Karlenzig impressed me as an honest, caring and intelligent person, and Ms. Rumak presented the employer's case with thoroughness and skill, the following considerations have prevented me from being convinced that Mr. Arnott distributed food to residents in an improper manner:

(1) Mrs. Karlenzig was the only first-hand witness to testify in support of the allegation at the hearing. Ms. Cousins was travelling outside of Canada, and thus unable to appear at the hearing. The residents did not have the ability to provide an account of events, either before or after the hearing. Neither side called Mr. Arnott's co-worker to testify;

(2) Mrs. Karlenzig viewed the distribution of food without any prior experience of seeing severely or profoundly handicapped persons being cared for, and in particular, being fed. She had no reason to guess that the residents had already eaten (which in fact they had). Mrs. Karlenzig might not have been aware of why a caregiver would buy entrées for himself but not the residents, or why he would hang on to the box of fries, and distribute them to residents a few at a time using a quick motion. Seeing events in isolation, there is a strong possibility that Mrs. Karlenzig acquired a very negative impression of Mr. Arnott's overall conduct even if it was in fact entirely innocent.

Given the general impression that Mr. Arnott was acting in a selfish and callous manner, it would be entirely possible to misperceive the quick distribution of food as a throwing action. Perhaps Mrs. Karlenzig was mistaken in thinking that fries actually flew through the air. Perhaps not; but the mere fact that a fry, or several of them, were in the air would still not mean that Mr. Arnott threw them. A fry, or several of them, could have been accidentally fumbled by either Mr. Arnott or a passenger during the

very quick distribution of the food, or while a passenger was eating it. To someone who believed Mr. Arnott's overall course of conduct was offensive, it would be possible to interpret events quite differently: as Mr. Arnott intentionally throwing fries and being indifferent - or even actually intending - that passengers would have to pick them up;

(3) Mrs. Karlenzig may well have viewed only a very limited number of actions by Mr. Arnott and the passengers. A witness to only a few specific actions is more likely to misperceive or mischaracterize them, both individually and as a set. The statement which Mrs. Karlenzig signed on September 27 (Exhibit 1I) refers to Mr. Arnott's throwing food "several times"; the supplemental statement (Exhibit 1J) speaks of "a passenger bending over to pick up food". The phrases "several time" and "a passenger" do not suggest a large number of events.

Mr. Arnott testified that he distributed only a portion of the order of fries to residents seated in the front row and that he did so in a very short period of time - certainly much less than three minutes. If Mr. Arnott's testimony on this point is correct, it would be entirely consistent with Mrs. Karlenzig's seeing only "several" movements that she interpreted as throwing motions.

Mrs. Karlenzig testified on cross-examination that the time she actually spent watching Mr. Arnott was from "three to five minutes". Even if that estimate were correct, it would not be logically inconsistent with her earlier written statement that Mr. Arnott threw fries only "several times" and that she observed only "a passenger" bending over to pick them up.

In any event, Mrs. Karlenzig's estimate of the time frame is not something I can confidently rely upon. She admitted during her testimony that she is not good at estimating spatial dimensions (such as size of windows, or whether a distance was in yards or feet). Mrs. Karlenzig's estimate of the time frame is not confirmed by testimony from any other witness. Mrs. Karlenzig did not claim to have verified that estimate against a watch or clock. The only reference to time in her written statement (Exhibit 1I) is that "the time of the incident was 13:04". There is no reference to the event's unfolding over three to five minutes, and the very precise figure of 13:04 appears to be derived from the Bopper's receipt (on which it is clearly marked) rather than Mrs. Karlenzig's own recollection.

To conclude on this point, neither the written record or Mrs. Karlenzig's testimony provide any clear and specific indication that she actually witnessed a large number of physical motions by Mr. Arnott. Mrs. Karlenzig's own written statements actually suggest the opposite. Even if I were to entirely disregard Mrs. Karlenzig's written statements - despite the fact that she herself made no effort to distance herself from them, and specifically re-

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affirmed them in a number of respects - I would still have credible testimony by Mr. Arnott which suggests that Mrs. Karlenzig characterized his conduct as "throwing" on the basis of rather few specific observations;

(4) It could very well be that Mrs. Karlenzig did not see the whole story of how food was distributed to the residents at Bopper's itself.

Her own testimony does not establish that she saw the very beginning of the distribution of food, and she could have missed some things while summoning over Ms. Cousins or while looking at the license plate on the van.

Mrs. Karlenzig's observations were limited in space as well as time. She had to see all the events through the front window of the van. By her own admission, she could not actually see the floor of the van. More importantly, Mrs. Karlenzig was limited in her ability to see what was happening in the rows further back. There was no central aisle, and her view was very likely obstructed by the front row group leaders and the passengers in the row immediately behind them. She might not have been able to see Mr. Arnott feeding the residents in the back rows. I have no clear and convincing evidentiary basis, therefore, to reject certain elements of Mr. Arnott's testimony that support his account. If he did take the time and trouble to get up and feed the residents in the back, and if he did distribute the food to those residents in a proper fashion, it would be less plausible that he callously flung food to the residents seated nearest to him;

(5) Mr. Porter, who is a trained and experienced worker in the field, provided credible evidence concerning the way food has to be distributed by staff to persons with severe or profound handicaps, and about why the methods used may, to an inexperienced observer, "look bad";

(6) Mr. Arnott himself testified, and neither the substance or style of his presentation indicated to me that he was lying. His version of events was detailed, logically consistent, and plausible;

(7) Mr. Arnott knew he was on "thin ice"; while this gave him a reason to deny any wrongdoing, it would also have been a strong reason to avoid getting into trouble in the first place. If the allegation against him were true, he would have had to mistreat patients in a demeaning manner in the presence of a co-worker and with complete disregard for the obvious possibility that he would be seen and reported by a member of the public. When Ms. Rumak suggested to Mr. Arnott that he allowed himself to become careless because he was outside of the ward, with no supervisor watching, he immediately and firmly responded "someone is always watching you".

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I regard these considerations as being more than sufficient to sustain my conclusion. The result is not a precarious one that depends on each and every observation and argument just presented. The burden of proof is on the employer, and the evidence falls substantially short of the minimum necessary to sustain its decision.

Just before closing arguments were presented, I invited both sides to suggest what inferences, if any, I could draw from the fact that Mr. Arnott's co-worker did not appear at the hearing. Ms. Rumak suggested that if Mr. Arnott's story is true, one would expect a colleague of Mr. Arnott to back him up - unless she was unwilling to do so under oath. Mr. Rodgers responded that the burden of proof is on the employer to prove that Mr. Arnott acted improperly, and not on Mr. Arnott to prove the opposite.

Leaving aside the union's failure to call the co-worker, I would definitely conclude that the employer has not been able to prove its case. Looking at all of the facts of this case, the union's failure to call the co-worker would be much too speculative a reason for me to reverse course, and rule in favour of the employer instead.

By the way, I would hasten to assure the employer that I have not counted the co-worker's statements to Mr. Flatman as being any factor whatever in favour of Mr. Arnott's case. I am not absolutely bound by the legal rules against the admission or consideration of hearsay evidence. In this case, however, I do not even have a complete and precise record of what the co-worker actually told Mr. Flatman. Furthermore, even if there were such a record, it would probably not be one on which I could put any weight; without an opportunity for the employer to cross-examine, I would be concerned whether one colleague was merely attempting to cover-up for another.

### Conclusion

Both sides have agreed that every resident should be treated with dignity and respect at all times. On the basis of the evidence at the hearing, I am unable to conclude that on September 23, 1991, Mr. Arnott engaged in any inappropriate conduct in connection with the residents under his supervision.

I would therefore order as follows:

- the grievance is allowed;
- Mr. Arnott should be re-instated immediately to the position he occupied prior to the initial suspension in connection with this incident;
- he should receive back pay and other benefits sufficient to put him the same position as if he had not been suspended or dismissed in connection with this incident;



-the record of his having been suspended or disciplined in connection with the Brunkild episode should be deleted from all files maintained by the employer.

I would expressly retain jurisdiction for the purpose of assisting the parties with implementing this award, should such assistance be required.

I would like to thank both Mr. Rumak and Mr. Rodgers for their thorough and professional presentation of the respective cases. I am particularly grateful for the concise, direct and candid assistance they provided in framing the issues and summarizing the applicable law.

*Bryan Schwartz*

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Dr. Bryan Schwartz  
Arbitrator  
27 March 1992

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