#187

Gene, Tim, et. al.
An interesting application on "progressive" discipline by Gerhart.
Jack

OPINION AND AWARD

In the Matter of Arbitration Between the STATE OF OHIO Department of Mental Health And THE STATE COUNCIL OF PROFESSIONAL EDUCATORS, OHIO EDUCATION ASSOCIATION	Parties Grievance No. MH-CC-OEA-034-87 Grievance of: Shannon Maloney Hearing: February 26, 1988 Award: June 2, 1988 Paul F. Gerhart, Arbitrator

Appearances

For the State of Ohio, Department of Mental Health:

Felicia Bernardini, Labor Relations Specialist
Albert Hogan, Labor Relations Specialist
Jack Burgess, Chief, Arbitration Services, Office of Collective Bargaining
Janifer H. Bennett, Director of Client Advocacy and Volunteer Services
Jane C. Renner, Director of Education
Jerry A. Woodland, Maintenance, C.O.A.C.

For the State Council of Professional Educators, OEA:

Henry L. Stevens, UniServ, Ohio Education Association
Shannon Maloney, grievant
Richard Sowell, witness
Carrie Smolik, Grievance Chairperson

Background

The State Council of Professional Educators, Ohio Education Association, National Education Association (the Association) is the bargaining representative for, among others, teachers at the Central Ohio Adolescent Center which is operated by the Ohio Department of Mental Health (the Employer). During the term of their labor agreement dated July 1, 1986 through June 30, 1989 (the Agreement), the parties were unable to resolve a disciplinary grievance involving a member of the bargaining unit, Shannon Maloney. Under the provisions of the Agreement, Article 6, Arbitration, the undersigned was assigned by the parties to issue a final and binding decision in the matter.

Upon the mutual agreement of the parties, a hearing was held in the conference room at the Office of Collective Bargaining, Columbus, Ohio, on February 26, 1988. At that time, the parties stipulated that the matter was properly before the arbitrator. During the course of the hearing, each party was accorded the opportunity to examine witnesses and present other evidence. Witnesses were sworn and separated. The parties waived oral argument and, instead, submitted post-hearing briefs which were exchanged through the arbitrator on March 27, at which time the record in the matter was closed.

Grievance

By memorandum dated July 21, 1987, Shannon Maloney, a teacher at the Central Ohio Adolescent Center, was charged with "Failure of good behavior." Subsequently, on August 6, 1987, Ms. Maloney was notified that she was to be suspended for two days (August 12 & 13). The letter of notification stated:

> The reason for this action is that you have been guilty of Failure of Good Behavior in that on June 9, 1987 you spoke inappropriately to a patient.

On September 11, 1987, Ms. Maloney filed a formal grievance in the matter:

> Explanation of Grievance: Reprimand without just cause.
> (Suspension)
>
> Specific Violation of Article 13 - 13.01 & 13.04
>
> Remedy Sought: Rescind the two day suspension and that she be made whole.

Issue

At the hearing, Mr. Stevens, on behalf of the Association, raised both the substantive issue of whether there was just cause to suspend Grievant and a procedural issue concerning the timeliness of the Employer's responses pursuant to Article 5, particularly 5.01 and 5.08(B) of the Agreement. The Employer agreed that the substantive issue was whether just cause for discipline existed in the case of Grievant, but objected to the Union's raising the procedural issue, contending that such issue was properly the subject of another grievance that should have been filed at the time of the alleged contractual violation.

The arbitrator held that the substantive issue was properly before him, but that the procedural question, as a separate issue, was not properly within his jurisdiction since the Employer had not waived the normal procedures for processing grievances outlined in the Agreement. Nonetheless, the arbitrator advised the parties that to the extent the procedural matter had a measurable impact on Grievant's due process rights with respect to the substantive issue, evidence concerning procedure was relevant and would be allowed at the hearing.

The issue in this case, as determined by the arbitrator, is whether there was just cause for the suspension of Grievant. And, if not, what is the appropriate remedy?

Relevant contractual provisions and Employer work rules

From the Agreement:

ARTICLE 5 - GRIEVANCE PROCEDURE

5.01 - Purpose

. . . . . .

The parties intend that every effort shall be made to share all relevant and pertinent records, papers, data, and names of witnesses to facilitate the resolution of grievances at the lowest possible level.

. . . . . .

5.06 - Association Representation

(A) In each step of the grievance procedure, certain specific Association representatives are given approval to attend the meetings therein prescribed. . . .

(B) . . .

(C) The Association shall be the exclusive representative of the employee in all matters pertaining to the enforcement of any rights of the employee under the provisions of this article and in accordance wit Chapter 4117.03(A)(5) of the Ohio Revised Code.

(D) At any step of the grievance procedure, the Association shall have the final authority, in respect to any aggrieved employee, to decline to process a grievance . . . .

ARTICLE 13 - PROGRESSIVE DISCIPLINE

13.01 - Standard

Employees shall only be disciplined or discharged for just cause.

13.02 - Investigatory Meeting

An employee may, upon request, have an Association representative present during a meeting with representatives of the employing agency held for the purpose of obtaining information which might reasonably lead to disciplinary action against that employee. The right to representation does not extend to day-to-day communications which occur between an employee and the Employer, such as: performance evaluations, training, job audits, counseling sessions, work-related instructions, or to inform an employee of the disciplinary action.

13.03 - Pre-Suspension or Pre-Termination Conference

When the Appointing Authority plans to initiate a suspension, termination or demotion which is not the result of a job audit, a written notice of pre-disciplinary conference shall be given to the employee who is the subject of the pending discipline and to the designated Association representative. . . .

. . . . . .

13.04 - Progressive Discipline

The following system of progressive discipline will be ordinarily followed:

1. Verbal reprimand (with appropriate notation in the employee's personnel file);
2. Written reprimand;
3. Suspension without pay;
4. Demotion or discharge.

However, more severe discipline may be imposed at any point if, at the Appointing Authority's discretion, the infraction or violation merits more severe action.

From State of Ohio, Department of Mental Health (JX 2):

5122-3-14. PATIENT ABUSE/NEGLECT.

. . . . . .

(C)(1) "Abuse" means . . . insulting or coarse language or gestures directed toward a patient which subjects the patient to humiliation or degradation . . . .

. . . . . .

(E)(2) Each employee shall be responsible for safeguarding patients from abuse or neglect which could be self-inflicted or caused by other patients, other employees, or nonhospital persons.

Evidence

Jerry Woodland, a Maintenance Repair Worker III at the Central Ohio Adolescent Center with seven years service in that position, testified that he knew Grievant because they both work at the same facility. He stated that on June 9, 1987, as he stood at the drinking fountain outside the door of Grievant's classroom, he heard loud talking. He stepped to the door because he anticipated that a crisis might be developing. He observed Grievant and a client arguing. The client stated that she could not do the work. Grievant responded in a harsh tone, "Sit down, it is right there in front of you."

The witness then read a statement he had written on June 16, 1987 (EX 1):

> To whom it may concern, one day in the early part of the week of 6/8/87 I came out of the storeroom and heard a commotion coming out of Shannon Maloney's room. I hurried to the door thinking my assistance may be needed. Miss Maloney and M- S- [a client] were confronting each other. M- was saying she did not know how to do her work and Shannon was yelling at her: (Look at the paper, it is right in front of you, just look at the paper) M- then started to say something about her illness and Shannon yelled) (I don't want to hear that illness crap just do it. and M- was crying. I saw that my assistance was not needed, so I left the area.

Mr. Woodland stated that he stood in the door about 90 seconds and that the interaction was within 20 feet of him. He described Ms. Maloney's voice as harsh and very loud and testified that his written statement reflected the exact words of Ms. Maloney as near as he could remember.

A few days later while Woodland was having lunch with his wife who is the Director of Nursing, he asked her whether the institution was still practicing "desensitization therapy" whereby patients are confronted with problems. She responded no. He then related what he had seen earlier and she told him perhaps someone else would ask him about it. Later, Ms. Jan Bennett asked him to make a statement.

Woodland stated he was a member of Bargaining Unit 6 represented by OCSEA. He stated that he was testifying because he believed M- was misused. He based that conclusion on his observation that M- was yelled at to the point where she was crying and was being abused as a human being. Woodland stated he had been employed at the Center for almost ten years and had not observed the subject tone of voice as a regular occurrence.

On cross-examination, Mr. Woodland stated he had no expertise in evaluating teachers, but that he did have expertise in evaluating behavioral patterns because he knew when someone was being abusive to him. He said he had no training, however.

Mr. Woodland stated that he had never appeared before any other body concerning this matter and had never been asked by management to appear.

Mr. Woodland stated he could not remember the exact date of the incident. He reiterated that as he came out of

the storeroom where his office is, and approached the water fountain, he passed Grievant's classroom door and heard a commotion. He said that in his opinion, Grievant was trying to force M- to do work, M- was saying she did not understand it and was ill. Grievant responded that she did not want to hear any illness crap in a very harsh tone of voice and told M- to sit down and do the work. Both people were yelling. Woodland first heard M- saying, "I can't do it; I can't do it." Within a minute to two Woodland left the scene, "M- was broken down into tears." He specifically recalled Grievant using the term "illness crap" during the altercation.

Mr. Woodland could not recall the day he spoke to his wife, but it was two or three days after the incident on Thursday or Friday. He said "around Monday" Janifer Bennett asked him to give her a written statement concerning what he saw.

He agreed that he thought it was a very important incident at the time. When he witnessed it, he thought that Grievant was engaged in desensitization therapy. Woodland stated that had he known that it was not in use, he would have gone directly to his or her supervisor. However, since he had seen this type of therapy in the Center, he asked the Director of Nursing about it when he saw her.

On redirect, Mr. Woodland identified Employer exhibit 2 which is a Department of Mental Health document all employees at the Center read and sign during their orientation. He stated he had no training, but had received periodic updates about it.

Janifer Bennett, Director of Client Advocacy and Volunteer Services for the Adolescent Center, testified that she had been employed at the Center for 16 years and had been a Client Advocate since 1978. The Advocate investigates and protects client rights. The instant case was initiated by a complaint from M-, the student. Ms. Bennett then initiated an investigation of the incident.

Employer exhibit 3 was a series of reports developed out of the investigation. The Union objected to the admission of Employer exhibit 3 on grounds of hearsay. [The arbitrator has allowed the exhibit into the record inasmuch as it contained statements from the patient who was no longer at the Center and could not be called for the hearing. Moreover, Ms. Bennett is a trained and experienced investigator who carefully checked the written reports with the witnesses after they had been compiled. Nonetheless, the arbitrator has considered the fact that the reports, as well as Bennett's testimony concerning what she found in her investigation, do constitute hearsay, and the Union's

inability to cross-examine the witnesses reduces the weight that can be properly accorded the reports and testimony.]

Ms. Bennett testified that the student reported asking Grievant for help in a nice way but that Grievant talked to her in a way that the student thought did not reflect "respect" or "dignity." Ms. Bennett explained that one of the first things she explains to patients is that they have the right to be treated with respect and dignity while patients at the Center. The student reported to Ms. Bennett that Grievant told the student she didn't know where the student would be without her. The student said she had an IQ of 190 but that her illness makes her mind slow, to which the teacher responded that was "bull crap" and "crap" and that the patient did not have an IQ of 190. After which, the patient began crying.

Ms. Bennett took statements from other students, L- and B-, as well as from Woodland and Ms. Maloney. She testified that all but Maloney's statement corroborate the statement of the student. Ms. Bennett said that in each case, after the statement was written, it was returned to the individual for corrections or additions before it was finalized.

Following her investigation, Ms. Bennett recommended to her supervisor that the student, M- be removed from Grievant's classroom and placed in another teacher's class. She made the recommendation because she thought it would be in the best interests of the patient. The student was removed.

Ms. Bennett reported that there had been prior incidents regarding Ms. Maloney's behavior. She stated she had witnessed unacceptable behavior, herself. Employer exhibit 4 (dated 2-12-85) is a report of an incident witnessed by Ms. Bennett in which she accused Grievant of using a loud, harsh and condescending tone toward a student who had apparently not completed an assignment in another class. Bennett and Grievant were apparently jointly assigned to an art class at the time. She further stated that Grievant refused to help the student. Her statement goes on to say,

> This is the second time in art class that I have observed Shannon talking in a loud, harsh and condescending manner to M-. I feel that this incident violated the Patient's right to be treated with dignity and respect.

Ms. Bennett stated the behavior was not in the interest of the student and very untherapeutic.

Ms. Bennett also introduced a Client Advocacy Complaint Record dated 9-11-86 (EX 5). It is a report of a student

complaint that she had been unfairly treated. After completion of an assignment which the student felt had been done per Grievant's instructions, Grievant was not pleased and disciplined the student by confining her to her ward until the assignment was done. The Union again objected on grounds that Ms. Bennett's testimony was hearsay.

Ms. Bennett testified that following the incident, she counselled Grievant concerning patient rights. This is documented by Employer exhibit 6. An outline for the counselling session includes the following points:

CLIENT RIGHTS TRAINING

C. Appropriate demeanor for C. O. A. C. employees

1. Be as gentle and kind as possible in tone of voice, words used and body language. Tone of voice is very important. Demanding, dictatorial or sarcastic tones generally are not appropriate.

2. Do not talk about patients or staff in a loud derogatory way or laugh loudly about patients while in any area where you may be overheard.

. . . . . .

5. Verbal abuse of patients is never permitted.

a. Never tell a patient to shut-up.
b. Mocking or imitating a patient can be considered verbal abuse.

From Grievant's employment date, Ms. Bennett stated that she (Bennett) had received seven complaints and three inquiries about Grievant. During the same period no complaints have been received about other teachers. One of the complaints was partially substantiated and two were fully substantiated by other adult, non-patient witnesses. Five different students filed complaints.

On cross-examination, Ms. Bennett testified she had a degree in fine arts with a minor in art education. She has further work, but no degree, in special education and is certified in special education in the areas of learning disabilities and behavior disorders.

When asked why, in light of seven complaints, Ms. Maloney had only been counselled once, Ms. Bennett responded that she was not responsible for discipline of employees. She indicated she had done training in patient rights with

other employees pursuant to the outline in Employer exhibit 6.

She testified that there was nothing in the reports (EX 3) to indicated that Ms. Maloney had use the phrase "shut up." Ms. Bennett said she was unaware of the content of M-'s IEP. She stated that whether or not it would be abusive to encourage M- to "work independently" depended on how such encouragement was carried out.

Ms. Bennett acknowledged that the statements of the witnesses differed with respect to the words used by Grievant in her discussion with M-. One says "bull" and "bull crap"; one says "crap"; and one said "bull, or baloney, or words to that effect."

Ms. Bennett testified that M- was not psychotic but that she did have a tendency to become upset. This tendency varied. She stated that M- remained at the Center for a year and a half (while the average stay for others was 45 days) because it was difficult to place her. Ms. Bennett did not know why. Ms. Bennett stated that a child would not become hostile and defensive if she were encouraged to work independently. After she were berated, a child might become upset.

On redirect, Ms. Bennett stated that the extra training session for Grievant with respect to client rights was undertaken because Bennett had a number of complaints about Grievant. She said such one-on-one sessions were arranged as needed.

Ms. Jane Renner, Director of Education at the Central Ohio Adolescent Center, testified she had held that position five years, had been with the Department of Mental Health for eight years, and had supervised Grievant since Grievant was employed in 1984. She also testified that she had engaged in corrective counselling with Grievant. One of these occasions involved loud, harsh admonishing of a student in a classroom (EX 7). She agreed this was an incident in the art room. The conclusion of this Record of Counseling Interview, dated 2/20/85 (EX 7) is,

> Shannon agreed that her tone of voice was an area that she needs to pay close attention to.

The Record of Counseling Interview was signed by Grievant.

A second record of Counseling Interview dated 9/16/86 (EX 8) was introduced by Ms. Renner. It concerns "disrespectful comments on ward work" and allowing a psychotic student to close himself into a closet during a playful interchange. As part of a response, Renner suggested, and Grievant agreed to receive, training in

client's rights with Jan Bennett. The training was carried out and reported in a memo dated October 7, 1986 (EX 6).

On 12/3/86, Ms. Renner filed an Employee Incident Report (EX 9) and caused a Written Reprimand (EX 10) to be issued to Grievant for playing a radio at her desk and working on an assignment for her own post-graduate studies while students were working at their desks. According to the Employee Incident Report radio playing was a violation of a long-standing rule that had been discussed with Grievant a number of times.

In general, Ms. Renner stated Grievant has been receptive to counseling and improves for a time following such counseling sessions, but the behavior repeats itself. She stated that the link among the incidents described in Employer exhibits 7, 8, and 9 was a lack of respect for the students. Ms. Renner characterized Grievant as a "very good teacher," she plans well and is good with her written work. She appears to have had some difficulty in making the transition from her former position and the special clientele at the Center. She has gone beyond the call of duty in doing volunteer activities.

Ms. Renner introduced the Corrective Action Report (EX 11). It states,

> 6/9/87 in AM
>
> On this date a patient reported she asked you for help with her work in a nice manner. You told her she could do the work herself. She then said she had an IQ of 190 but that her illness makes her slow. She said you replied "Bullcrap, that's Crap! You do not have an IQ of 190." An argument resulted. M- became quiet and then you explained the work while the patient sat crying. The patient does not feel she was treated with respect and dignity.

On 6/16, Ms. Renner testified she approached Grievant with the Report and asked whether she wanted representation. Grievant replied that she did. On 6/18 Renner approached Grievant again who said she would arrange representation by the next day. On the 19th, Renner met with Grievant, but there was no Union representation present. Renner stated that Grievant wanted to go ahead with the matter without representation.

Ms. Renner stated that the incident led to progressive discipline because earlier discipline did not seem to have worked. In Renner's opinion, the behavior of Grievant during the incident in question met the definition contained in Mental Health rules on Patient Abuse (EX 2) at

paragraph C(1), ". . . insulting or course language or gestures directed toward a patient which subjects the patient to humiliation or degradation . . . ."

Ms. Renner stated that she did not treat Grievant any differently from any other employees and that Grievant had not been discriminated against because of her Association activities. Ms. Renner stated she had been a member of OEA when she, herself, was a teacher, and would rejoin if she were to return to teaching. She stated Grievant had never filed any grievances with her; and Grievant had never been denied time off for Association business.

On cross-examination, Ms. Renner testified that she had not sent any official notice to Mr. Stevens, the site representative of the Association. She agreed that Grievant had indicated she wanted representation, but stated also that representation had not been denied.

Mr. Stevens then introduced a letter (AX 2) dated January 8, 1988, in which Grievant was thanked for her special efforts at the holiday season to arrange a donation of sweaters from the UPS and off-grounds trips for the patients and for playing Santa at the holiday party. Ms. Renner thought these efforts deserved to be noted and so she wrote the letter to Grievant.

With respect to the incident in question, Renner described the patient, M-, to be a concerned student who felt she was falling behind and realized it. Prior to the incident, in April, M- filed a complaint to the effect that Grievant was not answering her questions. Renner, Grievant and M- met to discuss the matter. Renner stated that M-'s IQ did not test at 190 in her schizophrenic condition at the Center. She described a schizophrenic child as one who is very emotionally disturbed.

Ms. Renner agreed that working independently might be one of the Individual Education Plan (IEP) goals for M-. She also agreed at the time of the incident that Grievant may have been trying to promote independent work, but she also stated that was not the issue here. Rather, it was the demeanor in which the instruction was given. She agreed that she was not present and based her knowledge of what happened on the reports she had read.

Ms. Renner testified that she did not appear at the pre-disciplinary conference or any previous hearing on this matter. After her initial meeting with Grievant, Ms. Renner testified she had not been invited to participate in any of the proceedings in this case.

Mr. Stevens introduced Association exhibits 4 and 5 relating to grievances Grievant had filed earlier. One

related to absenteeism for which Grievant had been suspended for two days. The discipline was reduced to a warning. The second related to a requirement that Grievant supply a doctor's slip following each absence--a requirement that was rescinded after the grievance was settled. Ms. Renner testified she was unfamiliar with the outcomes in both cases.

Ms. Renner testified that although management had provided counseling, it had not given Grievant any previous discipline with respect to the type of offense involved in this grievance.

On redirect, Ms. Renner stated that the interactions she had with Grievant on June 16-19, 1987, were not, in her opinion, pre-disciplinary conferences. Renner said she merely wanted to inform Grievant of the reported incident. She said she believed a pre-disciplinary conference had been conducted at a higher level.

In developing an Individual Treatment Plan for M-, Renner, Grievant and others participated. She stated that such a plan would not include yelling at a client or talking to them in a harsh manner. She stated that part of the training of staff involves the need to talk to patients in a calm manner.

Ms. Renner testified that the instant disciplinary action was related to the radio playing incident inasmuch as they both reflect an underlying tendency on the part grievant to improperly attend to students--a lack of respect. It is the right of the students to be taught.

She also testified that loud, harsh voices can have a damaging effect on patients at the Center regardless of the intent of the person who is being loud or harsh.

On re-cross, Ms. Renner stated that a teacher may occasionally work on paperwork related to her teaching assignment while students are completing in-class assignments. In the incident involving the radio, however, Grievant was working on personal matters, not her teaching assignment.

Albert Hogan, Labor Relations Officer at Central Ohio Psychiatric Hospital, testified that he acts as labor relations officer for the Central Ohio Adolescent Center which is on the same grounds. He investigated the instant charges against Grievant and in the process interviewed her. He stated she did not request representation at the time, nor did he offer any. Mr. Hogan stated that the meeting he had with Grievant was pursuant to Section 13.02 of the Agreement wherein it states, "An employee may, upon request,

have an Association representative present . . . ." He reiterated that Grievant did not request representation.

Mr. Hogan testified that the Corrective Action Reports, Reports of Oral Counseling, and Suspension Letters are all in an employee's personnel file to which the employee has access. He also testified that there were a total of 48 grievances last year for all 700 employees on the grounds of the Hospital and Center. He characterized that as a relatively low number reflecting a good working relationship with the employees and unions involved.

Mr. Hogan was asked to read the following sentence from Section 13.03 of the Agreement,

> At the [pre-disciplinary] conference, the employee will be provided with an explanation of the Appointing Authority's evidence, and an opportunity to present the employee's side of the story.

He was asked whether this required the presence of all witnesses. In his opinion, he stated, it did not. A list of witnesses and the nature of their testimony is what is required.

On cross-examination, Mr. Hogan stated that the Agreement provides for representation at pre-disciplinary hearings that may lead to suspension or discharge, but not necessarily at hearings related to reprimands or to counseling sessions. Hogan admitted that during the course of his initial interview with him, Grievant asked whether she needed a lawyer. He told her, in his opinion, he did not think so, although he also told her she had a right to have one. Mr. Hogan also stated that in his opinion "counseling" and "oral warning" are the same. Moreover, in his opinion, representation is not required where disciplinary action is less than a suspension.

Mr. Hogan testified that the pre-disciplinary hearing was held 49 days after the incident. He stated that this was "prompt" pursuant to the Agreement.

[At this point, Mr. Stevens questioned Mr. Hogan extensively regarding the time frame and, in Mr. Stevens's view, delay associated with this case. The arbitrator allowed the questioning, but has since concluded that the delays, to the extent that they occurred, were not so extraordinary that they interfered with the due process to which Grievant is entitled in any material way. Therefore, this questioning has no bearing on the outcome of this dispute and is not reviewed here.]

Richard Sowell, an employee of the Central Ohio Adolescent Center, testified that he knew the patient/student, M-, who was the accuser in this case. He also testified that he was the focus of a rape investigation as a result of a charge by M-. The alleged incident occurred about May, 1987. He was placed on administrative leave until cleared of the charge. Sowell testified that another patient told him at several points during the subsequent period that M- had made other accusations involving him. On each occasion he went to his supervisor to find out whether the charges were being seriously considered.

Mr. Sowell stated that one day he saw M- come back to her room upset saying that Grievant had refused to help her with her work. She said she wanted to go see Jan Bennett to see about getting Grievant fired.

On cross-examination, Mr. Sowell stated that he is responsible for instruction in Physical Aggression Avoidance Response Remediation training for employees. Grievant has been in his classes. Mr. Sowell stated that if a client is upset and acting improperly in class, that it would not be appropriate to yell at the client. The proper response is to wait until the client stops yelling and then to speak to them in a normal tone.

Mr. Sowell stated that he found out from another patient that M- had called security. He as not told by the Center, or anyone in authority, who had made the charge.

On the day M- came back to the ward crying, Mr. Sowell asked her what the problem was. She stated that Grievant would not help her with her assignments and that she wanted to go to Jan Bennett. He did not recall talking to Grievant about the situation, "because a lot of our patients make accusations." He clarified that M- had charged Sowell with raping another patient, not M-, herself.

Carrie Smolik, a teacher at the Ohio School for the Deaf for 8 1/2 years, and departmental representative for the State Council of Professional Educators, testified that as grievance chairperson, she receives copies of all grievances that are filed. Her committee processes the grievances and makes determinations about what will go to arbitration. She therefore has an opportunity to review all grievances in depth.

With respect to the instant grievance, Ms. Smolik testified that grievant had told her that she had never been reprimanded for this sort of behavior before and thought it was unfair that she receive a suspension for her offense.

Ms. Smolik testified that counseling was never intended to be a part of the progressive discipline system.

Ms. Smolik stated that when the Employer did not offer a timely response to a grievance, it made it difficult for the Association since the only possible response from the Association is to escalate the grievance to a higher level. She stated that the Association had never refused an Employer request to extend a time limit for response.

Mary Shannon Maloney, Grievant, testified that she had been a teacher at the Center for almost four years. She has a degree in special education with training in how to work with patients of the sort the Center has. On June 9, 1987, she was teaching a class with three students: M-, L-, and B- who was a new student. These were the only people in the room. Grievant saw no one at the door at any time.

At the time of first investigatory interview, Grievant said that Ms. Van Pelt, her supervisor, brought Mr. Hogan to her room and told Grievant that Grievant needed to speak with Hogan. She assumed it was an order and that to refuse would be insubordinate. When Hogan told her he wanted to talk to her about an incident with M-, Grievant asked whether she needed a lawyer. Hogan responded that he did not think it was necessary.

Grievant described the incident of June 9 for which she was subsequently disciplined. M- asked Grievant for some help with her work. Grievant asked M- whether she had read the directions and M- said, "No." Grievant told her she needed to do that before she would help and that after that, if she needed help, Grievant would give it to her. M- became upset and started talking about her IQ and her medication slowed her down. Grievant again instructed her to read the directions. M- became more upset. The grievant told M- they were not going to discuss M-'s mother or her IQ and that M- needed to do the work. Grievant told her that if she couldn't control her behavior she would need to return to the ward. At that point M- was very upset, but she read the directions and did the work.

Grievant stated that M- was very upset and speaking loudly and screaming. Grievant admitted that she (Grievant) was talking as loud as M- "in order to communicate with her." Grievant denied using the terms "bull," "bullcrap," or "crap" during the discussion. She stated she did not use any of those terms with her students.

Grievant testified that she wrote the individual education plan (IEP) for M-, and one of the goals was to try to get M- to work independently. Grievant stated that is what she was trying to encourage the student to do on the day of the incident. She stated she had no intention to treat the student in a malicious way or to treat her in an

unprofessional manner. In Grievant's opinion, she did not do either of these.

Grievant did not believe the conversation she had with Mr. Hogan the following week would lead to discipline and was reassured in that respect when he told her she did not need counsel. She testified that there is a lot of counseling among the staff and the management-staff relationship was very informal at the school. At lunch, she has heard about incidents like the one she was disciplined for.

Grievant testified that at the time she received counseling from management, she signed a statement to the effect that it had occurred, but nothing was said about such sessions being "disciplinary."

Grievant stated that M- had been diagnosed as schizophrenic and psychotic. She also stated she had been a teacher for nine to ten years. Her relationship with M- has not always been smooth because M- "has problems" from time to time. Grievant felt that a two day suspension was an "over reaction" to what happened. The delay in getting the matter to arbitration has caused the matter to hang over her head for a long time.

Grievant testified that at the "personal conference" (July 21, 1987, first page of JX 2), she and Mr. Stevens asked for the witnesses to appear, or that they have access to their statements. She testified that she and Stevens were told they could have neither. She was told there was a statement from Mr. Woodland, but she was told by Ms. York that she could not have it.

At the Step 3 hearing, none of the clients and neither Mr. Woodland or Ms. Renner were present. She stated that at the conclusion of that hearing, she was still not sure exactly what the charges were against her. The charge was "failure of good behavior" which is ambiguous to Grievant. In her opinion, she was therefore unable to prepare her case properly.

On cross-examination, Grievant said she was familiar with Employer exhibit 2 and had read an updated version of it. [Mr. Stevens objected to EX 2 at the hearing on the basis that it is in the nature of "work rules" that the contract requires be submitted to the Association. Mr. Stevens asserted the Association had not received EX 2. The arbitrator has allowed EX 2 into the record inasmuch as it is a published Employer policy, known to Grievant, that was in existence for many years prior to the Agreement.] Employer exhibit 13 is an Employer record signed by Grievant indicating she had read and had explained to her the rules contained in the Patient Abuse/Neglect policy.

Grievant was asked to describe her voice during the incident in question. She said she was speaking in a voice louder than the normal conversational tone but she did not believe there was a problem with the tone. She did not agree that she was talking louder than M-. Grievant indicated she had been through the training offered by Mr. Sowell. She said that at the time of the incident she was trying to avoid sending M- back to the ward. M- finds that extremely stressful. Grievant stated that she did remain quiet for a time and let M- talk pursuant to the Sowell training. Grievant denied yelling at M- while she was yelling at Grievant.

Grievant agreed that it was possible someone was at the door, but it was within her line of vision and she saw no one.

Grievant said she understood that it was inappropriate to embarrass and humiliate a client. She said she recalled her training sessions with Jan Bennett but did not think the incident with M- fell into any of the categories of verbal abuse discussed by Bennett.

With respect to the interview with Hogan, Grievant indicated she had asked only whether she needed counsel but admitted that she did not ask for union representation. She agreed she was familiar with the Agreement since she was on the negotiating team. She also understood the right to representation. She said she felt "under attack" and that she might need something more than union representation. When asked whether she understood that discipline was being contemplated, she replied that she had no idea what was being contemplated. During the interview, she stated she was under the impression that it was merely intended as a form of harassment and even at the end of it she did not anticipate any disciplinary action would come of it. The reason she requested representation in her initial interview with Renner was because she felt she was being harassed so when Renner offered it she took it.

With respect to her lunch discussions, Grievant could not describe specific incidents.

At the pre-disciplinary hearing, Grievant was told that the incident report had been signed by Ms. Renner and that there were statements from Mr. Woodland and M- and the other two girls in the classroom, but she was not permitted to see the statements or to know what was in them in detail.

At the step 3 hearing, specific issues raised included the fact that the original pre-disciplinary hearing was called a "personal conference"; that some of the timelines had not been met; and, of course, that there was no just cause for suspension. She also recalled Mr. Stevens raising

the issue of access to documents or to interview witnesses. The objection was that the Association had never been given access to the specifics of the charges against Grievant; it was only generally described by management representatives.

Grievant stated that prior to her service with the Employer she had worked for the Lancaster City Schools, the Ohio Department of Youth Services and the Ohio Department of Mental Retardation and Developmental Disabilities. She agreed that there were differences between these past employers and the current Employer, although she has dealt with mentally disturbed youth in the classroom. She did not agree that she felt she could be more assertive with students in the other settings.

On redirect, Grievant testified that M- did her work, it was satisfactory, and she had calmed down. She agreed with Mr. Stevens's statement that she had taken charge of the situation and resolved it without sending the student back to the ward.

Position of the Employer

The following is the arbitrator's summary of the argument contained in the Employer's post-hearing brief.

Procedural matters.--With respect to timeliness of disciplinary action, the Agreement does not impose a time-frame for taking disciplinary action. Without contractual limits, the Employer is bound by basic notions of fairness when imposing discipline. In this instance 37 working days passed between the day of the incident and the pre-disciplinary conference. This is not an unreasonable amount of time in which to conduct two investigations and schedule the pre-disciplinary conference. The Association has failed to show how this time span adversely affected the grievant or the Association. It did not in any way deprive the grievant of a fair consideration of her case. Additionally, this issue of untimeliness was not raised at the Step 3 grievance meeting. Not raising the issue when it would have been fresh is indicative of the fact that this is a completely contrived issue.

With respect to discovery of documents, the Agreement provides specifically at 13.03, "At the conference the employee will be provided with an explanation of the appointing authority's evidence . . . ." (Emphasis added.) The contract does not provide for the grievant the right to cross-examine witnesses nor for discovery of documents at the pre-disciplinary conference. Subsequent to the pre-disciplinary conference, the record does not show that either party made a request for documents prior to the arbitration step. At Step 3, the Association lodged an

objection over the Employer's failure to provide documents at the pre-disciplinary conference, but not at the grievance hearing. In the week of the arbitration hearing, the Employer voluntarily sent copies of all the documents it intended to present in order to provide the Association with complete discovery. Finally, testimony established that all of the documents introduced by the Employer except the client complaint forms are kept in the grievant's personnel file to which both Grievant and the Association had access.

These alleged procedural errors did not contravene the basic notion of fairness and are not founded on contract language. Grievant and the Association knew the charge against the grievant and the evidence the Employer had to support the charge at the conclusion of the pre-disciplinary conference on July 30, 1987.

With respect to representation rights, the grievant, herself, testified that she did not request Association representation during the investigatory interview. The contract clearly places the burden on the employee to request representation. Grievant cannot reasonably claim she was deterred from asking for representation by her supervisors statement, "You need to speak to this man," because she did ask whether she needed an attorney. The right to representation was never denied because Grievant never asked for it.

Substantive issue.--Jerry Woodland's statement and testimony establish the facts of the June 9, 1987 incident which led to the disciplinary action. He was an eye witness and has established both the tone of voice and some of the exact language used. Mr. Woodland testified that the student was agitated and crying throughout the incident and that she blamed her inability to do the assignment on her illness. Grievant confirmed that this incident occurred. She supports Mr. Woodland's statement that the student was agitated, claiming that her illness kept her from understanding her schoolwork, and that Grievant raised her voice. The two differ only with respect to Grievant's "tone" of voice and usage of the words, "illness crap." Grievant's testimony is clearly self-serving in that it stops just short of self indictment. Her credibility is further reduced by her claim that Mr. Woodland did not observe the incident as he claims without offering any explanation of how he could have otherwise known of the incident.

The testimony of Janifer Bennett adds support to the Employer's claims concerning this incident. Ms. Bennett testified to the findings of her investigation and entered into the record a collection of statements that had been made shortly after the incident. The client who initiated the complaint against Grievant is no longer in the Center

and could not be compelled to testify. The clients' statements substantiate Mr. Woodland's statement.

Ms. Bennett's testimony also shows that the grievant has repeatedly displayed a disregard for client rights. She testified to first hand knowledge concerning Grievant's inappropriate tone of voice on at least two occasions in her art class. One of these incidents prompted Ms. Bennett to write an incident report which resulted in a formal counselling session between Grievant and her supervisor, Jane Renner. This incident occurred in February, 1985.

Another documented instance of Grievant's nontherapeutic behavior was provided in a client's complaint about Grievant's response to the client's written assignment characterizing it as "garbage." This incident occurred in September, 1986 and resulted in an extended individual counseling session during which Grievant was clearly told that her interactions with clients had been filled with violations of their rights. There was an explanation of client rights provided during this session as well as training on proper demeanor, attitude and tone of voice for client interaction.

A written reprimand was issued to Grievant on December 12, 1986, which, despite the fact that it did not deal with tone of voice, was significantly related to the instant offense. It represents yet another incident wherein Grievant displayed inappropriate behavior in the classroom in front of her students. Incidents of misconduct do not have to be identical to result in progressive discipline. If they had to, conceivably an employee could violate each and every workrule the employer had without suffering removal. Incidents of misconduct need only be of a related nature to allow the Employer to move along the steps of progressive discipline. In this case, Grievant received ample prior notice that violating the institution's rules concerning proper classroom demeanor would result in increasingly severe discipline. The behavior in each of these incidents has shown the grievant's lack of respect for the clients in her class. This pattern of behavior is more than mere poor performance. It is a matter of misconduct that is destructive of the therapeutic environment.

Association arguments.--The Association alleges that the Employer has on other occasions disciplined Grievant because of her Association activity without just cause and that the Employer denied a grievance filed by Grievant that was subsequently found to have merit. The record shows a written reprimand concerning Grievant's classroom behavior (EX 10) which was not grieved when it was received in December, 1986; thus the Grievant and Association accepted it as disciplinary action taken for just cause. Six months later the Employer suspended Grievant for tardiness. This

suspension was subsequently reduced to a written reprimand because the Employer determined that the previous written reprimand was not sufficiently related to Grievant's tardiness to result in the next step of progressive discipline. The Association's witness testified that just cause for discipline did exist in the tardiness case. In another grievance concerning Grievant's use of sick leave, the grievance was resolved at the second hearing. One grievance resolved after its second hearing does not define harassment or signal a retaliatory labor-management relationship.

The Association also attempted to discredit the client who filed the complaint through the testimony of Richard Sowell. His testimony merely shows that unsubstantiated charges are levied against employees; but it also shows that the Employer is aware of this possibility and thoroughly investigates allegations before taking administrative action. Ms. Bennett testified the client filed five charges while she was a resident and only two of them were against Grievant. She also testified this was not an extraordinary number given her length of stay and level of functioning. On the other hand, Grievant has been the subject of seven complaints and three inquiries during her four years of employment. During the same time period there have been no complaints against her peers. The seven complaints involved five different clients. Additionally, both the client advocate and Grievant's supervisor directly observed episodes of misconduct from the Grievant which were similar to the current misconduct. Further, the allegation in this instance was substantiated by another employee.

With regard to the disparate treatment in similar circumstances involving other teachers, the Association offered absolutely no corroborating evidence, and no name or date of a specific incident. This argument must be dismissed as completely contrived.

Summary & Conclusion.--Given the clear and convincing evidence surrounding this disciplinary action and the obvious lack of animosity between Grievant and her supervisor, the Employer is forced to conclude that the Association has pursued this grievance to arbitration for purely political reasons. The fact that Grievant was on the negotiating team and is currently on the grievance committee for the Association has not led to harassment by the Employer but has forced the Association to arbitrate a grievance clearly lacking in merit.

The Employer requests that the arbitrator deny this grievance.

Position of the Association

The following is the arbitrator's summary of the argument contained in the Union's post-hearing brief.

Just cause is the major issue in this case. Daugherty's seven tests will be used to show that management had no just and sufficient cause to discipline Grievant.

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? Grievant was charged with Failure of Good Behavior (spoke inappropriately to a patient). Management offered no rule concerning failure of good behavior. Grievant was never given forewarning or foreknowledge of the possible or probable consequences of her conduct.

2. Was the Company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the Company's business and (b) the performance the Company might properly expect of the employee? If Management had a rule concerning "failure of good behavior" (speaking inappropriately to patients) that had been properly promulgated, it might reasonably be related to (a) the orderly, efficient and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee.

3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? Management conducted an investigation to substantiate its charge. In no way was this investigation a full, fair and objective one. On or about June 16, 1987, Ms. Renner informed Grievant of an investigation and asked if she wanted representation. Grievant requested representation. Section 13.03 provides that there shall be written notice of a pre-disciplinary conference to the employee and to the designated Association representative. The designated site representative received no notice of a meeting held on or about June 18, 1987 from the appointing authority.

Further, Section 5.06 provides that Association representatives are given approval to attend meetings in each step of the grievance procedure; that the Association is the exclusive representative of the employee in the enforcement of any rights under Article 5; and that the Association has the final authority to pursue a grievance at each step of the grievance procedure. Section 5.01 provides that ". . . every effort shall be made to share all relevant and pertinent records, papers, data, and names of witnesses

to facilitate the resolution of grievances at the lowest possible level."

Sometime between June 16, 1987 and July 28, 1987, an investigatory meeting was conducted by Mr. Al Hogan, Labor Relations Coordinator, Central Ohio Psychiatric Hospital. The Association Site representative was not involved. The investigation was not full, fair, or objective. Some of management's staff served as prosecutor, judge, and witness against the employee (Al Hogan and Mary York).

4. Was the Employer's investigation conducted fairly and objectively? The Employer's investigation was not conducted fairly or objectively. Management went about its investigation in a haphazard manner not giving notice to the Association. The grievant was not informed of the charges until July 28, 1987. Grievant was not given an opportunity to tell her side of the story until Management had clearly made a decision to suspend. No data, document, or relevant information was shared with the Association until the arbitration hearing. Management has alleged that they have no contract obligation to allow representation before the pre-disciplinary conference. It is obvious that management is not familiar with Section 5.06 of the Agreement. Grievant's statement was not given consideration. Other teachers whose rooms were in close proximity to the Grievant's were not questioned or used as witnesses.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged? Management has the burden of proof and the proof must be substantial, not flimsy. The evidence obtained by management in this case ranged from flimsy to non-existent. The testimony of Renner and Bennett was hearsay. Jerry Woodland, who did not give a statement to management until a week after the incident, gave conflicting testimony. He was not sure of the day or year of the incident. Woodland was not sure where he was at the time; at the water fountain, in the hall, or coming from the storeroom. The student witnesses alleged that the terms "bull" or "baloney" were used in reference to the 190 IQ, Woodland alleges that the term "crap" was used concerning the illness and not being able to do the work. Woodland also alleges Grievant said, "Look at the paper, it is right in front of you, just look at the paper." The students in the room made no such reference to looking at the paper. Management offered no substantial evidence or proof that the employee was guilty as charged.

6. Has the Company applied its rules, orders and penalties evenhandedly and without discrimination to all employees? Article 13 of the Agreement provides for progressive discipline. It is agreed by the parties that where the charge is less than theft, fighting, selling

drugs, sexual assault, etc., this negotiated form of discipline will be followed. While management has used counseling before the Agreement was negotiated, counseling is not one of the forms of discipline in the negotiated progression. Grievant has never received either a verbal or written reprimand for the alleged charge (Failure of Good Behavior, spoke inappropriately to a patient).

Management has given the Grievant two written reprimands since the signing of the Agreement; one for playing a radio during class and one for tardiness. The latter was reduced from a two-day suspension on June 9, 1987, on the same day as the alleged incident. Article 5 of the Agreement prohibits reprisals against employees who initiate or participate in grievance procedures. The Association submits that the two-day suspension for Failure of Good Behavior is a direct reprisal for the reduction of the earlier suspension to a written reprimand. Management has not applied its rules, orders and penalties even-handedly without discrimination to all employees.

7. Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Company? The teaching of adolescents is a difficult and challenging task. Teaching a severely, profoundly, mentally handicapped adolescent, diagnosed as having schizophrenic tendencies is an even greater task.

The student's IHP encourages more independent work. Grievant should be praised for working hard to get the client to read a story and answer questions before seeking help. Evaluating a teacher's procedures without complete knowledge of the total situation is completely irresponsible. In a school environment, it may often be appropriate to speak firmly. In a psychiatric hospital it may be necessary. The Association contends that the degree of discipline administered in this case is extremely out of line with the offense.

Conclusion.--The action against Grievant was unreasonable, inappropriate and in violation of Article 13, Progressive Discipline, of the Agreement. Management has acted arbitrarily and capriciously. We ask that you rescind the two-day suspension and make the grievant whole.

Discussion

Procedural issues.--At the hearing, the Association addressed a number of procedural issues. In its post-hearing brief, the Association focused on three alleged procedural errors--(1) failure on the part of the Employer

to conduct a complete and fair investigation; (2) failure of the Employer to notify the Association or assure the grievant proper representation; and (3) failure to share all relevant documents with the Association at the lowest possible level. The arbitrator held, at the time of the hearing, that procedural errors, if found, would be considered by the arbitrator only to the extent that they prejudiced the grievant.

The Association's principal complaint with respect to the first charge is that the grievant was not given a chance to explain her position until after the Employer had effectively made its decision to suspend her. The arbitrator is somewhat confused by this assertion. Ms. Bennett was the Employer's initial investigator in this matter and it was based on her report, including a statement by the grievant (part of EX 3) that the Employer decided to take disciplinary action. Moreover, the pre-disciplinary conference of July 28 allowed Grievant the opportunity to respond to the charges being made against her. At least she had an opportunity to give her version of the events of June 9. The notice of suspension was dated August 6, well after the July 28 meeting. There is no evidence that the decision to suspend had been made prior to the July 28 meeting.

The Association also asserted the Employer had made no effort to interview other teachers in the general area where Grievant's room is. In fact, it is unclear whether the Employer interviewed such teachers or even whether there were other teachers in the area. Given the circumstances of this case, the Association must do more than simply throw out an assertion that other persons should have been interviewed in order to prove there was an incomplete investigation. It is incumbent upon the Association to be specific and to show how and why such interviews might have been relevant. Moreover, in order for the assertion to be given serious weight, the Association would have to explain why it did not call such potential witnesses in defense of the grievant.

In sum, the arbitrator is convinced that the Employer's investigation was as fair and complete as necessary, given the circumstances of the incident.

The Association's second assertion is that the Employer did not fulfill either its contractual or legal obligation with respect to notice of pending disciplinary action or to Grievant's representation rights. The Association points first to Article 13 which requires written notice of any "pre-disciplinary conference" and then to Article 5 which assures the Association the right to be present in grievance adjustments.

There is no question that the Employer sent written notice to both Grievant and the Association of its intent to conduct a pre-disciplinary conference on July 28. That notice is dated July 21. Apparently the Association objects to the labelling of that meeting as a "Personal Conference" but the structure and content of the notice leaves no doubt about its purpose. Moreover, although there were prior contacts between Grievant and various representatives of management including Renner and Bennett, none of these could properly be construed as pre-disciplinary conferences as that term is used in Article 13 of the Agreement. Renner testified she merely informed Grievant the June 9 incident was under investigation and the meeting with Bennett was clearly investigatory. Hence, the arbitrator must conclude that there was proper written notice pursuant to Article 13.

With respect to Section 5.06, from both context and content it is clear that these paragraphs are intended to guarantee the Association its rights as the bargaining agent, not to assure any particular employee representation. Without further explanation or argument from the Association to the contrary, the arbitrator finds this portion of the Agreement irrelevant to the case.

Although the Association did not cite Section 13.02 in its brief, that section has relevance to the Association's assertion since it provides that,

> An employee may, upon request, have an Association present during a meeting with representatives of an employing agency held for the purpose of obtaining information which might reasonably lead to disciplinary action against that employee.

The two meetings held for the purpose of eliciting information about the incident from Grievant were those with Bennett and Hogan. In neither case was there a showing by the Association that Grievant requested representation.

Thus, the Association's position with respect to both notice and representation cannot be sustained.

Finally, the Association points to Section 5.01 which states, in relevant part,

> The parties intend that every effort shall be made to share all relevant and pertinent records, papers, data, and names of witnesses to facilitate the resolution of grievances at the lowest possible level.

At the pre-disciplinary hearing, the Association specifically requested the reports of interviews with witnesses and any statements made by them. For some unexplained reason,

management did not comply with that request. At the hearing, as well as in its brief, the Employer contended that "discovery" was not a contractual obligation until the arbitration step of the grievance procedure.

Such a position is in clear conflict with the obligation of the Employer as set forth above. Although the pre-disciplinary conference is not part of the grievance procedure, it is clearly an adversarial process and could lead to a grievance. Moreover, the absence of a specific request from the Association at later steps of the grievance process does not absolve the Employer from the responsibility to share relevant documents. The obligation in Section 5.01 is an affirmative one which requires the sharing of documents and other evidence even in the absence of a request. It is not conditional upon a request.

Although the Employer has violated the Agreement by its refusal to share information, it is difficult to see how the absence of the specific documents in question could have prejudiced the Grievant. The Association was provided with the names of the witnesses and the substance of their statements. The Association has not convinced the arbitrator that it was surprised in any way by what was presented to it during the week before the arbitration hearing. Thus, although the Employer violated the Agreement, specifically Section 5.01, the Association has failed to show any material loss, so there is no necessity for any remedy.

Substantive issue.--The first substantive question is whether the evidence supports a finding that Grievant committed an offense meriting discipline at all. The Employer presented evidence in the form of testimony from Jerry Woodland and signed statements from the complaining client/student (M-) and her classmates that Grievant confronted the client in a loud voice yelling at her. The Grievant was alleged to have used the term "crap," "bull crap," "bull," or "baloney," during the course of the altercation. Mr. Woodland characterized Grievant's tone as abusive and demeaning.

Grievant did not deny that the incident had occurred and that she had raised her voice to a level above normal in her efforts to encourage the client to work independently and not to rely on Grievant to accomplish her assigned tasks. She explained that M- had not read the directions for her assignment and became upset when Grievant told her she would assist M- only after M- had read the directions and tried to do the assignment herself. Grievant denied that she had used any of the terms listed by her accusers, however, and she also denied that she had abused the client. The Association characterized her demeanor as "firm."

The evidence convinces the arbitrator that an altercation occurred between Grievant and M-. It was apparently brief, but significant enough to attract the attention of Mr. Woodland as he headed for the drinking fountain from his storeroom. Contrary to the Association's brief, Mr. Woodland's testimony reflected a clear picture of what had happened and was without confusion or discrepancy. Woodland mentioned different locations at different points in his testimony, but none were inconsistent. At no time did he exhibit any confusion about the date--it was early the week of June 8, 1987. Based primarily on his testimony, the arbitrator has concluded that the demeanor of the grievant was neither "gentle" nor "kind" and at the very least she was "demanding." By her own testimony, Grievant raised her voice above a normal tone as she addressed a student who was upset even in the eyes of Grievant.

The arbitrator is also convinced that Grievant used the moderately harsh term, "crap," to characterize what M- was saying to Grievant about her illness, although such a finding is less significant than the general demeanor with which Grievant was conducting herself.

The line between firmness and abusiveness in a situation such as this is thin. Firmness implies a defensive posture while abusiveness implies a more aggressive demeanor. When one is being challenged and frustrated by what is admittedly a regular if not daily problem, it is easy to slip over the line from firmness to abusiveness. The fact that such a slip is easy to make, that there was a responsible eyewitness who asserts that it did, and that Grievant has been observed committing the same offense before is enough to convince the arbitrator that it happened in the instant case.

The offense committed was a momentary lapse in good judgement, perhaps caused by habit, that any professional may make from time to time. It must be viewed in light of clear evidence that Grievant is considered a good teacher by her supervisor (testimony of Jane Renner) and an extra-ordinarily caring person as demonstrated by the letter of commendation she received in January, 1988 (AX 2).

Is discipline merited for this kind of behavior? In other places it might not be. Where, as here, the students are severely mentally disturbed and the Employer has issued regulations and offered instruction concerning the inappropriateness of such behavior, it is rightly subject to discipline if it occurs. In this particular instance, Grievant was fully aware of the subject student's diagnosis. She had signed to acknowledge that she had read the Employer's regulations which bar the use of ". . . insulting or course language . . . directed toward a patient which subjects the patient to humiliation or degradation;" and

less than a year before the incident she attended a special personal counseling session on Client Rights where she was specifically instructed to, "Be as gentle and kind as possible in tone of voice, words used and body language. Tone of voice is very important. Demanding, dictatorial or sarcastic tones generally are not appropriate."

The arbitrator is sympathetic to the Association's argument to the effect that handling a student in the classroom setting is a professional matter, generally best left to the teacher's discretion. The Association went on to elicit testimony that M- had, in fact, calmed down and completed her assignments as requested by Grievant without the need for further disciplinary action against M-, thus demonstrating the correctness of Grievant's response. The fact that Grievant's approach seems to have worked in this instance does not make it acceptable to the Employer. The existence of explicit directives regarding tone of voice, gentleness and kindness override such an argument by the Association. The arbitrator is certainly no professional in the field of special education, but it does not take an expert to know that it is more important to avoid exacerbation of schizophrenic or psychotic behavior than to teach an adolescent to be independent. Such exacerbation was the risk run by the Grievant here.

Turning now to the appropriate disciplinary response by the Employer, it was clear at the hearing that a crucial issue in this case could be whether the offense committed here is sufficiently similar to Grievant's earlier offenses to warrant advanced progressive discipline, or whether it was so different that the appropriate response is at the initial step of the progressive discipline schedule laid out in the Agreement.

The Employer argues that this incident is similar to the one for which Grievant was reprimanded in December, 1986--playing a radio in the classroom and pursuing her own personal work while students were completing assignments at their desks. In the Employer's view it is but a further reflection of Grievant's lack of regard for student rights and failure of good behavior in the classroom in front of her students.

The Association argues, on the contrary, that the December, 1986 offense was distinctly different from the June, 1987 incident. Therefore, the Section 13.04 progressive discipline program must begin at the beginning.

A progressive discipline system is, above all, designed to correct or change employee behavior which an employer finds unacceptable. It is not merely a set of hurdles over which the Employer must jump in order to fire an employee. These conclusions are so widely understood in the labor

relations community that the arbitrator has no choice but to conclude they are the foundation intended by the parties for the progressive discipline Article of the Agreement. The question before the arbitrator, then, is whether the Employer has applied the concept as it is spelled out in the Agreement and intended by the parties.

The incident in question involves what the arbitrator has already concluded was an error in judgement by Grievant --a momentary lapse in which she verbally abused a student. It is fair to say that Grievant was frustrated, and perhaps even provoked to some extent by the student, but her lapse was nonetheless unacceptable behavior. In her view, however, even at the time of the hearing, her behavior was not incorrect or in violation of Employer expectations.

The December 1986 incident, wherein Grievant was discovered playing a radio in violation of previous instructions, and pursuing a personal homework assignment while actively on duty for the Employer, was not an error of judgement but a knowing violation of her obligations to the Employer and her students. She accepted the disciplinary action which followed without grieving it.

Errors of professional judgement are much more complex than knowing violations of management directives and are substantially different from them. Most important, from the viewpoint of progressive discipline, it is altogether unclear what Grievant could have learned from her disciplinary reprimand for radio playing and misallocation of time to do personal homework that would have prevented the error in judgement she made in verbally abusing her student, M-. The two incidents are no more alike than excessive tardiness is to either one.

The arbitrator is mindful of the Employer argument that offenses need not be identical to evoke progressive discipline. In some collective bargaining agreements, parties explicitly agree that offenses against employer rules are "cumulative" and will lead to progressive discipline; ordinarily such language is accompanied by a relatively short period during which offenses are maintained in an employee's personnel file.

Despite the fact that such language is absent here, it is entirely reasonable to invoke progressive discipline for only loosely related offenses under certain circumstances. For example, where a general pattern of employee behavior reflects a level of irresponsibility that is unacceptable to the employer, and discipline for various offenses coupled with a sustained employer effort has failed to correct such an employee attitude, progressive discipline is appropriate. In this case, however, the Employer has failed to establish such a pattern of employee irresponsibility.

Finally, the severity of the Employer action must be considered. Sustaining this disciplinary action by management would mean more than merely sustaining a two-day suspension with loss of pay. It also carries with it the effective probation of the employee for an indefinite period. On her next offense, the employee would be subject to immediate discharge. The Agreement apparently sets no limit on the length of time such threat would hang over Grievant.

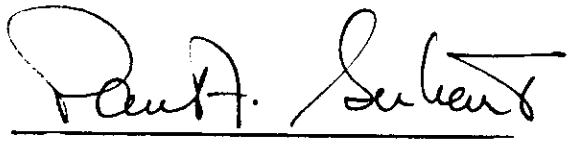
Such a penalty is not appropriate in the face of the offense--a momentary lapse of good judgement. This was the first recorded lapse of professional judgement since her training review by Ms. Bennett nine months earlier. At that time, Grievant received what was labelled a Counseling Interview, a record of which is in her file (EX 8). There is no question that this interview constituted a "Verbal reprimand (with appropriate notation in the employee's personnel file)" as required at the first step of progressive discipline. Despite the absence of the word "reprimand," both the explicit words of EX 8 and the context in which it was received by Grievant indicate that it was, indeed, a verbal reprimand. The next step of progressive discipline, therefore, should be a written reprimand pursuant to the Agreement, and the arbitrator determines that is what the Agreement requires in this case.

Notwithstanding the right of the Appointing Authority to impose "more severe discipline" than is provided in the progressive discipline system when, in its discretion, "the infraction or violation merits more severe discipline," the Arbitrator is empowered by the Agreement, in this instance, to reduce the two-days suspension to a written reprimand. The Agreement clearly provides that the progressive discipline schedule will "ordinarily" be followed. In this case, the Employer did not attempt to justify more severe discipline than the schedule provides; the Employer merely misapplied the schedule. Moreover, the Employer provided no reason to apply more severe discipline.

Finally, the charge by the Association that the Employer has discriminated against Grievant due to her Association activity is a serious one never to be taken lightly by an arbitrator. The Association bears the burden of showing the existence of such discrimination, however. The Association has asserted that other teachers have been guilty of similar offenses in the past without consequence, but no specific incidents were cited nor was any evidence adduced to show the Employer knew about such incidents but failed to take action. Where, as here, the charge against a grievant is substantiated, and the Association has produced no clear evidence of disparate treatment, the charge of discrimination must be dismissed.

AWARD

The grievance is sustained, in part. There was just cause for discipline of Grievant, M. Shannon Maloney, but the progressive discipline schedule was misapplied. Discipline shall be reduced to a Written Reprimand; Grievant's personnel file shall be adjusted accordingly; and Grievant shall be made whole for any loss of wages, benefits or seniority due to her improper two-day suspension.



ARBITRATOR

Cleveland,
Cuyahoga County, Ohio
June 2, 1988