

A R B I T R A T I O N
O P I N I O N A N D A W A R D

STATE OF OHIO
DEPARTMENT OF MENTAL HEALTH
(DAYTON MENTAL HEALTH CENTER)

and

February 21, 1989

OHIO HEALTH CARE EMPLOYEES UNION
DISTRICT 1199, WV/KY/OH,
National Union of Hospital and
Health Care Employees, AFL-CIO

ARBITRATOR: DONALD B. LEACH, appointed through the procedures of the
Office of Collective Bargaining, Ohio Department of
Administrative Services

APPEARANCES: FOR THE EMPLOYER:
 Karlin Dunlop, Advocate, Ohio Department of Mental
 Health, 30 East Broad Street, Columbus, Ohio 43215

 FOR THE UNION:
 Kathleen Kraemer, Union Organizer, 1579 Summit Road,
 Room 124, Cincinnati, Ohio 45237

I S S U E

Stipulated by the Parties

"Was there just cause for Grievant's two-day suspension
for sexual harrassment? If not, what shall the remedy be."

B A C K G R O U N D

This matter arose at the Dayton Mental Health Center of the Ohio Department of Mental Health among three individuals, the Grievant, Mr. Mario Mancini, classified as Workshop Program Evaluator 2 in Psycho-Social Rehabilitation, on the one hand, and Ms. Beth Smith (nee Newport) and Ms. Debra Evans, two students in Mental Health Technology at Sinclair Community College, who were assigned to the Dayton Mental Health Center for practical experience, called a "practicum", as part of their college work and while there were placed under the direction of the Grievant.

The events in issue extended from June 18, 1987 until about August 4, 1987. During that period, both students alleged repeated acts and comments, primarily of sexual harrassment, consisting of approximately twenty-four items in all. (During the latter part of that period Ms. Evans was absent from the program for a few weeks while undergoing indoctrination for employment at the Center.)

Disciplinary action was begun in August 1987 and pursuant to the labor Agreement a pre-disciplinary conference was held. Dr. James P. Gahagan, at that time the Acting Superintendent of the Center, presided. A number of individuals attended the conference, including the two students and the Grievant. Several items of complaint were heard at that time and summarized by Dr. Gahagan. They are as follows:

"Mr. Mancini was alleged to have made an offensive statement while eating a cherry in Building 66 in the presence of Ms. Evans and Ms. Newport. This allegation was made in both women's statement and by Ms. Evans in the conference. According to Mr. Mancini, the statement was made by him to Mr. Temple. Mr. Temple and Mr. Mancini indicated that Ms. Evans was not present when the comment was made. She was apparently in the Personnel Director's office at the time. Mr. Temple indicated that Ms. Newport was on the other side of an office divider. While the statement may well have offended Ms. Evans and Ms. Newport, it was directed to Mr. Temple and apparently overheard by Ms. Newport. Ms. Evans apparently was not present at the time.

Ms. Newport, in her statement and in the conference, indicated that Mr. Mancini told her in his office that he had an affair with a particular DMHC staff member and asked her about her personal social life. Mr. Mancini denies making these statements. Ms. Pat Russell-Campbell's

statement indicated Ms. Newport said she "heard rumors that Mario had had an affair with a nurse here at the hospital...". There were no witnesses.

Ms. Evans, in her statement and in the conference, indicated that after a statement by her about a Social Worker who just left Mr. Mancini's office as being a nice person, Mr. Mancini said "she has nice tits too". Mr. Mancini denies making the statement. There were no witnesses to this exchange.

Ms. Evans, in her statement indicated that Mr. Mancini "was deliberately and knowingly staring at me, and in certain private areas of my body". When she asked him what he was staring at, Mr. Mancini stated "you". Mr. Mancini denies this. There were no witnesses to this exchange.

Ms. Evans, in her statement and in the conference, indicated that while getting out of a car when Mr. Mancini, Ms. Evans, and Ms. Newport were all sitting in the front seat, Mr. Mancini squeezed Ms. Evans' leg. During the conference, Ms. Evans stated that Ms. Newport did not see this. Ms. Newport, in the conference, said she did see Mr. Mancini squeeze Ms. Evans' leg. Ms. Evans, in her statement, said it was intentional though Mr. Mancini said it was accidental. Mr. Mancini denied squeezing Ms. Evans' leg intentionally.

Ms. Evans, in her statement, indicated that on the way to Goodwill, Ms. Evans, Ms. Newport, and Mr. Mancini were listening to music on the radio. Each expressed the kind of music they liked. Ms. Evans stated that Mr. Mancini said "he liked the kind of music that the girls danced on the tables". Mr. Mancini denied making that statement. Ms. Evans did not mention this statement in the conference. Ms. Newport did not mention this in her statement or in the conference. A review of the check-out slips for state cars used by Mr. Mancini during the time frame of 6/15/87 - 7/20/87 to Goodwill was done. The car Mr. Mancini checked out as well as the other state car Mr. Mancini could have used do not have radio in them.

Ms. Evans, in her statement and in the conference, indicated that on June 30, 1987, "Mr. Mancini squeezed and felt my behind and I turned and asked him 'What are you doing?' He stated I had something on my pants. I then stated that if I had something on my pants to tell me and

I would get it off, and to also never touch me again". In the conference, Ms. Evans said the "something on my pants" was a staple. Mr. Mancini denied having done what Ms. Evans said he did and denied ever touching her on the rear. There were no witnesses.

Ms. Evans, in her statement and in the conference, indicated while eating at the commissary, Mr. Mancini sat with some roofers and made some comments to them which she did not hear. Following these comments, "the entire table turned and looked at me and started laughing. Mr. Mancini then joined another gentleman and faced his chair towards my direction so he could stare at me. I left the commissary and the table of men started laughing and whistling and continued to watch me as I exited the building". Mr. Mancini denied having done what Ms. Evans stated he did. Further, Mr. Mancini said he seldom went to the commissary for lunch. Ms. Evans indicated that she believes she recognized one of the people waiting for their turn in the conference as having been one of the roofers at the table when the incident occurred. Mr. Jones and Mr. Reffitt both indicated that they did not meet Mr. Mancini until about 8/21/87 when he asked them to come to the conference on his behalf. Both further indicated they never had any contact with Mr. Mancini in the commissary nor any other place prior to their meeting him about 8/21/87.

Ms. Newport, in her statement and in the conference, indicated that while the three of them, Mancini, Evans, and Newport, were sitting in the front seat of the station wagon, "Mario reached over and grabbed the top of my leg and then ran his hand down to my knee. He said 'Can you feel that?' I pushed his hand away and grabbed my own knee and said, 'No, I have a lot of padding there'. Ms. Newport indicated that Ms. Evans had seen the incident and it made her (Evans) very uncomfortable. Ms. Evans, in the conference, indicated she saw Mr. Mancini touch Ms. Newport as described above. Mr. Mancini denied he touched Ms. Newport as described.

Ms. Newport, in her statement, indicated that in Mr. Mancini's office about 7/23/87, Mr. Mancini "made a comment by saying 'Show me your tits or get out of my office.' I just looked at him and left." In the conference, Ms. Newport indicated the interchange occurred twice. The first time Mr. Mancini made the statement, Ms. Newport acted as if she didn't hear the statement and Mr. Mancini repeated the same statement before she left the office. Mr. Mancini denied making the statement(s). Nobody witnessed the interchange.

Ms. Newport, in her statement, indicated that during the second week of Ms. Evans' orientation, she talked to Mike Horan, her instructor at Sinclair. Newport stated Horan "told me that Mario said Debbie was not working out and had a lot of personal problems. Mario also told Mr. Horan I also thought Debbie had a lot of problems which was a lie". Mr. Horan, in a telephone conversation indicated that he did not talk to Ms. Newport about any problems Ms. Evans might have in the practicum. Mr. Horan indicated Mr. Mancini discussed a problem concerning who is in a group that concerned Ms. Evans. Mr. Horan did not, however, discuss this problem with Ms. Newport.

Both Ms. Evans and Ms. Newport, in their statements and in the conference, indicated distress about various rumors of a sexual nature and about other matters concerning them and concerning allegations of Mr. Mancini's relationship to them. Mr. Mancini and Ms. Russell-Campbell attempted to follow-up on those brought to their attention. Ms. Newport and Ms. Evans could, in a few cases, not identify the DMHC staff members involved.

In reviewing the statements both written and in the hearing, it seems probable that Mr. Mancini touched both Ms. Evans and Ms. Newport on the leg in the manner described by them. These instances were witnessed by both Ms. Newport and Ms. Evans. Even though Mr. Mancini denies having touched either person intentionally, the description by both Ms. Evans and Ms. Newport of the two touching incidents seems unlikely to have been either unintentional or accidental.

The "cherry" statement was not directed at Ms. Evans or Ms. Newport but to Mr. Temple. Ms. Evans apparently was not in the vicinity. Ms. Newport overheard the comment. While the comment showed poor judgment on the part of Mr. Mancini, it was not directed at or intended towards either woman.

The reference to the type of music Ms. Evans indicated Mr. Mancini said he preferred, as best as can be determined, took place in a car in which there is no radio. Since reference was made to a car radio, the statement appears to be spurious and unsubstantiated.

Mr. Horan indicated he did not have the conversation with Ms Newport that she indicated in her statement.

There is no reasonable way to determine the degree of accuracy of the other actions indicated in the statements and

the conference because the statements or actions were made or done involving either Ms. Newport or Ms. Evans each alone in the presence of Mr. Mancini. Mr. Mancini denies the statements or actions. There were no independent witnesses to confirm Ms. Evans', Ms. Newport's, or Mr. Mancini's statements or actions.

Based on the two verifiable instances of inappropriate touching of both Ms. Evans as witnessed by Ms. Newport and Ms. Newport as witnessed by Ms. Evans, I recommend a two day suspension for Mr. Mancini."

Dr. Gahagan's findings were upheld later by Mr. L. W. Easley, a Departmental Hearing Officer. Letter of discipline followed on September 18, 1987, by Dr. Torvik, Superintendent, which stated in pertinent part:

"Specifically, you have been found guilty of incidents involving two female Sinclair Community College students who were under your supervision for their practicum placement at that time. On or about June 25, 1987, you and the two female students drove from Dayton Mental Health Center, all three of you sitting on the front seat of the station wagon. When you arrived in front of the Job Training Partnership Act building, you reached over and touched the thigh of one female student (Ms. Beth Newport) and ran your hand down to the student's knee. You voiced a comment, "can you feel that?", that implied sexual advancement. This unwelcome action was witnessed by the other student and made her feel very uncomfortable.

Approximately one week later, you imposed sexual harrasment upon the student, Ms. Debbie Evans, when the three of you were again in a car headed for another agency. When the car stopped, you reached over and squeezed the leg of Ms. Evans."

From the time of the pre-disciplinary conference on, of course, the real issues narrowed to the offensive touching that Dr. Gahagan found, all other allegations of the two students having been found by him to be incorrect or lacking in support, conclusions adhered to by Mr. Easley. Notwithstanding, other allegations and evidence are summarized here since they bear on credibility.

The evidence at the arbitration hearing, in addition to Dr. Gahagan's report, primarily consisted of a number of joint exhibits and

the testimony of the three plus a few others. Here the data must be summarized from its raw form as it was introduced.

On August 4th, each of the students wrote out and signed separate statements outlining their charges. Those statements initiated the discipline and effected their transfer to another supervisor, as well.

Ms. Newport, her name at that time, wrote in her report that Ms. Evans and she had started at the Center on June 18, 1987. Five days later, as Grievant and she waited in his office for Ms. Evans, a conversation developed, she said, and Grievant acknowledged that he had had an affair recently with a nurse at the Center. She said she told him he shouldn't talk to her about that sort of thing. Later that morning, she said, they all went to lunch in his car and, in the course of the ride, he asked her to get a book from the glove compartment, in the course of which a bag of marijuana fell out. Some discussion ensued and both girls, she said, told him they didn't use the drug.

Two days later, on June 25th, they went in Grievant's car to the JTPA building. As he stopped the car, she said, Grievant grabbed the top of her thigh and then ran his hand down to her knee, asking if she could feel that, to which she replied "No, I have a lot of padding there" while at the same time pushing his hand away. Later she said she had asked Ms. Evans if she had seen the touching to which Ms. Evans had replied affirmatively.

Five days after that, as they were all walking into a building, she said she heard Ms. Evans say "What are you doing?" She, being further ahead, looked back and noticed that Ms. Evans appeared to be angry while Grievant was smiling.

Nothing of any relevance, except some remote hearsay about gossip among others in the Center appears to have happened, according to her statement, until July 23rd, more than three weeks after the last incident. On that day, she said she was sitting in Grievant's office with him while waiting for Ms. Evans. As she got up to leave to meet Ms. Evans, she said he told her "Show me your tits or get out of my office".

In her testimony at the arbitration hearing, Ms. Newport said Grievant appeared to be "playing with himself" at times, and said dirty things.

She reiterated that while driving he had felt her thigh all the way to her knee and asked if she felt anything. She said he had ordered her to sit in the front seat of the car while on that trip.

Grievant also, according to her, had said "Show me your tits or get out of my office".

She said she had tried to tell Ms. Gregg, Rehabilitation Services Director, who supervised Grievant, about the matter but had been refused, Ms. Gregg confining herself to removing her from the tutelage of Grievant to that of another employee. Ms. Gregg made a written statement, also introduced as a joint exhibit. In the course of the exchange between them, according to Ms. Gregg, Ms. Newport said that she was being "dragged into the situation". Ms. Gregg also reported that Ms. Newport had told her at the same time that Ms. Evans had retained a lawyer because she was afraid for her position.

At the hearing, Ms. Newport said that she had used the expression "dragged into" because she had tried to transfer out of the program and had been forced to return to it.

Ms. Newport also said that she talked to Ms. Evans about the matter almost every day.

On cross-examination, she said she had felt in the middle because she was assigned to the hospital, although she didn't want to be there. She admitted, however, that she hadn't asked for transfer until after she had filed her complaint on August 4th.

She said that the first time she talked to Mr. Horan, her instructor at the college, was about July 15th and that she had recounted no problem of hers but that the conversation was about Ms. Evans.

Ms. Evans' statement alleged that, on her first day, Grievant was offered and ate a cherry, saying to another employee "I heard that when you bite into one of these you can hear a woman scream", the other replying "I bet that's the only cherry you'll ever get".

Ms. Evans said that on their second day, Grievant told Ms. Newport that he had had an affair with a nurse that lasted about nine months.

In the course of the next week, Ms. Evans remarked to Grievant, in connection with his just completed private conversation with a social worker, that the social worker was nice and had pretty eyes, to which he responded "She's got nice tits too". Ms. Evans responded "I am a lady and that was not okay with me".

Ms. Evans said that in the week following such exchange, Grievant, at one point, was staring, deliberately and knowingly at certain "private areas of my body".

At some other time, not identified, Ms. Evans said that the three were sitting in the front seat of the car because a combative

patient was in the rear. When Grievant stopped the car, he squeezed her leg. She continued that when she looked at him, he said "Excuse me", but she believes it to have been intentional.

Ms. Evans also related the marijuana incident that Ms. Newport had reported.

At another unspecified time, they were in the car going to the Goodwill, she said. They listened to music on the car radio and discussed the kinds of music they liked and Grievant had said he liked the kind that women danced to on a table top.

She said that throughout her training with Grievant, he "was xxx telling sexual and visual jokes".

On another occasion, she said Grievant felt her "behind". When she asked what he was doing, he replied that she had something on her pants.

On July 2nd, Ms. Evans said she had asked Grievant if it were all right for a certain client to participate in a physical activities group. He responded that only certain clients could participate. She observed that she had already asked the client to participate and that now she would have to renege. She observed that she felt such conduct constituted bad "client rapport". She had told Grievant of her conclusion and, she said, he began "yelling" at her, saying that she thought she knew everything. She discussed the matter with Ms. Newport that same day, telling her that she would have to talk to her college adviser, Mr. Horan, about what had happened because Grievant was going to have to give an evaluation of her and she believed he would not give her a fair one.

On another undated occasion, she said that she was in the commissary, that Grievant entered and sat with some men who were working at that time in repairing the roof. She said Grievant made some remarks to them and that they all turned and stared at her, and then started laughing and whistling.

She said that the EEO officer had asked her if she wanted to make a complaint, to which she had responded:

I did not want to destroy Mr. Mancini's career, only that I wanted to be treated fairly, and not have my job, or practicum effected (sic)

She said she learned that there was to be a meeting in the EEO office with Grievant and her, a "confrontation" as she phrased it, at which point she refused to attend and decided to retain an attorney.

She concluded her statement with the following:

"I only wanted for Mr. Mancini to quit harrasing (sic) me, and to also discontinue the slandering of my name. I have no intentions of destroying Mr. Mancini's career, but I am not being treated fairly. When Ms. Newport went to tell her story to Ms. Gregg she told her to stay out of it because she was only a student, not to get involved and to mind her own business.

I would like the situation to be solved and for Mr. Mancini to be reprimanded, and also a written letter of apology from Mr. Mancini."

Ms. Evans testified at the hearing and said at the outset that she did not believe Grievant was "professional" and that she had separated herself from him.

She recounted Grievant's comment about "cherries", that he showed pictures and made other jokes. She said Grievant had squeezed her leg in the front seat of the automobile on one occasion and at some later time had squeezed her left buttock at which point she had told him not to touch her again.

She also alleged that after a while, Grievant had called her a "bitch" or a "nigger" every time he saw her when she was by herself, but was pleasant when Ms. Newport was around.

She said Grievant showed them both a picture of a penis and told them five reasons why it was good.

She said that Mr. Horan had told her on July 21st or 22nd that Grievant had reported she was not working out.

She said she had declined a "confrontational meeting" with Grievant and thereupon retained a lawyer.

On cross-examination, she said that she had kept a chronology of events in writing with attendant notes, but that she had not noted dates on which Ms. Newport experienced offenses.

She said, however, that she had seen Grievant touch Ms. Newport's leg.

She said she had had a disagreement with Grievant about the size of the therapy group and other matters pertaining to it in the course of which she had become angry.

Grievant testified at the arbitration hearing and described his job as grooming patients for a vocation, in which function he often had them evaluated by Goodwill Industries and the Bureau of Vocational Education.

He said he had had no other discipline since his employment in 1986 and that his work performance evaluations had been excellent. In fact, he said he had been commended for his work. He said further that these were not the first students assigned but that he had had two prior ones, one of whom was a female.

He said that he had talked to Mr. Horan about the students and told him that these two were getting out of hand, particularly with respect to Ms. Evans' attitude.

Grievant testified that at one time Ms. Evans had burst out saying that she hated white men.

He said Ms. Evans and he had argued about the therapy group because she reported going to thirty-eight patients to get them to participate, which he told her was too many. He instructed her that patients had to be taken from referral lists and not independently.

Grievant said that none of Ms. Evans' allegations was true and that, in fact, he had not even heard of the charge of playing with himself before the day of the arbitration hearing.

He said he had never called anybody a "bitch" or "nigger", never had said anything obscene, that the charge of playing with himself was absurd.

As to the trip to JTPA in which the touching of Ms. Newport was alleged to have occurred, he said there had been no such trip on the date she had alleged. He also denied ever having touched either of them.

Grievant said he knew of no complaint by anyone else about his professional behavior.

As to the meeting proposed by the EEOC office between Ms. Evans and him, he said he had wanted it in the hope of straightening things out and that no one else was supposed to be present.

Ms. Carole Leffler, a Union Delegate, testified that she knew of two other cases in which Ms. Evans had complained of sexual harrassment, in one of which, at least, she (Leffler) had participated at one of the procedural steps. (On cross-examination, Miss Evans had denied complaining about two specifically named employees.)

Dr. Leslie Hopkins, a Staff Psychologist at the Center, who had been employed there for seven years, testified that she had known Grievant since his employment began there and had worked with him and attended treatment meetings with him on two different wards.

Dr. Hopkins said that Grievant was always polite and never used unusual or bad language in her presence; that, in fact, he withdrew when others told bad jokes.

She said she had observed Grievant's contacts with staff and patients and had observed nothing in bad taste.

Grievant's office and hers, she said, adjoined each other with a common wall between and, because of temperature problems, she had been forced to leave her office door open most of the time.

When the two offices were first located in the position described, very few if any others were in the area because of remodeling. Indeed, only the two were there on occasion. In that period, she said, Grievant had always conducted himself as a gentleman and never discussed sexual matters. His presence there allayed her fears respecting the otherwise emptiness of the space.

She testified that she never heard him use the words "bitch" or "nigger", had never heard him tell dirty jokes.

One statement of an employee of the Center was discussed above for clarity in the context. In addition, other individuals signed statements concerning their knowledge of the matter. As noted, these too were entered into evidence by stipulation. It is therefore appropriate to summarize them in pertinent part.

Mr. Willie Williams, the EEO Officer said:

"On Friday afternoon July 31, 1987 Mario came in to request a meeting with Debbie, John and myself. At 2:00 p.m., Debbie arrived with a male friend and she stated she was seeing an attorney to stop Mario from saying negative things about her to other staff, as she had been told some of the things said. She refused to meet with Mario and went to OCRC to file a charge of sexual harrassment.

On Tuesday August 4, 1987 I met with Debbie and her male friend and was told she would drop the charge if Mario would apologize. At this point I requested that all the information be put in writing and I would see the Superintendent with the written documentation. At 10:00 p.m. (sic), I met with Debbie and Beth Newport, a witness and party to the charges.

of race, sex, creed, color, religion, age, national origin, political affiliation, union affiliation and activity, handicap or sexual preference, or discriminate in the application or interpretation of the provisions of this agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio.

The employer and union hereby state a mutual commitment to affirmative action, as regards job opportunities within the agencies covered by this agreement.

ARTICLE 8 - DISCIPLINE

S8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

S8.03 Pre-Discipline

Prior to the imposition of a suspension of more than three (3) days, demotion or termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story. This opportunity shall be offered in accordance with the "Loudermill decision" or any subsequent court decisions that shall impact on pre-discipline due process requirements.

D I S C U S S I O N

Much of the evidence was in the nature of hearsay. To some extent it was excluded as being too remote to be useful at all. To some extent it was accepted where it bore on credibility or supported other more solid evidence. To some extent also, it was accepted because each party presented some of its evidence in that form, apparently because of lack of other methods in the circumstances.

Much of the evidence related to gossip at the Center, one to drug matters and other charges, irrelevant in terms of the basis for discipline, which was limited to sexual harrassment. Some has been recited here to give some color to the matter but, obviously, has been ignored in reaching the decision.

It bears underlining that although the complaints of the two students covered a wide range of events relating to sexual misconduct, the presiding officer of the pre-disciplinary conference found only two valid offenses, the touching of each of the students by the Grievant. It follows that the decision here must relate exclusively to those two charges and that the evidence on other matters bears only on the

credibility problem. That problem, however, lies at the crux of this case, i. e., whether the two students are correct or the Grievant is.

In many respects, the evidence by the two students coincides. There is no one who can substantiate the Grievant's testimony as to exact occurrences. Since Dr. Gahagan didn't believe the students in at least one instance, however, the evaluation of the evidence becomes of the utmost importance.

The two students said that in parking the car at one time, Grievant had run his hand down Ms. Newport's thigh.

The evidence of Grievant's alleged squeezing of Ms. Evans' leg, on the other hand, is somewhat confused. Ms. Evans testified to that effect at the arbitration hearing but Ms. Newport did not even allude to any such occurrence. In their respective written statements, the same thing was true. At the pre-disciplinary conference, the presiding officer wrote that Ms. Evans had said that Ms. Newport hadn't seen the incident but Ms. Newport had said at that time that she had seen it.

There are bound to be discrepancies between two witnesses to the same evidence but, here, the charge is the most serious one of all under any circumstances or way of looking at the case, and Ms. Newport reflected its seriousness as to her when she mentioned it prominently in her statement and early in her testimony. Her silence in her statement and testimony about his touching of Ms. Evans makes her evidence suspect in that it didn't seem to her to be important, if true. In short, she seemed willing to support Ms. Evans but not to assert her own alleged observations on her own initiative, in any manner appropriate to the event so observed.

As to Grievant's alleged touching of Ms. Evans' buttock, Ms. Newport said she had gone ahead of the other two at the time and, in turning around, observed only Ms. Evans' appearance of anger, having heard only the ambiguous phrase used by Ms. Evans of "What are you doing?" In effect, then, Grievant's alleged touching of Ms. Evans' buttock is unsupported, depending only on Ms. Evans' evidence.

Those factors reduce the strength of the charge supporting offensive touching of any sort.

Further doubt arises from the finding of the presiding member of the pre-disciplinary conference who concluded with respect to the discussion of music and of their testimony to hearing music on the car radio that such evidence was "spurious and unsubstantiated" because the State cars had no radios. The word "spurious" clearly implies something false and knowingly so.

When the presiding member of the conference found that the testimony of the students was "spurious" in one respect, it is odd that he found the "touching" allegations to be valid simply because the two backed each other even when they didn't seem to do so fully. If the statement of one or both could not be trusted as truthful on one point, it would follow that one or both prevaricated or misstated the facts. In short, their agreement is suspect as valueless on anything and to find it valuable on one other point without some outside support is unusual to say the least.

The presiding officer also found that the "cherry" remark was not made in the presence of either woman but was only overheard by one of them while she and the Grievant were in different rooms, he not being aware of her proximity at all. This has the implication of a search by Ms. Evans for any kind of basis she could imagine to support her charges.

Ms. Newport's views of Grievant seemed to be quite ambiguous in that she was offended by him and yet said that she liked him. In fact, she said she was waiting in his office for Ms. Evans when he made an obscene remark. That incident occurred about six weeks after she started her practical experience training under him and after many incidents that allegedly offended her. One usually avoids another who is offensive whenever avoidance is possible and there certainly was no requirement that she wait for Ms. Evans in that spot, so that her presence was voluntary.

Moreover, the incident itself is somewhat peculiar. She was sitting with him in his office and apparently nothing obscene was said. When she got up to leave, he made the obscene remark along with "or get out of my office". The threat to eject her might have been meaningful while she was sitting there but can hardly be taken seriously when she was already on the way out.

By Ms. Evans' own testimony, there is reason to believe that she was biased against Grievant. She said at the hearing that he had many lapses from standards of professional conduct and that one, at least, had made her very angry because she was required to renege on her invitation to a patient to participate in a particular program, which had caused her great embarrassment. In other words, he was unprofessional for requiring her to renege on a promise she had made without authority and contrary to policy, a strange definition of "unprofessional". (She did not assert that it had been authorized, whereas he was unambiguous about the policy.)

In addition, Ms. Evans said, in relation to the calendar she kept of his offenses, that she hadn't noted improprieties concerning Ms. Newport because she was looking out for herself. The impression is that she was looking for some kind of evidence against Grievant.

Ms. Evans said she had maintained a calendar record of matters in which Grievant had offended her but in most instances failed even to mention the dates in her testimony on which offenses took place, even though she had her calendar with her at the hearing.

Her testimony was given in a hurried manner with few specifics while reciting in general terms a large number of incidents of misconduct. She was urged repeatedly to take her time but she reiterated frequently that she didn't want to take too much of the arbitrator's time. While some evidence can be hurried, the essence of a charge self-evidently must be stated clearly.

Moreover, she alleged lack of knowledge about some matters, implying lack of detailed knowledge, even though, on being pressed, she explained those details, such as the basis of her suit against the State. Thus, she had the knowledge but for some reason wanted to talk about particular things only.

According to Ms. Newport, Ms. Evans was a valued friend with whom she discussed matters frequently, sometimes daily. On that basis, she said Ms. Evans was afraid of an adverse report to her teacher supervisor at the College, an adverse report that she feared because of her mistake in inviting patients to participate in a program without authority and because she had understood Grievant to have reported in a telephone call to her teacher supervisor that she wasn't "working out".

Ms. Newport's testimony was given in a much more mature and credible manner. On the other hand, she attempted unsuccessfully to explain a remark she admitted having made to Ms. Gregg that she had been "dragged into it". She said it referred to being dragged into the program she was in, even though she had asked to be transferred. The problem is that the phrase was used during the events in issue and she made no request for transfer until after she had filed charges against Grievant and had already had a change of training supervisor from Grievant to another. The remark was understood, as Ms. Newport knew, by Ms. Gregg who heard it, to refer to the difficult problem of the relationship between Grievant and Ms. Evans, the advice to Ms. Newport at the time having to do with Ms. Evans.

Ms. Newport's testimony is suspect, then, on her explanations and on the general ground of bias in favor of Ms. Evans, a bias that became prominent in her written statement in which she took elaborate pains to praise Ms. Evans as an exemplary worker.

It is also noteworthy in that respect that during the period governing several weeks in which Ms. Evans was in an indoctrination course for employment at the Center, Ms. Newport reported no incidents of misconduct by Grievant. If he misbehaved frequently toward Ms. Newport, why didn't he do so when Ms. Evans was away and when the

opportunities would have been greater? The inference is that Ms. Newport was backing up Ms. Evans when Ms. Evans suggested an item but wasn't interested in generating charges on her own.

It may be reasonably concluded that the evidence of events by both Ms. Evans and Ms. Newport lacks the credibility necessary to uphold the charges they made.

On the other hand, it is easy to deny charges, as Grievant did, where little basis of verifying either side exists. Since he was the only other person present with the two students most of the time, there is little basis for detailed analysis of his testimony.

Grievant did admit at the pre-disciplinary conference that he had made the remark about "cherries" but, as was found in that conference, such remark was not made in the known presence of either student and no allegation was made that any other female was present. On the other hand, it demonstrates that he was not a paragon of unusual virtue but seemed to share a proclivity for telling dirty stories, a common male habit. In short, that point proves nothing except to give some indication that he tells the truth when it is embarrassing.

For resort to other evidence as to his character and conduct, reference must be made, among other things, to his record. That had remained spotless. He had worked at the Center since 1986, had worked with other students, including one female, had worked with female employees, and had never had an adverse report or a charge leveled against him. His work evaluations were excellent, implying a reasonable dedication to his duties.

In terms of the evidence against him which tended to prove a man on the prowl with a vulgar approach spread broadly toward females, it is odd that no other had been heard to complain. In short, he seems, on the basis of the objective evidence, to be a man with good rapport with his fellow employees and who enjoyed their respect.

The testimony of the students was that the remarks to them started within two to five days after their acquaintance began. It is difficult to reconcile brazenness of that sort with one who had never before had a single charge leveled against him. One does not change his spots so readily, from excellent conduct with all to innuendo and obscenity overnight with two new associates.

In terms of ulterior motive, it is also difficult to perceive any benefit to him from such conduct. Neither student alleged actual sexual advance to her. (Feeling a leg may be an advance but is not necessarily so.) His alleged remarks, to the contrary, were focused on degrading sexual relationships, an approach that is not unknown, of course, but which is not deemed to be a very intelligent or successful

one. If such conduct were merely to embarrass the women, the problem discussed above is encountered - why were they singled out when so many women are inclined to be embarrassed by such remarks and yet no others had complained about him.

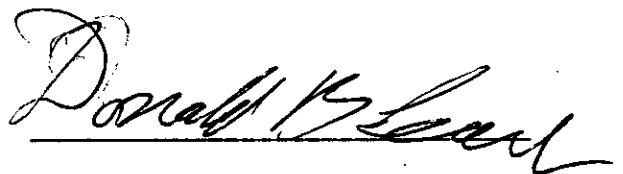
It is thus apparent that the Grievant's evidence does not rise to a level of certainty but, of course, it is about as high as can be expected in a case of this type, where the actions complained of are not open for all the world to observe. On balance, Grievant's evidence is reasonable and not rebutted.

On the other hand, as noted, the students' testimony has too many inconsistencies and ambiguities to carry the burden of proof imposed on the State in a disciplinary matter of this type.

In these circumstances, it must be held that the State's case must fall for lack of adequate support. It follows that the Grievant's record must be cleared, the two day suspension set aside and that he be made whole for any loss he incurred.

A W A R D

1. Just cause did not exist for the two day suspension of Grievant, Mario Mancini, based on sexual harrassment.
2. The said suspension shall be set aside and held for naught, and the record thereof shall be removed from his personnel file and other files pertaining to his performance as an employee.
3. Grievant shall be made whole for all loss of earnings he suffered because of such erroneous suspension and any loss of seniority and benefits shall be restored to him fully.



Donald B. Leach

At 1:30 p.m., both complaintants gave me written statements detailing harrassment. I immediately made an appointment to see Dr. Torvik on Wednesday, August 5, 1987."

An employee, Ms. Russell-Campbell said respecting Ms. Newport:

"During our discussion she talked about Debbie being mad at Mario - something about a picnic that had been on Ward 56 while I was off on sick leave. Beth stated that she felt in the middle because Debbie wanted her to side with her and she liked Mario and did not like feeling in the middle.

In meetings between myself, Mario and students, Mario has always conducted himself in a professional manner."

Ms. Gregg, in her statement, said with respect to "being in the middle":

"On July 30, 1987 Ms. Newport came to my office and I took her up to Building 65 to introduce her to Ms. Glenna Beck who had agreed to take on another MHT student. In the car, Ms. Newport stated that she was being dragged into this situation. I assumed she meant the allegations made by Ms. Evans, as Ms. Newport and I had not spoken about Mr. Mancini's conduct towards Ms. Newport. Ms. Newport further stated that Ms. Evans had hired an attorney and that she was afraid for her job. I told Ms. Newport that she was at DMHC as a student, that she needed to pay attention to her studies and not get involved in others' personal business. I also stated that Ms. Evans need not fear for her job. Ms. Newport did not at any time mention to me allegations of sexual misconduct by Mr. Mancini."

Another stipulated Exhibit was the last two evaluations of Grievant's work. They showed a uniformly high evaluation, each category of the 9 marked being in the upper third or higher.

Other facts are discussed hereafter.

C O N T R A C T P R O V I S I O N S

ARTICLE 6 - NON-DISCRIMINATION

Neither the employer nor the union shall unlawfully discriminate against any employee of the bargaining units on the basis