ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1278

OCB GRIEVANT NUMBER: 23-18-950824-1275-01-04

GRIEVANT NAME: John Kestner

UNION: OCSEA

DEPARTMENT: Mental Health

ARBITRATOR: Robert Brookins

MANAGEMENT ADVOCATE: Linda Thernes

2ND CHAIR: Cynthia Sovell-Klein

UNION ADVOCATE: Robert Robinson

ARBITRATION DATE: March 4, 1998

DECISION DATE: April 30, 1998

DECISION: Sustained in part/ Denied in part

CONTRACT SECTIONS AND/OR ISSUES: Article 24. 01, was the Grievant disciplined for just cause?

HOLDING: The Grievant received a 6-day suspension for the charges of failure of good behavior, insubordination and smoking in a nonsmoking area. Arbitrator Brookins ruled that the Employer failed to prove two of the three charges. The charge of failure of good behavior was upheld. Therefore, the 6-day suspension originally imposed was modified to a 3-day suspension. The Grievant was reinstated with full back pay and all privileges, except those lost because of the 3-day suspension.

ARB COST: $

#1278

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Northcoast Behavioral Healthcare Systems

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For the State
Linda Thernes, Labor Relations Officer
Cynthice Sovell-Klein, 2nd Chair OCB
Roger Beyer, Labor Relations
For the Union
Robert Robinson, Staff Representative
Marline McDaniel, Witness, Therapeutic Program Worker
Jonh Kestner, Grievant
Pam Chasteen, CAS
Annie Travassos, CAS
Carolyn Murphy, MR/Psych Nurse Coordinator
George Gintolli, Chief Executive Officer
Kishan C. Gupta, Psychologist
Allison Nedel, Registered Nurse
Lori Bacharowski, Therapeutic Program Worker
Nellie M. Cline, Licensed Practical Nurse
Vera M. Johnson, Therapeutic Program Worker
Case-Specific Data
Hearing Held
March 4, 1998

Grievance #
23-18-950824-1275-01-04

Case Decided
April 30, 1998

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Suspension

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Northcoast Behavioral Healthcare Systems

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For the State
Linda Thernes, Labor Relations Officer
Cynthice Sovell-Klein, 2nd Chair OCB
Roger Beyer, Labor Relations
For the Union
Robert Robinson, Staff Representative
Marline McDaniel, Witness, Therapeutic Program Worker
Jonh Kestner, Grievant
Pam Chasteen, CAS
Annie Travassos, CAS
Carolyn Murphy, MR/Psych Nurse Coordinator
George Gintolli, Chief Executive Officer
Kishan C. Gupta, Psychologist
Allison Nedel, Registered Nurse
Lori Bacharowski, Therapeutic Program Worker
Nellie M. Cline, Licensed Practical Nurse
Vera M. Johnson, Therapeutic Program Worker
Case-Specific Data
Hearing Held
March 4, 1998

Case Decided
April 30, 1998

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Suspension

TABLE OF CONTENTS

I. The Facts

The state of Ohio operates the Northcoast Behavioral Healthcare Systems (NBHS or the Employer), a hospital that treats and houses forensic patients as well as those who suffer from other severe mental disabilities. The mission of NBHS is to return its patients to society as quickly as possible. In furtherance of this mission, the NBHS staff is expected to serve as a role model for patients. Moreover, in light of the Mental Health Act of 1988,[1] NBHS must now compete with private sector hospitals for bed days. If NBHS is to retain its accreditation and to remain competitive, it must observe applicable regulations and maintain a professional atmosphere. Accordingly, NBHS maintains a strict no-smoking policy within its buildings. This policy and the related rules are reasonably related to the maintenance of an efficient operation as well as healthy patients and staff.

NBHS has employed Mr. John Kestner, the Grievant, for approximately 15 years. When this dispute arose, the Grievant was classified as a Therapeutic Program Worker. On January 18, 1995, between 2:40 and 2:45 p.m., Mr. Gupta, a staff Psychologist, allegedly observed the Grievant sitting at a patio table smoking a cigarette in the dayhall section of Unit 23-E (a nonsmoking area). Dayhall is a part of the Impulse Control Disorder Unit. Mr. Gupta immediately notified a supervisor of nursing, Ms. Chasteen, who was in a supervisor's meeting. She paged Ms. Murphy, a Registered Nurse, and asked her to witness Mr. Gupta's allegation. Ms. Murphy returned the page and, without hanging up the telephone, simply looked up and confirmed that the Grievant was sitting at a patio table smoking a cigarette in the above-mentioned area. Then Ms. Chasteen along with Ms. Travassos, another supervisor of nursing, went to Unit 23-E to investigate the matter.

They found the Grievant, Ms. Nellie Cline, a Licensed Practical Nurse, and Ms. Marline McDaniel,

---

[1] R.C. § 5119.62, Ch. 5119. Dept. of Mental Health, Federal Assistance and Reimbursements (1998).

Therapeutic Program Worker, sitting at the patio table. Ms. Chasteen asked the Grievant and Ms. Cline to join her and Ms. Travassos in a nearby report room. There, Ms. Chasteen, who did most of the talking, informed the Grievant that someone had observed him smoking in dayhall. She also stressed Northcoast's nonsmoking policy. During the meeting, the Grievant loudly demanded to know who reported him, but Ms. Chasteen declined to say. Ultimately he guessed that Mr. Gupta was the whistle blower. As the parties left the meeting room, the Grievant and Ms. Chasteen were speaking loudly to each other, and the Grievant told her something akin to: "You've been on my back for a year and its time to stop."[2] Ms. Travassos, Ms. Murphy, Ms. Cline, and Ms. McDaniel heard the statement but disagree as to whether the Grievant said "back" or "ass." Ms. Chasteen first asked and then told the Grievant to calm down and he did. However, she never directly ordered him to do so. During her investigation, a day or two after the incident, Ms. Travassos attempted to obtain a statement from the Grievant, but he waited until the pre-disciplinary hearing to offer his statement. Finally, the Employer waited fifty-six days after the foregoing incident to conduct a pre-disciplinary hearing.

On April 4, 1995, the Grievant received a six-day suspension for three infractions: "Failure of good behavior," "insubordination," and "smoking in a nonsmoking area." While processing the grievance, the Union persuaded the Employer that smoking was addictive behavior for which the Grievant should be admitted to the Employee Assistance Program. The Employer agreed to hold the suspension in abeyance until the Grievant successfully completed the Program. The Grievant, however, declined this offer because he did not believe that he had a problem.

This was neither the Grievant's first encounter with discipline, nor his first clash with Ms. Chasteen. Approximately one year before the instant dispute the Grievant reported Ms. Chasteen for physically battering another employee, Ms. Allison Nedel. As a result of that report, Ms. Chasteen received a written

---

[2] The Union claims that the Grievant said, "You've been on my back for over a year and it needs to stop."

reprimand.[3] Shortly after the Employer disciplined Ms. Chasteen, the Grievant's disciplinary problems began. Ms. Chasteen, the Grievant's supervisor, was directly responsible for at least one disciplinary action against the Grievant. A summary of his disciplinary record follows:

Date	Corrective Action Taken	Misconduct	Charging Supervisor
9/9/94	Written Reprimand	Failure to accept supervision—disobeying two orders not to place progress notes in patients' medical records and failing to attend a team meeting as ordered	Pamela Chasteen
11/22/94	Two-day suspension	Neglect of duty–insubordination—disobeying a direct order to meet with supervision to discuss allegations against him	Unknown

II. The Issue

Was the Grievant disciplined for just cause, and if not what should the remedy be?

III. Relevant Contractual and Regulatory Language

Article 24.01

"Discipline shall not be imposed on an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action."

Article 24.02

"Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of other provisions of this Article. An Arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

---

[3] The Union stresses the asymmetry between the seriousness of physical battery and the "wrist-slapping" nature of a written reprimand.

Standard Guide for Disciplinary Action

Failure of Good Behavior—"Practical joking &/or horseplay, causing or having the potential to cause injury to person(s) or property; verbal outburst or engaging in heated argument."

Insubordination—"Intentional refusal to obey instructions or orders in a matter related to a patient; demeaning or abuseful treatment of management, failure to accept authority or supervision."

EC.5

"A nonsmoking policy is communicated and enforced throughout all buildings. . . . Patients, visitors, and staff are prohibited from smoking in any of the organization's buildings. . . ."

IV. Positions of the Parties

The Employer's Position

The Employer alleges that the Grievant smoked in a nonsmoking area, was insubordinate and displayed a "Failure of good behavior," apparently by engaging in either a "verbal outburst" or "heated argument."

The Union's Position

The Union contends that the Grievant did not smoke in a nonsmoking area and that he was not insubordinate toward Ms. Chasteen. The Union did not address the charge of "Failure of good behavior."

V. Analysis

A. Burdens of Proof

Section 24.02 of the parties' collective bargaining agreement requires the Employer to carry the burden of proving its charges against the Grievant. Moreover, because the charges do not expose the Grievant to a substantial risk of stigmatization, a preponderance of the evidence is the applicable measure of persuasion or quantum of proof. Of course, the Union has the burden of proving any affirmative defenses it raises by a preponderance of the evidence in the hearing record. In this case, the Union has raised one affirmative defense—procedural error.

B. The Employer's Charges

1. Smoking In a Nonsmoking Area

Whether the Grievant was smoking in a nonsmoking area is almost entirely an issue of credibility. Under these circumstances, arbitrators often rely on one or more of the following criteria to assess the credibility of a witness: (1) Demeanor of the witness; (2) Character—specificity and clarity—of a witness' testimony; (3) a witness' capacity to perceive, recollect, and communicate relevant, material facts;(4) a witness' bias, interest, or motive, or the potential therefor; (5) a witness' prior consistent or inconsistent statements;(6) the existence of circumstantial evidence which, standing alone is not dispositive of the disputed issue, but which tends to support or contradict a witness' testimony.[4]

Also, where credibility is an issue, many arbitrators begin their analysis with a rebuttable presumption that, other matters equal, an employer's witnesses are likely to be more credible than union witnesses because the former have less reason to falsify their testimony. Such presumptions are rebuttable by any one of the foregoing criteria.

Several of the enumerated factors come into play in evaluating the Employer's witnesses. For example, internal inconsistency and gaps in his recall adversely affect Mr. Gupta's testimony. In his written statement, Mr. Gupta claimed he observed the Grievant "smoking in the dining area while sitting at the last desk around 2:35 p.m. . . ."[5] Under direct examination at the arbitral hearing, he essentially repeated that observation but with some remarkable additions. First, he stated that Ms. Cline was holding a cup of liquid while sitting at the table. Then, under cross examination, he further concluded that the liquid in Ms. Cline's cup was water.

Mr. Gupta's conclusions about the contents of Ms. Cline's cup erode his credibility as a witness on whether the Grievant smoked in a nonsmoking area. First, Mr. Gupta's testimony is more detailed than—and

---

4 HILL & SINICROPI, EVIDENCE IN ARBITRATION 101-108 (1981).

5 JX-2 at 13.

hence inconsistent with—his written account which never mentioned either Ms. Cline, her cup, or its contents. Yet, he offered the written statement one day after the incident and the detailed testimony more than three years later.

Also there is a significant discrepancy regarding Mr. Gupta's ability to recall facts. Although he easily recalled that Ms. Cline held a cup of liquid in her hands, during cross examination he could not remember how he knew the cup contained water. In fact, Ms. Chasteen and Ms. Travassos made that determination only after approaching the table where Ms. Daniels, the Grievant, and Ms. Cline were seated. Nothing in the record suggests that Mr. Gupta came close enough to the table to make that observation himself. Indeed, there is some question about whether Mr. Gupta was even on Unit 23-E when the alleged smoking incident occurred. Ms. Daniels, the Grievant, and Ms. Cline testified that Mr. Gupta was not on the unit at that time. Although Ms. Murphy testified that Mr. Gupta was on the unit before she left, that does not place him on the unit during the relevant time period—between 2:40 and 2:45 p.m. Surely if Mr. Gupta was close enough to observe whether Ms. Cline's cup contained liquid—not to mention the type of liquid—Ms. Daniel, the Grievant, or Ms. Cline would have at least seen him. The inconsistency between his statement and his subsequent testimony and the gaps in his recall compromise Mr. Gupta's credibility as a witness in this dispute.

Relevant parts of Ms. Murphy's statement[6] and testimony resemble the statements of Ms. Chasteen and Ms. Travassos. Thus, Ms. Murphy testified that when the Grievant declared that Ms. Chasteen had "been on his ass," he was "tense and his voice was *loud and angry*, with an angry look on his face." "Loud and angry" is also the phrase that Ms. Chasteen and Ms. Travassos used to describe the Grievant's demeanor. In addition, Ms. McDaniel testified that Ms. Murphy's office—from which she apparently observed the Grievant smoking—is too far away for Ms. Murphy to have observed that alleged behavior. Overall, however, the Arbitrator finds Ms. Murphy's testimony to retain some credibility. Finally, because they did

---

[6] JX-2 at 12.

not witness anything, Ms. Chasteen and Ms. Travassos are incompetent to testify as to whether the Grievant smoked in a nonsmoking area. Thus, the Employer has one credible witness regarding whether the Grievant smoked in a nonsmoking area.

The Union's witnesses also have their problems. First, circumstantial evidence indicates that Ms. Bacharowski probably was not on Unit 23-E between 2:40 and 2:45 on January 18, 1995. As Ms. Thernes pointed out in her post hearing brief, Ms. Travassos interviewed all employees who were at the scene, except Ms. Bacharowski. Why was Ms. Bacharowski overlooked? Further, neither the Union's nor the Employer's witnesses mentioned Ms. Bacharowski in their written statements.

Second, testimony of the Union's witnesses is to some extent in disarray on this issue, thereby tending to corroborate Ms. Bacharowski's absence. First, Ms Bacharowski testified that she and the Grievant were standing outside the building smoking, but Ms. Cline testified that the Grievant was standing in the doorway smoking and blowing his smoke outside. Second, Ms. Bacharowski testified that Ms. Chasteen asked her to gather the rest of the staff for a staff meeting, an allegation that the Employer stoutly denies.

Third, under direct examination, the Grievant stated that Ms. Chasteen asked him and Ms. Cline to step into the report room because he and Ms. Cline were the only smokers in the area. Later, under cross examination, he directly contradicted this testimony— stating that Ms. Bacharowski, a smoker, was present but was not asked to attend the meeting in the report room. It is doubtful that Ms. Bacharowski was on Unit 23-E and even if she were present, the discrepancy between her testimony and the Grievant's weakens her credibility.

The difficulty with Ms. Cline's testimony is that it is not supported by her demonstrated behavior which is of course circumstantial evidence. Ms. Cline testified that she and the Grievant were standing in the doorway smoking and blowing smoke outside of the building. The Employer established that ashtrays

or other receptacles suitable for discarded cigarettes were close at hand.[7] Instead of discarding the cigarette butts in the ashtrays, Ms. Cline: (1) placed them in a cup of water; (2) carried them back into the building; and (3) sat at the table holding the cup of water containing the butts. Why? This piece of circumstantial evidence tends to contradict Ms. Cline's testimony that no one was smoking at the table.

Ms. McDaniel credibly testified that none of the staff was smoking at the table and that the Grievant was standing in the doorway smoking and watching her client who was smoking outside the building. Ultimately, the Employer and the Union each have one credible witness whose testimonies profoundly conflict with each other. Under these conditions, the party with the burden of proof or burden of persuasion loses. In this case, the Employer has the burden of proving its allegations by a preponderance of credible evidence in the hearing record as a whole. That quantum of evidence does not exist in this case. Therefore, the Employer has failed to establish that the Grievant smoked in a nonsmoking area.

2. Insubordination

There are essentially two threshold issues here: (1) whether the Grievant said "Ass" or "Back" when he addressed Ms. Chasteen; (2) whether he spoke to her in a "loud and angry" or disrespectful manner; and (3) whether Ms. Chasteen directly ordered the Grievant to stop yelling. As expected, eyewitness accounts diverge along party lines. With minor variations, the Employer's witnesses essentially maintain that the Grievant shouted to Ms. Chasteen: "You've been on my ass for a year now and I'm going to put a stop to it." In contrast, the Union's witnesses insist, with minor variations, that the Grievant said: "You've been on my back for a year now and you need to get off."

Turning first to whether the Grievant said "ass" or "back, the Arbitrator views Ms. Chasteen's account of this issue with some misgivings because of: (1) the history between her and the Grievant; (2) her active and direct role in disciplining the Grievant; and (3) the fact that the Grievant's disciplinary problems

---

[7] The proposition that ashtrays were available is strengthened by the following excerpt from Center Policy # 5-8, "Designated Smoking Area" part 4: "Outdoor ashtrays will be provided and are expected to be used."

began shortly after NBHS disciplined Ms. Chasteen pursuant to the Grievant's report. Moreover, as discussed below, even if one assumed Ms. Chasteen's account to be absolutely accurate, the outcome here remains the same.

The credibility of Ms. Travassos also suffers. Her problem stems from the unlikely and unexplained similarity between her written statement[8] of February 7, 1995 and Ms. Chasteen's, which was drafted on January 19, 1995. The similarity between the letters is much more than one could reasonably attribute to chance. Following is an excerpt from paragraphs # 3 and # 4 of Ms. Chasteen's statement:

> As we entered the unit, J. Kestner, TPW, N. Cline, LPN, and M. McDaniel were sitting together at a dining room table by the patio door. N. Cline, LPN had a paper cup in her hands with wet cigarette butts in it. We approached the table and told Nellie and John that we would like to see them in the report room. In the report room, I told Nellie and John that the reason we were there was because I had received a call that John was smoking at the table in the day hall. Nellie said John had been standing at the door smoking. . . . John started loudly demanding to know who had called me. . . . John continued in a loud and angry tone of voice, that he was sick of being harassed and that it was going to stop. . . .

Following is an excerpt from paragraph # 3 of Ms. Travassos' statement:

> As we were entering **into** . . . [??] unit we found J. Kestner, TPW, N. Cline, LPN, and M. McDaniel were sitting together at a dinning (sic) room table by the patio door. N. Cline LPN had a paper cup in her hands with wet cigarette butts in it. We approached the table **there** and told Nellie and John that we wanted to see them in the report room.
>
> In the report room, **P. Chasteen** told Nellie and John that the reason we were **there was** because **Pam** had received a **phone** call that John was smoking in the day hall. Nellie said John had been standing at the door smoking. John wanted to know who had called **Pam and he was** demanding to know who had called **her**. **He** continued in a loud and angry tone of voice, that he was sick of being harassed and that it was going to stop. . . .[9]

Only the bold words in Ms. Travassos's statement are her own. The remainder belong to Ms. Chasteen. This is remarkable. Ms. Travassos simply parroted the actionable parts of the incident from Ms. Chasteen's statement. As a supervisor and a witness to a potentially serious disciplinary incident, Ms. Travassos should have drafted her statement independently of Ms. Chasteen's. This demonstrated lack of independence fatally

---

[8] JX-2 at 14.

[9] JX-2 at 14-15.

compromises Ms. Travassos' credibility as a witness in this case.

Ms. Murphy is, therefore, the Employer's remaining eyewitness regarding the "insubordination" issue. Under cross examination, Ms. Murphy testified that the Grievant said "ass" and not "back." Nothing in the record compromises her credibility on this particular point.

On the Union's side, the Arbitrator has found that more likely than not Ms. Bacharowski was not present to witness the incident in question and therefore is incompetent to testify on the issue of insubordination. Ms. Cline testified that the Grievant said "back," As between Ms. Murphy and Ms. Cline, the former holds the edge with respect to credibility. For reasons set forth above, Ms. Cline's credibility is somewhat tarnished. Finally, Ms. McDaniel offered neither a written statement nor testimony on the content of the Grievant's speech. Nor is the Grievant's testimony—that he said "back"— particularly persuasive. Therefore, the Arbitrator finds that the Grievant said "ass" rather than "back" when he complained about Ms. Chasteen's behavior toward him.

The next issue is whether the Grievant shouted his objection to Ms. Chasteen. Here, Ms. Murphy claims she heard him shout the contested statement. In contrast, Ms. Cline testified that the conversation between the Grievant and Ms. Chasteen was not "unusually loud" and, Ms McDaniel testified that the Grievant and Ms. Chasteen emerged from the report room shouting at each other. Nor did the Grievant ever deny speaking to Ms. Chasteen in a loud voice.

Again, Ms. McDaniel and Ms. Murphy are credible witnesses on this point. Circumstantial evidence—the strained relationship between the Grievant and Ms. Chasteen—and reason tend to corroborate Ms. Murphy's observation. Their history makes it unlikely that the Grievant would not become annoyed at the prospect of having Ms. Chasteen to verbally counsel him about smoking on Unit 23. Therefore, it does not stretch credulity to find that the Grievant probably spoke at an elevated pitch to Ms. Chasteen. The Arbitrator, therefore, finds that the Grievant loudly proclaimed to Ms. Chasteen: "You've been on my ass for a year, and I'm going to put a stop to it." Finally, a preponderance of evidence in the record shows that

Ms. Chasteen twice asked the Grievant to calm down but never gave him a direct order to do so. After her second request, the Grievant quieted down.

The issue now is whether either the Grievant's statement or his delayed compliance with Ms. Chasteen's requests constitute insubordination. Insubordination is a cardinal offense in industry because it erodes management's traditional right and authority to direct the work force. Also, insubordination has a number of faces, two of which are indicated here: (1) verbal insubordination: and (2) failure to obey a supervisory request. Verbal insubordination occurs where an employee uses abusive language towards a supervisor, especially in the presence of other employees. The record clearly shows that other employees and patients were present when the Grievant uttered the statement in question. Finally, the record does not show that "Ass" is a part of the institutional language or shop talk at NBHS. Therefore, the only issue is whether the term itself— or taken in the context of the statement—was abusive.

It was not. Several reasons support this holding. First, the Grievant did not use the pejorative either to characterize or to personally attack Ms. Chasteen. Instead the pejorative was simply a part of his frustrated complaint about the situation. This is not to say that the Arbitrator condones the use of this pejorative or that the Grievant might not have wisely chosen a more tasteful and professional way to express his frustration. Second, on its face, the pejorative is not sufficiently vile to support a presumption—as distinguished from hard evidence—that the statement seriously challenged either Ms. Chasteen's supervisory authority or the rehabilitation of patients on Unit 23-E. Nevertheless, the Employer is hardly obliged to tolerate repeated utterances of such pejoratives, given the cumulative risk of an adverse impact on supervisory authority or patient rehabilitation or both. Third, the statement was vented in the heat of the moment and in all likelihood simply reflected the heated history between the Grievant and Ms. Chasteen. For these reasons "Ass" as used in these particular circumstances and in the context of the established statement does not constitute verbal insubordination.

The second issue is whether the Grievant's failure to calm down after Ms. Chasteen's first request

constitutes insubordination. Again the answer is no. To prove behavioral insubordination, the Employer must establish the elements of that charge: (1) the supervisor issued an order and not a request or suggestion; (2) the order was clearly and specifically stated; (3) the supervisor clearly warned the employee of the consequences if the employee disobeyed the order.[10] These criteria reflect that insubordination is a serious charge with correspondingly serious disciplinary consequences. Employees, therefore, deserve proper notice of these facts so that they may timely correct their errant behavior. The enumerated criteria ensure that employees receive such notice.

The hearing record contains neither evidence nor allegations that all of the criteria were satisfied. First, Ms. Chasteen, testified that after the Grievant's first outburst—"Someone told them I was smoking. I know it was Gupta!"—she "*asked* [the Grievant] to stop it."[11] After his second outburst—"You've been on my ass for a year now and I'm going to put a stop to it."—Ms. Chasteen "*told* [the Grievant] that he was in a patient area and this was not appropriate behavior." The Grievant then calmed down. In short, Ms. Chasteen asked the Grievant to calm down; then told him to calm down, and he did. When she clearly issued the order, the Grievant obeyed.

There is no insubordination here. Even if the Grievant had not immediately calmed down after being specifically told to do so, the Employer would have difficulty sustaining a charge of insubordination because Ms. Chasteen failed to satisfy the third criterion—apprising the Grievant of the disciplinary consequences if he did not calm down. In conclusion, the facts in this case do not support a charge of insubordination.

3. Failure of Good Behavior

The Standard Guide for Disciplinary Action defines "Failure of good behavior" as either emitting a "verbal outburst" or engaging in a "heated argument." The Arbitrator has found that the Grievant did shout

---

[10] ADOLPH M. KOVEN & SUSAN L. SMITH, JUST CAUSE THE SEVEN TESTS 79, 245 (Donald F. Farwell ed., 2d ed. 1992).

[11] JX-1 at 11.

to Ms. Chasteen: " "You've been on my ass for a year now and I'm going to put a stop to it." Shouting such a statement clearly falls within the ambit of "Failure of good behavior," as defined in the Standard Guide for Disciplinary Action. Moreover, the Union did not address this charge either during the hearing or in its brief. Even if it had, however, the record establishes that the Grievant spoke to Ms. Chasteen in a loud, angry manner, which, in the Arbitrator's view, constitutes a verbal outburst as defined in "Failure of good behavior." It is not clear, however, that the Grievant's outbursts constituted "heated argument," since there was no evidence of an argument between him and Ms. Chasteen. Consequently, the record shows that the Grievant is guilty of a "Failure of good behavior."

C. The Union's Affirmative Defenses

1. Procedural Error

The Union correctly points out that Article 24.02 of the collective bargaining agreement obliges the Arbitrator to consider any delays by the Employer in initiating the disciplinary process. The record shows that the incident in question occurred on January 18, 1995 and that the pre-disciplinary hearing occurred on March 14, 1995, approximately 56 days later. During this period, the Grievant was available to attend a pre-disciplinary hearing.[12] In attempting to justify its delay of the hearing, the Employer asserts that, during the time in question, resources in the Human Resource Department were occupied in preparing for a large merger which would improve the Employer's sagging financial status. Under these circumstances, according to the Employer, "[T]he Grievant's discipline was not the immediate priority."[13] From the Employer's perspective, the substantive questions are: (1) whether the collective bargaining agreement specifically states when a disciplinary meeting is to be held; and (2) whether delaying the pre-disciplinary hearing somehow harmed

---

[12] However, the Grievant was unavailable for discipline from April 1, 1995 through August 1995.

[13] Employer brief at 8.

the Grievant.[14]

The Employer is partly correct. First, the collective bargaining agreement does not provide for a pre-disciplinary hearing within a specific time period after alleged employee misconduct. Therefore, according to the Employer, the collective bargaining agreement is satisfied so long as a pre-disciplinary hearing is held within a reasonable time under the prevailing circumstances.

On the other hand, the hearing record does not support the Employer's contention that the fifty-six-day delay was reasonable under the circumstances of the merger. Reasonableness in this context implies due diligence on the Employer's part. Moreover, under the collective bargaining agreement, the Employer is responsible for holding timely pre-disciplinary hearings. Thus, if the Union raises a good-faith challenge to the timing of a pre-disciplinary hearing, the Employer has the burden of proving that the hearing was timely under the circumstances. Of course, the Union must establish its availability for a pre-disciplinary hearing. But the Employer must prove that, despite due diligence, prevailing circumstances precluded it from holding a timely hearing. Otherwise, the Employer is free to hold pre-disciplinary hearings at its convenience—a result that the "reasonableness" language of Article 24.02 clearly rejects.

Nothing in this hearing record establishes that with due diligence the Employer could not have held the hearing sooner. Instead, in its brief, the Employer merely alludes to the impact of the merger and the financial crises as reasons for discounting the importance of the Grievant's pre-disciplinary hearing. Furthermore, during the arbitral hearing, Mr. Beyer testified that preparations for impact bargaining delayed the pre-disciplinary hearing. It is not clear that these preparations are related to the merger.

In any event, these bald assertions hardly reflect diligent effort. If the Arbitrator is to consider whether the fifty-six-day delay is reasonable under the circumstances, the Employer must offer

---

[14] In addition, the Employer argues that this Arbitrator would violate Article 24.02 by setting a specific time period within which to hold pre-disciplinary meetings, since the collective bargaining agreement contains none. In contrast, the Union argues that the Arbitrator would violate article 24.02 if he fails to factor procedural matters into the evaluation of the merits." Both parties are correct on these points.

evidence—not mere assertions—of the surrounding circumstances and how the Employer diligently attempted to meet its contractual responsibility of timeliness. On its face, no fifty-six-day delay is reasonable. There must be sufficient explanation available to permit reasonable minds to assess the propriety of such a delay. Nothing in this record indicates any effort whatsoever by the Employer to conduct a timely pre-disciplinary hearing. Absent such evidence, the fifty-six-day delay is unreasonable on its face and, thus, violates Article 24.02. The analysis does not end here, however.

The Employer's second argument has more persuasive force. It correctly asserts that procedural defects, without more, do not necessarily warrant remedial adjustments or adjustments to the merits. Nowhere does the collective bargaining agreement provide that a procedural defect without more justifies remedial action. Therefore, one may safely assume that the parties indeed wanted employers and arbitrators to be ever vigilant of procedural errors, and in that way minimize them. Procedural rules are imposed in large part to assure that disputes are settled before either party is harmed due to lost evidence, faded memories, etc. Moreover, as the Union correctly asserts, dilatory discipline might very well frustrate the rehabilitative role of progressive discipline as well as its specific and general role as a deterrent. Even so, the party who alleges a procedural defect traditionally must link the defect to some harm—unless perhaps the procedural defect is egregious on its face, thereby warranting a presumption of adverse impact. That is, the charging party must show that the defect either skewed the outcome of the dispute or otherwise caused a non-trivial impact. Because the record does not establish that the fifty-six-day delay harmed the Grievant or otherwise skewed the outcome of this dispute, no remedial adjustments are warranted.

VI. The Award

Because the Employer failed to prove two of the three charges asserted, some adjustment in the severity of discipline is proper. The disciplinary measures associated with "Failure of good behavior" range from a written reprimand to a six-day suspension.[15] Also, section 24.02 provides for "one or more day(s)

[15] JX-1 at 42.

suspension(s). . . ." In light of the Grievant's prior disciplinary record and in the interest of progressive discipline, neither a written reprimand nor a two-day suspension is indicated, however. Under these circumstances, a three-day suspension will serve: (1) the purposes of general and specific deterrence; and (2) the purpose of progressive discipline—notifying the Grievant that continued misconduct on his part will inevitably trigger harsher disciplinary measures up to and including termination.

Therefore, the grievance is **SUSTAINED IN PART AND DENIED IN PART**. The Employer shall reinstate the Grievant with full back pay and **all** attendant privileges, except those he lost **because of** the three-day suspension imposed by this Arbitrator.

Notary Certificate

State of Indiana)

)SS:

County of MARION

Before me the undersigned, Notary Public for MARION County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 28th day of April, 1998

Signature of Notary Public: Lee Kirkwood Randolph

Printed Name of Notary Public: Lee Kirkwood Randolph

My commission expires: 1/12/08

County of Residency: MARION

Robert Brookins

Robert Brookins