BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WOOD COUNTY (COURTHOUSE & SOCIAL SERVICES)	
and	Case 78 No. 41545 MA-5406
WOOD COUNTY COURTHOUSE, SOCIAL SERVICES, AND UNIFIED SERVICES EMPLOYEES UNION, LOCAL 2486, WCCME, AFSCME, AFL-CIO	

Appearances:
Mr. William Weiland, Corporation Counsel, Wood County, Wood County Courthouse, 400 Market Street, Wisconsin Rapids, Wisconsin 54494, appearing on behalf of the Employer.
Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1973 Strongs Avenue, Stevens Point, Wisconsin 54481, appearing on behalf of the Union.

ARBITRATION AWARD

Wood County (Courthouse & Social Services), hereinafter referred to as the Employer or the County, and Wood County Courthouse, Social Services, and Unified Services Employees Union, Local 2486, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereinafter the Commission, to designate a member of its staff as Arbitrator to hear and decide the instant dispute. The Commission designated Coleen A. Burns, a member of its staff, as Arbitrator. An arbitration hearing was held on March 6, 1989, in Wisconsin Rapids, Wisconsin. The hearing was not transcribed and the record was closed on May 2, 1989, upon receipt of the parties post-hearing briefs.

STATEMENT OF THE ISSUE:

The parties were able to agree upon the following statement of the issue:

> Did the Employer have just cause to suspend the Grievant for three days, effective September 15, 1988?
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> If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

> Article I - Management Rights
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> Except as otherwise specifically provided in this Agreement, the Employer retains all rights and functions of management that it has by law.
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> Without limiting the generality of the foregoing, this includes:
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> A) The management of the work and the direction and arrangement of the working forces, including the right to hire, discipline, suspend or discharge for just cause or transfer. The right to relieve employees from duty because of lack of work or for other legitimate reasons is left exclusively in the Employer, provided that this will not be used for purposes of discrimination against any member of the Union because of Union activity.
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> The Employer agrees that the Union reserves the right to process grievances, including arbitration, for any unreasonable application of the management's rights as contained in this article.
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> * * *

BACKGROUND:

Jan Courtney, hereinafter Grievant, is employed as a Clerk/Steno II in the Employer's Health Department. The Grievant has held this position for approximately 12 years and, at all times relevant to this proceeding, has worked in the Employer's Marshfield office. The Grievant is required to attend monthly immunization clinics which are sponsored by the Employer's Health

Department. At the immunization clinic, the Grievant has the responsibility to register clients and to provide the clients with the appropriate immunization informed consent form. The forms at issue in the instant case are pink, blue or green in color and have bold print across the top identifying the vaccines which are covered by the form. The pink form, which is used for Diphtheria, Tetanus, and Pertussis and DTP, DT and Td vaccines is attached as Appendix "A". The blue form, which is used for Tetanus and Diphtheria and Td vaccine, is attached as Appendix "B" and the green form which is used for Polio and Oral Polio vaccine, is attached as Appendix "C".

On September 13, 1988, the Grievant received the following letter from Tina Brownell, Office Manager and Robert Newman, Director, of the Employer's Health Department:

> It has been brought to my attention through a discussion with and memos from Ann Ruesch and Nancy Holleran that you have committed a serious offense in carrying out your job duties. Therefore, this is a formal written reprimand due to the incident which took place on September 8, 1988. The specific incident is an follows:
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> > At the immunization clinic held in the Marshfield office on September 8, 1988, two children, one age four months and one age five, received forms from you for the Td vaccine which is never given to a person under the age of seven. When questioned about the incident you claim to have "trouble" differentiating between the form for the Td vaccine and the form for the polio vaccine. Since the type of vaccine is boldly printed on these forms, it is obvious that you were not paying attention to your duties. It was also reported that you were making a phone call during the registration period for the immunization clinic and allowing people to wander around the department. Your registration table was set up next to your desk inside of the office rather than in the lobby as is the set practice for immunization clinics.
>
> These actions have been deemed inconsistent with our departmental goals and objectives, specifically safeguarding the health of our clients and the public as a whole and an overstepping of your authority by choosing to utilize a new setup for the registration of patients for an immunization clinic. Because effectively working the agency immunization clinics is a vital part of your job, you are expected to know the proper immunization sequence, forms, and registration procedures. Additionally, your actions reflect on the credibility of the Health Department and our professional image in the community is threatened by your careless actions. You have been working these clinics for many years and should be very familiar with the policies and procedures.
>
> Since this is your third reprimand within a five month period of time, it has been necessary to suspend you from your position for a three day period without salary effective on Thursday, September 15, 1988. Significant improvement in the performance of your job duties is expected. If a marked improvement in job performance is not observed, we will be forced to pursue further action.

On September 26, 1988, the Grievant filed a grievance alleging that the Employer did not have just cause for the three-day disciplinary suspension. The Grievant requested reinstatement of the three days pay, vacation and longevity benefits that had been lost due to the three day suspension on September 15, 1988, September 16, 1988, and September 19, 1988. The Grievant further requested that the Employer expunge the suspension from her records. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

EMPLOYER

Under the provisions of Article I, Paragraph A, of the collective bargaining agreement between the Employer and the Union, management has the right to suspend employes for just cause. The Grievant, who has been an employe of the Health Department for 12 years, has continued to make errors, which can have drastic consequences, on duties which should be routine for her. Although a veteran of the Health Department the Grievant continues to provide clients with the wrong immunization forms and endangers their lives. Additionally, when given information regarding a client with chest pains, a potentially serious problem, the Grievant merely wrote a note to the nurse of

the client rather than immediately transferring the call to another nurse or referring the patient to another health resource. The Grievant has been trained, counseled and disciplined with regard to use of proper immunization forms and with regard to safeguarding the health of clients. Nonetheless, she again failed to properly perform her duties on September 8, 1988 and again endangered the lives of clients. The Grievant's attempt to shift the burden of responsibility to the nurse on-duty demonstrates that the Grievant fails to realize she, as well as all Department employes, have a responsibility for the well-being of the client.

Contrary to the Grievant's contention, her job duties have not increased, but rather have decreased. Both Ruesch and Brownell testified that the work of the Grievant's position in the Marshfield office has diminished due to the fact that the Health Department no longer conducts pre-natal classes or otology clinics. In addition, the Department has experienced a decline in the number of school children for which it does health screening, primarily due to the fact that a number of school districts no longer contract for this service. Also, the home health care responsibilities of the Grievant have diminished because there has been a significant reduction in home health care patients.

The Grievant's attempt to argue that the office atmosphere was difficult and tense, thereby preventing her from performing her duties, was contradicted by the testimony of Ruesch. Contrary to the Grievant's belief, the new management of the Health Department, which began working in late 1987 and early 1988, was not out to get the Grievant. The Grievant attempts to explain her failure on September 8, 1988 by stating that she has difficulty differentiating colors. The Grievant has never been diagnosed as being color blind. Furthermore, the forms have their purpose printed boldly across the top. If the Grievant has problems with colors, then she should be focusing her attention at the wording of the form to ensure that she is giving out the correct form.

Contrary to the argument of the Union, the Grievant has been forewarned of the possible consequences of her conduct. Specifically, she was forewarned in her written letter of reprimand on April 14, 1989. Similarly, the Union's argument that the Employer did not conduct a fair investigation is without merit. The Grievant was given a full opportunity to explain to Ruesch what occurred. Ruesch conveyed the information of the incident, the reports of the nurses, and the explanation provided by the Grievant to Brownell. A fair investigation does not require that a particular individual conduct the investigation.

The Union's argument that the County has not been consistent in the application of its discipline policy is without merit. The occasions when the County did not discipline the Grievant, or other employes who passed out incorrect forms, can be distinguished on the basis that, on those occasions, there were no apparent life-threatening consequences. While the Grievant attempts to narrow the issue to the provision of forms, the real issue is safeguarding the health of clients. It is appropriate for the County to expect a 12-year veteran of the Health Department to exercise good judgment in potentially life-threatening situations.

While the Union argues that the penalty does not match the seriousness of the offense, the County responds that there is nothing more serious than a life-threatening error. The seriousness of the Grievant's error is not mitigated by the fact that the nurse might catch the error.

The Grievant is responsible for exercising good judgment when dealing with the health of clients. A failure to exercise good judgment which results in a life-threatening situation warrants a serious penalty. The Grievant failed to perform her duty on September 8, 1988 and, as a consequence, potentially endangered the life of a client. The Grievant has been trained and counseled in the past regarding the use of the immunization forms and her duty to safeguard clients. The Grievant's entire record is one of poor performance. Accordingly, the County had just cause to impose the three-day suspension at issue herein. Such a suspension is required to impress upon the Grievant that her misconduct is serious and that she cannot continue to make such errors.

UNION:

In Enterprise Wire Company, 46 LA 359 (1966), Arbitrator Carroll R. Daugherty identified seven now famous tests to determine if an Employer had just cause to discipline an employe. While not all of these tests are relevant to the instant dispute, a number of them are. Examining the evidence in this case in light of these well-accepted standards, demonstrates that the Employer lacked just cause when it imposed a three-day suspension on the Grievant.

The Grievant was not forewarned of the possible consequences of her alleged conduct. The Employer was required to make the Grievant aware of the rules and the consequences of breaking these rules. The Grievant's failure to hand out the appropriate forms had been tolerated in the past. The Grievant was never told that this conduct could lead to discipline if continued. Therefore, the Employer is changing the "rules of the game" without having informed the Grievant. Arbitrators have refused to sustain discipline in cases

where an employer has disciplined an employe for behavior for which it had previously tolerated.

The Employer did not conduct a fair investigation. While the letter of discipline was signed by both Director Newman and Office Manager Brownell, it appears that Brownell actually decided upon the penalty of the three-day suspension period. Brownell, however, did nothing to investigate the incident prior to imposing the discipline. Had Brownell talked to the Grievant prior to imposing the discipline, she might have found out that the Grievant had a vision problem which interfered with her abilities to distinguish between the forms in question. A fair investigation would have revealed why the Grievant was on the telephone the night of the immunization clinic and why her table had been placed where it was. Without investigating the Grievant's side of the story before imposing discipline, Brownell acted without knowing all of the facts. Knowledge of all of the facts might very well have resulted in the imposition of a lesser penalty or perhaps no penalty at all.

The Employer has not applied its own discipline policies. According to the County's policies for corrective and progressive discipline, a first offense involves a verbal warning. A three-day suspension does not occur until the third offense. As the Deputy Director testified, the Grievant was not previously put on notice that discipline could result from an error in handing out forms at the immunization clinic. Thus, the County's first disciplinary action for this alleged offense, i.e. a three-day suspension, violates the County's disciplinary policy. The County cannot credibly claim that this was so serious an offense as to warrant discipline outside of the normal progression. While Brownell claims that this was the third time the Grievant was disciplined for an error in a "life-threatening" situation, Brownell has inappropriately interpreted the County's discipline policy. Progressive discipline involves the meting of progressively greater discipline for infractions of a very similar nature. The catch-all category the County is proposing, "life-threatening situations," is a vague category that is subject to a multitude of different interpretations, and might encompass widely disparate actions. A problem with such a catch-all category is that the corrective value of the discipline is lost entirely.

Furthermore, the instant situation does not fall within the confines of a "life-threatening" situation. According to the testimony of Deputy Director Ruesch, the nurse who administers the injection does not simply give the patient whatever injections correspond to the forms the patient is holding. The nurse asks the patient or the patient's parent what they believe they are receiving. Furthermore, the nurse is unlikely to administer an immunization to an infant that should not be received by anyone under age seven. Such errors would be the responsibility of the nurse. If the Grievant's alleged errors are truly life-threatening, why is it that no action was taken in the past for alleged errors of the same sort.

The record does not indicate that the Grievant received the first step disciplinary action for any alleged errors in a "life-threatening" situation. The fact of the matter is that Brownell imposed a three-day suspension first and came up with a justification later. Realizing that it did not follow its own policies, the County has invented the "life-threatening" situation catch-all to provide the appearance of propriety to its faulty actions.

A three-day suspension is a very serious penalty. Aside from having a significant affect on the income of the Grievant, such a suspension appears to place her one step away from discharge for an offense of this nature. An offense for which she had never previously received as much as a verbal warning. Clearly, the suspension is out of proportion to the seriousness of the alleged offense. Contrary to the argument of the County, the County lacked just cause to suspend the Grievant for three days for the alleged incident at the September 8, 1988 immunization clinic. Accordingly, the County has violated the collective bargaining agreement. In remedy of this contract violation, the Grievant should be made whole for all losses she incurred as a result of her unjust suspension. Further, the Grievant's record should be expunged of all reference to the suspension.

DISCUSSION:

While the suspension letter of September 13, 1988 contained a reference that the Grievant was (1) making a telephone call during the registration period, (2) allowing people to wander around the Department and (3) registering people in the inner office rather than in the lobby, the testimony of the Grievant's immediate supervisor, Ann Ruesch, demonstrates that the suspension was based solely upon the fact that the Grievant had provided clients with the wrong forms. Since the Grievant does not deny that she provided the clients with the wrong forms, the sole question to be determined herein is whether the County has just cause to suspend the Grievant for three days for providing the wrong forms.

As the Union argues, a fundamental principle of just cause is that the employer be consistent in the use of discipline. As both Ruesch and Brownell testified at hearing, there has been one other incident in which a clerical employe provided a client with the wrong form. Following that incident, the

employe was counseled against making such a mistake and, according, to Ruesch, the matter was "cured". The record does not demonstrate that any supervisory employe of the County had knowledge of any other employe making such a mistake. As the record demonstrates, the Grievant was also counseled about handing out the wrong form when the Grievant received her November, 1987 evaluation. As the record further demonstrates, such counseling was not very effective. Since the record demonstrates that the Grievant, unlike the other employe, has failed to improve after being counseled against providing the wrong forms, the County is not inconsistent when it chooses to do more than counsel the Grievant regarding the September 8, 1988 situation.

As the Union further argues, where as here, an employer has a specific policy requiring progressive discipline, the provisions of just cause require the employer to follow these provisions. The County's progressive discipline policy, attached as Appendix "D", requires, inter alia, that records of verbal reprimands be maintained in the departmental files. The policy provides that copies of written reprimands, suspensions, demotions and terminations shall be provided to the employe, to the employe's supervisor, and kept in the departmental files. The policy further provides that, depending upon the severity of the infraction, the normal sequence of disciplinary action is as follows:

(1) First Offense - verbal warning
(2) Second Offense - written warning
(3) Third Offense - Three-day suspension
(4) Fourth Offense - Discharge

In the present case, the Employer considers the statements in the Grievant's November, 1987 evaluation to constitute a verbal warning. The Arbitrator agrees. As the Union argues, the record does not demonstrate that, during the November, 1987 evaluation, the County specifically advised the Grievant that future incidences of providing the incorrect forms would result in disciplinary action. The Arbitrator does not consider such advice to be required by either the County's written disciplinary policy, or the standards of just cause. It is sufficient that the Grievant has been placed on notice that the County did not consider such conduct to be acceptable.

The County relies upon the Grievant's written warning of April 14, 1988 as meeting the requirements of the second step of the County's disciplinary procedure. The County characterizes the incident giving rise to the April 14, 1988 written warning as evidencing a failure to utilize proper judgement, thereby subjecting a client to a potentially life-threatening situation. The Arbitrator agrees with the County's characterization of the incident giving rise to the April 14, 1988 written warning, but disagrees with the County's assertion that the incident of September 8, 1988 involves similar misconduct.

As the Union argues, and the testimony of Ruesch demonstrates, the clinic nurse utilizes his/her own professional judgment in determining whether or not it is appropriate to administer a vaccine. The nurse does not, and should not, rely upon the informed consent form which is provided to the client by the Grievant. Accordingly, the undersigned rejects the County's argument that the provision of the incorrect form is life-threatening. The conclusion that the provision of the incorrect form is not "life-threatening" is also supported by the fact that the Grievant provided the wrong form at a clinic in July of 1987, Ruesch was aware of this fact at the time of the July Clinic, and Ruesch did not even mention the matter to the Grievant until the following November, when Ruesch assisted in the evaluation of the Grievant.

Given the record presented to the Arbitrator, it is evident that the Grievant has a long history of receiving evaluations which contain complaints of failure to cope with the normal stress of the job, inattention to details, and relying upon her own judgment and, consequently making inappropriate decisions, rather than consulting with professional staff or supervisory personnel. It is equally evident, that the previous administration did not take any corrective action on these complaints. While the current administration has the prerogative to "change the rules", the Grievant is entitled to fair warning that the rules are being changed.

In summary, the Grievant, in November, 1987, was warned that it is not acceptable work conduct to provide the clients with the wrong forms. Following this warning, the Grievant, on September 8, 1988, provided two clients with incorrect forms. The Grievant does not claim, and the record does not demonstrate, that she was unaware of the fact that the forms provided on September 8, 1988 were inappropriate. Rather, as a defense, the Grievant claims that she has impaired vision which makes it difficult to distinguish colors. As the County argues, the Grievant's defense of her conduct is not an acceptable defense. The forms identify the vaccines in bold print at the top of the form. Having knowledge of her vision impairment, the Grievant should not be relying upon the color of the form and should not be placing the forms with the vaccine identification side face down on the tables, as she stated was her normal procedure. Having previously warned the Grievant against providing the wrong immunization forms to clients, the County has just cause to impose a written warning upon the Grievant. However, the Grievant's conduct is not sufficiently egregious, in and of itself, to warrant bypassing the County's

normal sequence of disciplinary action. Accordingly, the County's issuance of the three-day suspension was without just cause.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not have just cause to suspend the Grievant for three days, effective September 15, 1988.

2. The Employer is to immediately make the Grievant whole for all wages and fringe benefits lost as a result of the three-day suspension and expunge all reference to the suspension from the Grievant's files.

3. The Employer does have just cause to issue a written reprimand for the events of September 8, 1988 and may, if it so chooses, issue such a written reprimand to the Grievant.

Dated at Madison, Wisconsin this 8th day of August, 1989.

By _____
Coleen A. Burns, Arbitrator