BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BROWN COUNTY EMPLOYEES LOCAL 1901 of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	Case 471 No. 47500 MA-7289
and	
BROWN COUNTY, WISCONSIN	

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 936 Pilgrim Way #6, Green Bay, Wisconsin 54304, appearing on behalf of Brown County Employees Local 1901 of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Kenneth J. Bukowski, Brown County Corporation Counsel, 305 East Walnut, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of Brown County, Wisconsin, referred to below as the Employer, or as the County.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of John Harris, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 5, 1992, in Green Bay, Wisconsin. The hearing was not transcribed. The parties chose to make their arguments at the hearing, and not to file written briefs.

ISSUES

The parties stipulated the following issues for decision: 1/

> Did the County have just cause to suspend the Grievant for three days?
>
> Did the County violate the collective bargaining agreement by requiring the Grievant to use sick leave for the period of time between the end of his three day

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1/ The parties stipulated that, in the event a contractual violation was found, the record posed no issue regarding remedy.

suspension and his return to work on February 4, 1992?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1. MANAGEMENT RIGHTS RESERVED

> Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to . . . suspend . . . for proper cause . . . is vested exclusively in the Employer . . .

BACKGROUND

In the summer of 1991, the City of Green Bay Police Department conducted an investigation into the conduct of Gary Bentley, an employe of Unit 1 of the County Mental Health Care Center (the Center). Unit 1 is the Center's Adolescent Care Unit. Bentley faced charges alleging he had initiated sexual contact with certain Center clients. The Bentley matter provoked considerable local interest, and the police, during the investigation, sought information from the public regarding incidents involving Bentley. Ben Renier, then fourteen years old, learned of the investigation and told a counselor of his own experiences. Ultimately, Renier was referred to the police.

On September 14, 1991, Renier executed a statement with the Green Bay Police Department. The investigating officer asked Renier to identify contact involving Bentley, or any other Center staff who had made him feel uncomfortable. In the course of that statement, Renier identified instances involving the Grievant. Those portions of his statement dealing with the Grievant read thus:

> The first time I was at Unit 1 of the Brown County Hospital was around Thanksgiving in 1990 . . . While I was there in 1990 there was a staff member named (the Grievant) who would kiss me on the cheek and mouth. More on the cheek than mouth. He would also rub my leg. (The Grievant) was really big. He had red hair and a mustache. He wore a gold ring with a cougar on it, sometimes. He had both ears pierced like about more than 5 times each. He has one nipple pierced because he insisted in showing it to me. He has a tattoo on his wrist. (The Grievant) would stare at me funny whenever I had to be strip searched, coming back from a pass. He made me feel very uncomfortable . . .

> The second time I was at the Brown County Hospital was from about FEB. 4 - 19, 1991 . . . The second time I was at Brown County Hospital (the Grievant) would make me write my journal either in (an) office or the children's day room when the children were not there. He was my PIC (Person in Charge) those times and he would sit next to me, or make me sit on his lap while I wrote or explained to him. There were times when I was writing that he would rub my leg and then rub his elbow in my groin area. Other times he kissed me and several times he told me that he loved me . . .

During its investigation, the police department consulted Robert Cole, the Center's Executive Director, concerning Unit 1 staff. The police ultimately supplied Cole with Renier's September 14, 1991, statement. The police did not, however, want Center personnel to contact Renier while the Bentley prosecution was ongoing. No charges were filed against the Grievant, but Center management decided to act on the information contained in Renier's statement as soon as the Bentley prosecution permitted.

On January 20, 1992, the Center issued a "NOTICE OF INVESTIGATION" to the Grievant which stated the following:

> Information has been submitted to the employer concerning your job performance as to client care and treatment. It is required under Wisconsin law that investigation of such information submitted be conducted to insure the health, safety and welfare of clients.
>
> In the event that the results of the investigation confirm a violation of work rules, laws, ordinances or regulations relating to client care and treatment, Wisconsin law requires that corrective action be taken.
>
> During the next 72 hours, an investigation will be conducted of the circumstances involved. It will be necessary to remove you from client care during this time period. If the investigation takes longer than seventy-two hours, Administration will decide, depending on the circumstances involved, if you will work in a non-client care area until the investigation is completed. If the investigation is extended, you will be issued a new notice.
>
> Upon completion of the investigation, you will be notified of the results and of any action which must be implemented to insure that client care and treatment is not jeopardized.

On January 22, 1992, the Center confronted the Grievant with Renier's allegations. Mary Broeckel is the Center's Unit 1 Manager, and was present during this meeting. Broeckel testified that the Grievant denied some of the allegations and minimized the significance of any hugging or kissing that may have occurred during Renier's stays. More specifically, she testified that the Grievant acknowledged that he would hug or kiss Renier to say goodnight. She noted he also acknowledged he would wish Renier goodnight by saying "Love you, kid." She felt that, during the interview, the Grievant displayed poor eye contact, and was unusually nervous.

After the interview, Broeckel, Cole and other members of Center management conferred. Cole testified that he relied on Broeckel's assessment of the Grievant's account. Ultimately, Center management determined that Renier's account was closer to the truth than was the Grievant's. On January 23, 1992, the Center issued a report on the conference, which read thus:

. . .

MANAGEMENT STATEMENT:

. . .

The alleged abuses as follows took place when the boy was a client on Unit 1 in 1990 and 1991.

The alleged abuses are as follows: Kissing ex-client on cheek and mouth; rubbing ex-client's leg; putting his elbow in the ex-client's groin area; having ex-client sit on his lap; showing ex-client employee's nipple with a ring in it; staring at ex-client in a manner that upset him when doing a strip search; and telling ex-client (h)e loved him.

After review, Management feels that the ex-client is a competent provider of information and that the facts should be taken as true. Therefore, discipline is hereby issued in regard to these incidents.

COMMENTS:

As a condition of continued employment, the following will be done:

1. A psychological evaluation and/or counseling for (the Grievant) is mandated prior to returning to work.

2. A written statement from a mental health care provider is necessary to verify that (the Grievant's):

   a. behavior towards and treatment of clients will be appropriate in the health care environment.

   b. actions will not cause harm or distress to clients.

3. (The Grievant) is to abide by facility's policies and procedures especially those relating to client care.

. . .

The Grievant was afforded space to respond to the Employer's conclusions in writing. He responded thus: "I feel that the ex-client's information and facts should not be taken as true and object to the fact that this has been on file since Aug. or Sept." The Center, on the report, noted that the Grievant was suspended without pay for four calendar days.

The Grievant testified that he had heard only rumors of an investigation prior to receiving the January 20 notice. He noted that he entered the interview on January 22, 1992, afraid that his job was at risk, and

acknowledged that he was nervous throughout the meeting. He also acknowledged that Center representatives informed him of Renier's allegations. He stated he informed management that he had no specific recall of Renier's Thanksgiving, 1991, visit. He further stated he responded to each allegation regarding Renier's second visit. He acknowledged that he had hugged or kissed Renier on occasion; he denied ever kissing Renier on the mouth; he denied ever rubbing Renier's leg; he denied putting his elbow in Renier's groin area; he denied having Renier sit on his lap; he denied showing Renier his nipple ring; he denied staring at Renier during a search; and he acknowledged he had told Renier he loved him. The Grievant noted that he never strip searched Renier. Rather, when Renier came in to the Center from the outside he was asked to disrobe, and to drop his underpants long enough for the Grievant to verify that he was not bringing in objects dangerous to himself or other Center clients. The Grievant specifically acknowledged that he had a pierced nipple with a ring in it, but noted that Renier could have seen it any time the two were swimming. He also noted he had attended inservices in which the role of hugging or kissing as a therapeutic tool had been discussed. He stated any statement of love he expressed to Renier was a gesture of his support for Renier as Renier faced difficult times.

Nancy Tomchek-May is the Center's Personnel Coordinator. She informed the Grievant of his options after the issuance of the January 23, 1992, report. She informed him he should seek an evaluation through a mental health care provider of his choice, and that he could account for the work time missed to secure the evaluation with any form of accrued paid leave or as unpaid time off. The Grievant chose to work through the Center's Employee Assistance Program, which referred him to Psychological Consultants of Green Bay, S.C. After receiving the evaluation, the Grievant contacted Tomchek-May, who was unable to secure a copy of the evaluation until February 4, because the Grievant's evaluator had gone on vacation. The Grievant returned to work on February 4.

Tomchek-May noted that in her eighteen years at the Center, she could recall five instances in which an employe was suspended until a satisfactory mental health evaluation had been secured. She noted that in each case the employe was afforded the same options for accounting for work time missed.

The Grievant, who was hired in March of 1981, had not been disciplined prior to the suspension at issue here. The evaluations of his work performance entered into the record were satisfactory or better.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union contends that this case does not pose complex facts or difficult issues of contract interpretation, but nevertheless poses a complicated matter. The Union argues initially that the Grievant has, unfortunately, been "tainted with the brush of other people's actions." More specifically, the Union argues that the acts the Grievant is accused of did not take place. The Union contends that the Grievant's testimony is fully credible, while Renier's is dated and difficult to follow. Beyond this, the Union argues that the Grievant has been denied a prompt hearing in this matter, and was further denied any right to confront his accuser during the investigatory process. In the absence of corroborating evidence, the Union concludes that the Grievant's account must be accepted.

Regarding the second issue, the Union contends that the County's delay in returning the Grievant to work effectively increased, without just cause, the length of his suspension.

THE EMPLOYER'S POSITION

The Employer does not dispute that the Grievant has served the Center for some time, and can not, on the basis of past performance, be characterized as a bad employe. The determinative issue here, according to the County, is whether or not the events alleged by Renier did occur. The County contends they did occur, and that the Grievant was fully aware of the impropriety of his actions. Noting that it was difficult for Renier to come forth and testify and that he had no reason to lie, the County concludes his account must be credited.

Regarding the second issue, the County argues that it had no choice but to wait for the Grievant's evaluation before returning him to work and that it afforded him a choice over how to account for the work missed. The County concludes that its conduct in this area can not be considered a violation of the contract, and that the grievance must be denied.

DISCUSSION

Article 1 governs the first issue, and requires that the Employer have proper cause to suspend the Grievant. The elements to a proper, or just, cause analysis have been variously stated. In my opinion, where the agreement does not specify the standards and where the parties have not otherwise stipulated to them, the just cause analysis must address two elements. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed for the conduct reasonably reflects that interest.

It is undisputed that the Employer has a disciplinary interest in the conduct alleged by Renier. The issue is whether that conduct has been proven. As both parties stress, this is a difficult issue.

The difficulty posed is that neither Renier's nor the Grievant's testimony can be corroborated. This difficulty is exacerbated by the timing and substance of Renier's account. He did not complain until almost one year after the initial incident. Beyond this, his written statement supplies little specificity on what the actions were, or on when or where the alleged incidents occurred. His testimony was no more specific, offering only a general affirmation of the written statement. In spite of this, as the Employer points out, he has no evident reason to have fabricated the allegations. Nor does witness demeanor offer a way around this difficulty. The testimony was an ordeal for each witness. Neither offered any solid indication that the ordeal involved the strain of fabrication.

The gravity of the competing interests posed underscores the difficulty. The Grievant faces damage to his reputation as a person and as an employe. Renier faced, and faces, damage to his sense of self and of privacy. Renier's vulnerability as a client emphasizes his own, and the Center's, interests.

Arbitral precedent has evolved burden of proof doctrines to assist in cases in which doubt remains after the close of the record. The doctrines seek to cope with the impossibility of accurately reconstructing past events. The doctrines only assist where the evidence will not support a definitive conclusion on a key question of fact. It is essential to the meaningful application of these doctrines that the factual issues be narrowly defined, for an overbroad application can be harmful. For example, if the Employer can not meet its burden of proving just cause solely because Renier's testimony can not be verified by another witness, this assures that a sexual abuser will be unpunishable and undeterable if the abuser has the foresight to limit acts of abuse to contexts in which only the abuser and the victim are witnesses. Similarly, if Renier's delay in reporting the incidents, standing alone,

creates a doubt which must be resolved against the Employer, this risks assuring that acts of sexual abuse will go unreported.

In this case, doubt must be acknowledged on whether the Grievant committed acts of sexual abuse. This doubt does not warrant resolution of the grievance against the Employer as a matter of the burden of proof because no such doubt surrounds the more narrow issue on whether the reliably proven contact can support the Employer's disciplinary interest.

The record does afford a basis to conclude the Grievant made deliberate sexual overtures to Renier. As noted above, Renier's testimony was not incredible. However, significant doubt remains on this point due to the lack of detail on the time, place and specific actions constituting the incidents of abuse. It is, for example, impossible to know if the Grievant stared at Renier in a fashion indicating sexual desire. Whether a disinterested eye-witness could reliably perceive such a point is debatable. It is even arguable that the Grievant could have done so without realizing it. As a further example, does the allegation that the Grievant "insisted in showing it (his nipple ring) to me" mean the Grievant took off his shirt to go swimming, thus displaying the ring? Or does it connote a deliberate, private act by which the Grievant opened his shirt to display the jewelry to Renier? No definitive conclusion can be made on such points, without making inferences not rooted in record evidence. On the issue of sexual abuse, which is the most troublesome factual issue posed here, the record will permit no definitive conclusion.

The reason this doubt does not require that the grievance be resolved, as a matter of the burden of proof, against the Employer turns on the nature of the allegations. Those allegations implicate more than deliberate sexual abuse. Renier's September, 1991, statement was the basis of the discipline. The investigating officer prefaced that statement by asking Renier to relate incidents in which he was made "uncomfortable". Renier's testimony followed this theme. Although the incidents written in the disciplinary history can be read to allege a sexual assault, Renier's testimony pointed to a series of unwelcome, but subtle sexual overtures. While the record will not permit definitive conclusions on when and how each act occurred, the record will support a conclusion that the Grievant, in a manner disapproved of by the Employer, engaged in a series of acts which, at the least, were ambiguous or ambivalent enough to make Renier uncomfortable.

The record establishes a considerable amount of physical contact between Renier and the Grievant. Each Union witness, including the Grievant, acknowledged that physical contact was part of the Grievant's relationship to Renier. The Grievant and Cheryl Jahnke viewed such contact to be an accepted practice on Unit 1. Pam Spang-Schmit stated that Renier was a "real needy kid", who sought out the Grievant's attention, and would crawl on him, asking for attention and hugs. Beyond this, both the Grievant and Renier noted the Grievant would kiss Renier. The Grievant denied doing so directly on Renier's mouth, but Renier alleged only that the Grievant kissed him "more on the cheek than mouth". It is uncontested that the Grievant told Renier he loved him.

The record on the Employer's disapproval of this level of contact is somewhat sketchy. The Grievant's and Jahnke's contention that such contact was an accepted practice states more about their personal view of patient care than about Center policy. Whether or not Spang-Schmit advised Broeckel that the Grievant needed to use less physical contact with clients, Broeckel's testimony that she cautioned the Grievant and one other employe against touching clients as a part of client care stands unrebutted.

The risk of Renier's perception of the Grievant's actions can not persuasively be held against Renier or the Employer. If the Employer's

disciplinary interest can not be implicated by any conduct short of deliberate sexual abuse, then the Center's clients' interest in their own physical safety and privacy is seriously compromised. In this case, the record establishes that the Grievant engaged in a level of physical contact with Renier which the Employer disapproved of. While doubt exists regarding whether the Grievant made deliberate sexual overtures to Renier, no such doubt exists regarding the fact that the Grievant acted toward Renier in a fashion which Renier could reasonably perceive as a sexual overture. Thus, the Employer has established conduct by the Grievant in which it has a disciplinary interest.

The second issue stipulated by the parties poses the second element of the just cause analysis, for the Union essentially argues that the Employer issued the Grievant an eight day suspension. The record indicates that the Employer returned the Grievant to work as promptly as it could. The record also indicates the Employer has, on at least five occasions, conditioned an employe's return to work on a psychological evaluation. In each case, the employe was afforded the same options as those the Grievant was afforded.

On the present facts, the evaluation was a disciplinary act. The Grievant was compelled not to report for work. This suspended the Grievant from work. That the Grievant was permitted to account for the period of the suspension as either paid or unpaid leave can not alter the fact that he was suspended from work. Under Article 1, the Employer must have proper cause to suspend.

The issue thus posed is whether a four calendar (three work) day unpaid suspension and a five day paid suspension reasonably reflect the Employer's disciplinary interest in the Grievant's conduct.

Underlying either part of the suspension imposed by the Employer is a fundamental ambiguity regarding whether the Grievant made deliberate sexual advances or exercised poor judgement. The Employer's case inevitably points to the latter possibility, since the former would have warranted discharge.

In any event, the Employer's conclusion that the Grievant's conduct warranted more than nominal discipline has a reasonable basis in the record. As noted above, the record demonstrates that the Employer could reasonably conclude that the Grievant's physical contact with Renier was sufficient to cause Renier discomfort. The record further demonstrates that the Grievant had been advised that the Center viewed touching as a questionable therapeutic tool. It is apparent that the Grievant disagreed with this as a matter of policy. As noted above, the Grievant bore the risk of acting on his own views. Beyond this, the significance of Renier's privacy interests as a client can reasonably support more than nominal discipline for the conduct at issue. The three day suspension is more than a nominal act of discipline, and does underscore the significance of the interests of the Center and its clients.

Similar considerations do not, however, govern the five day extension of the suspension. Because the sanction for the Grievant's conduct had already been decided, the evaluation can not be seen to have played any role in the process by which the veracity of Renier's allegations was tested. The evaluation itself underscores this point:

> The nature of this evaluation is not to determine the truth or falsehood of the events that have been alleged to occur. This evaluation is not designed to assess whether or not (the Grievant) is truthful in his version of the incidents cited.

For the same reason, the evaluation can not be considered part of the

Employer's attempt to determine the appropriate sanction or remedy for the Grievant's conduct. The evaluation itself underscores this point:

> The interpretations of this evaluation are not to be construed as assuming responsibility for (the Grievant's) future behavior or making conclusive predictions about any future behavior.

The Employer's demand for the evaluation thus did not enter into the decision to discipline, but did lengthen the suspension ordered.

There is, however, no demonstrated basis in the record to justify this extension. As noted above, it is not immediately apparent what protection the evaluation afforded the Center or its clients. Beyond this, the record shows no persuasive basis to conclude the disciplinary signal sent by the Employer requires more than a three day suspension. Nothing in the Grievant's work record indicates he needs more than a three day suspension to understand that repeating the conduct at issue puts his job in jeopardy. He is a long term employe, with no disciplinary history and solid work evaluations.

Because there is no demonstrated basis for suspending the Grievant from work pending his evaluation, the five day extension of the suspension was not for cause. The extension thus violated Article 1.

Before closing, it is appropriate to address certain concerns raised by the Union. Putting the risk of Renier's perception of the Grievant's contact with him on the Grievant does not mean a client's view is inevitably treated as true and an employe's as false. In this case, it is apparent Center management and certain of its employes differ on when and to what degree a physical display of affection is appropriate. Article 1 reserves to the Employer the policy level decision over such matters. The conclusion reached above states only that an employe choosing to touch a client must be prepared to assume the risk of that decision if the touch is perceived differently by the client than by the employe. This should deter such contact. This arguably may deny an employe a tool for relating to clients. Deterring such contact does, however, curb the risk of abuse by employes who exercise power over clients, and does serve to afford clients a measure of protection at a time of great vulnerability. In any event, the conclusion does no more than affirm a policy decision made by Center management which is reserved to them by Article 1.

AWARD

The County did have just cause to suspend the Grievant for three days.

The County did violate the collective bargaining agreement by requiring the Grievant to use sick leave for the period of time between the end of his three day suspension and his return to work on February 4, 1992.

Dated at Madison, Wisconsin, this 5th day of November, 1992.

By _____
Richard B. McLaughlin, Arbitrator