BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between BADGER-HAWKEYE REGIONAL BLOOD CENTER EMPLOYEES LOCAL 1558, COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, NO. 40, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO and AMERICAN NATIONAL RED CROSS, BLOOD SERVICES, BADGER-HAWKEYE REGION	Case 25 No. 53975 A-5470

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, for Badger-Hawkeye Regional Blood Center Employees Local 1558, Council of County and Municipal Employees, No. 40, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Fred W. Batten, Clark Hill P.L.C., Attorneys at Law, 1600 First Federal Building, 1001 Woodward Avenue, Detroit, Michigan 48226-1962, for American National Red Cross, Blood Services, Badger-Hawkeye Region, referred to below as the Employer.

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 Craig Jones, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on June 3, 1996, in Madison, Wisconsin. The hearing was not transcribed, and the parties filed briefs by July 22, 1996.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate the collective bargaining agreement when it discharged the Grievant?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 - MANAGEMENT

3.0 Except as may be expressly limited by this Agreement, the Employer has the sole right to . . . require employees to observe its reasonable rules and reasonable regulations . . . and to maintain order and to suspend, demote, discipline and discharge employees for just cause.

. . .

ARTICLE 15 - DISCIPLINE AND DISCHARGE

15.0 A discipline procedure is intended to inform employees of proper work habits consistent with the Employer's public function, and thereby to correct any deficiencies which may from time-to-time occur.

15.1 An employee may be warned, suspended or discharged for just cause. The sequence of disciplinary action shall normally be oral reprimand, written reprimand, suspension, and discharge. Employee counseling shall not be considered as a step in the disciplinary process.

15.2 The normal sequence of disciplinary action shall not apply in cases which are cause for more severe and immediate discipline . . .

15.7 When a supervisor is going to discuss a matter of discipline with an employee, the employee shall have the right to request the presence of a steward or officer of the

Union.

BACKGROUND

The grievance challenges the propriety of the Grievant's discharge, which was effective February 15, 1996. 1/ In the Grievant's termination letter, dated February 16, John A. Ridgely, the Employer's Human Resources Manager, stated the basis for the discharge thus: "Termination is due to your violation of Red Cross confidentiality policy."

At the arbitration hearing, the parties entered the following "Stipulated Facts:"

> 1. Grievant has a seniority date of January 28, 1986.
>
> 2. Blood donors, as a step in the process of donating blood, complete portions of a document entitled "Blood Donation Record" . . .
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> 3. The Employer maintains a written Confidentiality Policy . . . The Grievant acknowledged receipt and understanding of the confidentiality of donor information in executing a Confidentiality Statement . . .
>
> 4. The Grievant received training on Donor Registration procedures . . . He was last trained on these procedures on November 7, 1994 . . .
>
> 5. On February 13, 1996, without authorization, Grievant extracted a donor's phone number from a Blood Donation Record and used the information to call the Donor. The Donor returned to the blood mobile site on February 14, 1996 and complained to Team Leader Shirley Nygaard that Blood Donation Record information had been used in a manner not authorized by the Donor.
>
> 6. The Grievant was advised of the Donor complaint by Shirley Nygaard and directed to meet with the Director of Nursing Susan Wettstein after the mobile was closed that day.
>
> 7. Grievant gave his account of the incident in a

1/ References to dates are to 1996, unless otherwise noted.

meeting with Director of Nursing Sue Wettstein and other members of management on the afternoon of February 14, 1996. Grievant was advised that the donor would be contacted to give her account.

8. On February 16, 1996, Grievant was advised that his employment had been terminated by reason of his having violated the confidentiality policy of the employer . . .

9. The grievant has no prior relevant discipline.

10. A timely grievance was filed, denied, and appealed to arbitration . . .

The "Confidentiality Policy" noted in Stipulated Fact 3 reads thus:

Purpose: To provide Blood Services staff with a policy on handling confidential information they may deal with as a result of their affiliation with the Red Cross.

American Red Cross Blood Services staff deal with a variety of medical information and blood donors and patients that we serve. It is important for staff to understand the importance of maintaining confidentiality of this information.

No staff member shall disclose any confidential information that is available solely as a result of the staff members affiliation with the American Red Cross to any person not authorized to receive such information. Authorization is usually written permission from the donor or patient to release information to a specified person. However, certain exceptions are made for health care providers involved in the care of patients or donors. Unauthorized disclosure of information violates Red Cross directives, the public trust, and in some jurisdictions, violates the law.

Confidential information is:

1. Donor health history information.
2. Test results.

3. Patient health or test result information.
4. Any information concerning a donor or patient that is known only as a result of affiliation with the American Red Cross.
5. Any information marked "confidential."

Confidentiality Statement

> A confidentiality statement must be signed by every Blood Services staff person. See Attachment 1. The signed statement will be filed in the employee's personnel file.

Disciplinary Action

> Any Red Cross employee who is determined to have willfully disclosed confidential information should expect that his/her Red Cross employment will be terminated immediately.

Further evidence was submitted at the arbitration hearing. The evidence covered the circumstances surrounding the termination, and the parties' practices regarding Union representation at investigatory meetings.

The Circumstances Surrounding the Termination

On February 13, a donor, referred to below as the Donor, reported to the mobile blood bank set up at the Madison Area Technical College (MATC) as part of a blood drive. She completed the "Blood Donation Record" referred to in Stipulated Fact 2. This form seeks a variety of information from any prospective donor. The information sought includes a donor's name, address, social security number, home and business phone numbers together with relevant medical history. The medical history information ranges from past exposure to a variety of diseases to past sexual encounters.

At some time during the day, the Grievant and the Donor spoke. He took her phone number from the Blood Donation Record and later called her. The following day, the Donor complained about the contact to Shirley Nygaard, the Collections Supervisor at the MATC site. Nygaard spoke briefly with the Grievant and then advised Sue Wettstein, the Employer's Collections Manager, of the complaint. Wettstein, then preoccupied with the demands of the ongoing blood drive, advised Nygaard to contact the Grievant and to direct him to report for a meeting at the end of the work day. That meeting occurred roughly two hours later.

Sometime before the investigatory meeting, the Grievant and Wettstein briefly spoke. The Grievant asked her if he would lose his job over the phone call. Wettstein assured him no disciplinary action would be taken until she had discussed the matter fully with the Donor and with him.

Sometime after this, the investigatory meeting was held. Nygaard, Wettstein and two other Employer representatives met with the Grievant. During this meeting, Wettstein informed the Grievant of the complaint against him and asked him a series of questions concerning the

contact between him and the Donor. The Grievant stated that the Donor had approached him

in the MATC canteen, while he was on a break. They then spoke a while. During their conversation he asked for, and she voluntarily gave him, her phone number. After obtaining the Grievant's view of the incident, Wettstein directed him to report for work the next day. The Grievant did not request, and the Employer did not offer him access to a Union representative.

After this meeting, Wettstein attempted to contact the Donor to obtain her view of the incident. Sometime in the early evening, the Grievant phoned Wettstein and stated he had lied to her during the interview. He stated he did so fearing for his job, and admitted he had obtained the Donor's phone number from the Blood Donation Record. Wettstein responded that she would not fire him before the completion of her investigation, but stressed to him that she viewed the incident as a major breach of donor confidentiality. She again told him to report for work the next day.

Wettstein spoke with the Donor on February 15. After this conversation, she determined she would recommend the Grievant's discharge to the Human Resources Department. She testified that she recommended discharge rather than a lesser form of discipline based on the Donor's feelings about the phone call. She stated, however, that she would have discharged the Grievant even if she had not spoken with the Donor.

The Grievant testified that he was scared throughout the investigatory meeting. He was embarrassed and ashamed of himself for making the phone call to the Donor. He noted he had never been involved in any discipline before. He acknowledged his actions were improper, but stated he did not feel, at the time he called the Donor, that he had violated the Confidentiality Policy. The Donor and he had conversed in some detail and he did not see the phone call, at the time he made it, as an invasion of her privacy.

In April of 1993, the Grievant signed the Confidentiality Statement referred to in Stipulated Fact 3. As part of the training referred to in Stipulated Fact 4, the Grievant reviewed three separate written procedures, known as Local Operating Procedure (LOP) #207C, LOP #208C and Regional Standard Procedure (RSP) #202C. RSP #202C states, among its provisions, the following:

> 7. All information on the Blood Donation Record form is confidential.

LOP #208C states, among its provisions, the following:

> 7. Keep all donor information confidential.

LOP #207C states, among its provisions, the following:

> 5. <u>All information on blood donation records is confidential</u>.

Practice Regarding Union Representation At Investigatory Meetings

Virgil Miller is the Union's President and has been employed by the Employer since October of 1956, with one break in service. He testified that the Employer has consistently informed employes whether a meeting is for counseling or for disciplinary purposes. Where discipline is involved, the Employer will either offer the employe a Union Steward or will make one available. He estimated between two and four disciplinary conferences occur each year. Ridgely has served as Human Resources Director since 1983. He testified that the Employer often conducts disciplinary meetings at which no Union Steward is present. He noted the Employer will often make arrangements for the presence of a Union Steward, and will always respond to employe requests for a Steward.

Further facts will be noted in the DISCUSSION section below.

THE EMPLOYER'S POSITION

The Employer prefaces its review of the evidence by noting that the "facts . . . for all practical purposes, are not at issue." Its Confidentiality Policy defines what constitutes confidential information and cautions that an employe who willfully discloses confidential information "should expect that his . . . employment will be terminated immediately." The Employer contends that there is no dispute "all information on blood donation records is confidential" and that "confidentiality is violated when the information is distributed or used in a manner inconsistent with the purpose for which it is collected."

Against this background, the Employer argues that the Union's claim that the Confidentiality Policy has not been violated because the Grievant did not disclose information to a third party is "absurd." The Grievant "converted the information which he had access to by reason of his being an employee of Red Cross to himself in his individual capacity." An argument similar to the Union's was, the Employer notes, rejected in Duke University, 103 LA 289 (Babiskin, 1994). The reasoning of that case is, the Employer concludes, appropriate here.

The absence of Union representation during the investigation is not, according to the Employer, a significant fact. The evidence will not support the Union's assertion of a past practice of providing Union representation and, in any event, Section 15.7 makes such representation available on "request." Because the Grievant made no such request, no contract violation can be found on this point.

That the Union did not have the opportunity to cross examine the Donor is not a determinative consideration. The Employer's desire to maintain donor confidentiality placed "a

difficult decision" for it regarding the presentation of its case. However, the violation posed here "is established without regard to what statements were made by the Grievant to the donor." This makes the absence of cross examination less than a determinative consideration.

The Employer then contends that "discharge was the appropriate penalty." Article 15 does specify a system of progressive discipline, but the Employer argues that Section 15.2 governs the grievance since the conduct at issue is egregious. Noting that "(t)he significance of donor confidentiality cannot be overstated," the Employer argues that the breach of confidentiality posed here cuts at the heart of the Employer's mission. An examination of the Grievant's conduct manifests that he was fully aware of the significance of the impropriety he committed. The Employer concludes thus:

> Termination is warranted not only because of the fact that the Grievant knew the rule and the penalty. The Grievant's conduct involves the Red Cross and its relationship with donors. The breach of donor expectation and reliance upon the Red Cross to preserve their confidentiality cannot be tolerated.

It necessarily follows, according to the Employer, that the grievance must be denied.

THE UNION'S POSITION

After a review of the factual background, the Union notes that "(t)he Confidentiality Policy is clearly a non-disclosure policy . . . plainly important to the Company." The Union then contends that had the Grievant made an improper disclosure to a third party, "there would have been no hearing," since the Union would have concurred in the termination. In this case, however, the information "was available through other sources . . . was not of a medical nature . . . and . . . was not used to contact or disclose confidential material to a third party."

To consider the discharge appropriate based on the Grievant's conduct "blurs the policy basis for confidentiality" since that policy basis turns on the Employer's liability "for the consequences of the disclosure." Beyond this, the sanction of discharge ignores that the Confidentiality Policy is ambiguous regarding "same party contacts." Nor can the contact involved be considered egregious, according to the Union. That the Grievant was wrong to call the Donor can be granted, but is no more significant than calling a donor to return a forgotten coat to them. The Union contends that arbitral authority cautions against discipline based on ambiguous work rules or on conduct not "intended to harm the Employer."

The Union's next major line of argument is that significant due process violations preclude finding cause for the discharge. Interstate Brands, 97 LA 675 (Ellman, 1991), "bears a striking resemblance to many of the salient facts in this matter." In that case, an arbitrator refused to find

just cause for a discharge based on a customer complaint where the complaining customer refused to testify. That the Employer neither called the donor, nor sought to depose her underscores, according to the Union, the applicability of this case to the grievance. The denial of the Grievant's right to confront his accuser through cross examination is, the Union contends, determinative.

Beyond this, the Union contends that the Employer denied the Grievant's due process rights by failing to secure a Union representative for him during the investigatory interview. This violates the precepts of due process articulated by Arbitrator Carroll Daugherty in a series of decisions. As applied here, the Union contends that Wettstein's "conditional assurances" that no discipline would be taken until the donor had been consulted coupled with the failure to secure a Steward makes the Employer's investigation less than fair and objective. The investigation was, according to the Union, fundamentally flawed by the Employer's "failure to state the specific nature of the alleged misconduct . . . failure to provide evidentiary documents on time . . . and (failure) to have the principal witness present." Even if the Employer is not found to have a binding practice of securing a steward for investigatory interviews, the Union asserts the need for such representation is apparent where discharge is being considered.

The "egregious" nature of the Employer's due process violations precludes granting any probative force to the Grievant's admissions. The same violations preclude, according to the Union, granting probative value to any of the testimony adduced by the Employer. The Union contends that the Grievant's "spotless" personnel file and his ten years of excellent service stand in marked contrast to the evidence advanced by the Employer to justify its action. The Union concludes that the grievance should be sustained, and that the Grievant should be reinstated with "full back pay and benefits."

DISCUSSION

The issues are stipulated, and ultimately question whether the Grievant's termination meets the just cause standard stated in Articles 3 and 15. The broadly stated issues reflect that applying the just cause standard calls more of the contract into question than those sections which state the standard.

The Union points, in part, to Arbitrator Daugherty's seven standards 2/ as the definition of "just cause." The parties have not agreed to those standards. In my opinion, the standards are given meaning by the parties' agreement to use them.

In the absence of such agreement, their application is problematic. The seven standards include twenty-one explanatory notes and extend for roughly three pages. The clarity thus gained is debatable. Beyond this, they may conflict with the arguments posed here. For example, the

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2/ Enterprise Wire Co., 46 LA 359 (Daugherty, 1966).

Union asserts the Donor's absence at the hearing dooms the Employer's case. As written, the standards focus not on evidence adduced at hearing, but on the evidence secured by the Employer and on its pre-hearing procedures to secure that evidence. Whether the Donor's absence at hearing is fatal under the Daugherty standards is arguable, since the Employer spoke to the Donor and the Grievant before the decision to discipline was made. This is not to say the standards lack persuasive force. Rather, their persuasiveness is rooted in and defined by the parties' agreement to apply them. In this case, there is no such agreement.

Where the parties have not stipulated the standards defining just cause, the analysis must, in my opinion, 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 reasonably reflects that interest. This does not state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements to be addressed and relies on the parties' arguments to flesh out that outline.

The first element of this analysis does not pose significant doubt. The Grievant has acknowledged he obtained the Donor's phone number from the Blood Donation Record. RSP #202 establishes the confidentiality of "(a)ll information" on that form. It is undisputed that the Grievant has been trained in the application of this procedure and others which more generally address the significance of confidential information.

The significance of the Employer's disciplinary interest in maintaining the confidentiality of donor information is evident. This interest cannot be limited, as the Union asserts, to potential liability concerns. The assurance of confidentiality is crucial to the donation process. It is impossible to dispute the force of the Employer's assertion that breaches of confidentiality could adversely impact its ability to attract donors. Beyond this, a donor's expectation of privacy, standing alone, is significant. No donor should fear unwanted social or sexual advances as a result of the donation process. The Employer's interest in enforcing these goals is sufficiently significant to be independent of the express rules stating and enforcing them.

The Union's arguments on this aspect of the cause analysis are technical. They focus less on the Employer's general interest in enforcing its Confidentiality Policy than on flaws in the application of that policy to the facts underlying the grievance. More specifically, the Union points to procedural issues surrounding the determination of the Grievant's guilt and to the inapplicability of a "disclosure" policy to this grievance.

The flaws highlighted by the Union are considerable, but apply less to the first element of the cause analysis than to the second. The procedural flaws pointed to by the Union cannot be considered fatal to the Employer's position. The due process concerns posed by the Union can be given a constitutional, statutory or contractual basis. The Union focuses solely on the contractual basis. Section 15.7 is the ground of the Union's contentions in this area.

The evidence does not indicate any violation of Section 15.7. That provision grants an "employee" the "right to request the presence of a steward or officer of the Union." The Grievant never asserted that right. Nor will the evidence support a conclusion the Employer acted to deny that right. The Union contends Wettstein's assurances misled the Grievant regarding the disciplinary consequences of the investigatory meeting. Wettstein, however, merely informed the Grievant she would not impose discipline before she had obtained his account and the Donor's. The tension surrounding the investigatory interview cannot be doubted. That tension is, however, not traceable to Employer conduct indicating the Grievant spoke under duress. Rather, the Grievant testified the tension he felt was rooted in his embarrassment over his conduct and in his fear of the repercussions of that conduct.

Nor will the evidence support a conclusion that the parties, through past practice, have agreed that employes must be afforded Union representation at any investigatory interview. The source of the binding force of past practice is the agreement manifested by the bargaining parties' conduct. 3/ The evidence shows no such conduct. There is no reason to doubt either Miller's or Ridgely's testimony on the point. That testimony establishes only that Miller is unaware of investigatory interviews not including Union representation. This falls short of proving conduct manifesting agreement.

There is, then, no basis in Section 15.7 to conclude that the Employer has agreed to provide Union representation in every investigatory interview. The Union notes that arbitrators have implied such a duty, based on due process concepts. Whatever may be said of the propriety of arbitral imposition of duties not expressed in the contract, any such implication should be rooted in conduct which gives reason to doubt the probative worth of the evidence secured. In this case the evidence shows no more than the Employer's honest attempt to secure "both sides of the story" before imposing discipline. There is, then, no persuasive basis to conclude the Employer's conduct somehow taints the evidence of the Grievant's improper use of the Blood Donation Record. In any event, the Grievant has admitted this conduct both before the Employer and at hearing.

The Union's contention that the Confidentiality Policy does not apply to the Grievant's conduct poses a considerable point. The contention that the policy is ambiguous is not, on the facts posed here, persuasive. The generality of the definition of "Confidential information" does no more than underscore the Employer's estimation of the significance of the point. At best, only Item 4 of the definition of "Confidential information" is posed here. The generality of that provision must be acknowledged. Its generality, however, communicates not ambiguity, but a caution that all donor information should be presumed confidential.

3/ See "Past Practice And The Administration Of Collective Bargaining Agreements", by Richard Mittenthal in Arbitration and Public Policy, Proceedings of the Fourteenth Annual Meeting National Academy of Arbitrators, (BNA, 1961).

The more troublesome issue is the policy's focus on "disclosure." The policy imposes a duty not to "disclose any confidential information . . . to any person not authorized to receive" it. The sanction imposed for a violation of the duty is applied to an employe who has "willfully disclosed confidential information." The Union contends no disclosure occurred in this case, while the Employer counters that the Grievant disclosed confidential information from himself in his status as employe to himself in his personal status.

The Union's contention accurately points out that the conduct at issue here is "misappropriation" more than "disclosure" of confidential information. It also points out that the policy is directed more toward third party disclosure than to the invasion of privacy. These points do not, however, disprove the existence of the Employer's disciplinary interest in the Grievant's conduct. As noted above, the Employer would have a disciplinary interest in his conduct even if it had no Confidentiality Policy. That the policy is directed more to third party disclosure than to the invasion of privacy cannot obscure that the policy is rooted in the Employer's need to respect personal privacy to obtain the donors essential to its mission. As applied to the first element of the cause analysis, the Union's contention is technical. Its persuasive force is better rooted in the application of the second element.

The determination whether discharge reasonably reflects the Employer's disciplinary interest in the Grievant's conduct must start with Article 15. Section 15.1 imposes on the Employer a progressive discipline system which "shall normally" apply, but Section 15.2 provides that the "normal sequence" may not apply to "cases which are cause for more severe and immediate discipline." The broad and essential interests implicated by the Grievant's conduct have already been touched upon. Those interests constitute "cause" for the imposition of severe and immediate discipline. The invasion of privacy is significant.

The fundamental issue posed by the grievance turns on the propriety of discharge. The Employer points to the "Disciplinary Action" section of the Confidentiality Policy, and argues that the Grievant should have expected immediate termination. As argued by the Employer, the policy applies without regard to what was said between the Donor and the Grievant.

The Employer's position has considerable persuasive force, but cannot be accepted on these facts. As argued, the Confidentiality Policy was mechanically applied to the Grievant. As actually applied, however, the policy turned on an exercise of discretion. The basis of that discretion is not apparent. In light of the Grievant's proven conduct it is impossible to defer to the exercise of discretion without knowing what it was based on.

As preface to an examination of this conclusion, it should be stressed that the difficulty in fitting the Confidentiality Policy to the Grievant's conduct cannot be ignored. As noted above, that difficulty is not a defense to the Employer's disciplinary interest. It does, however, speak to the nature of the interest. The Grievant did not "disclose" information to "any person not

authorized to receive" it in the common sense of those terms. The phone number taken by the Grievant is among the least private types of information covered by the policy. Beyond this, the record is silent on what was said between the Grievant and the Donor.

The Employer's arguments turn the second element of the just cause analysis on whether the Grievant's call to the Donor, standing alone, is a sufficiently egregious violation of the Confidentiality Policy to warrant discharge. The Employer points to the "Disciplinary Action" section of the policy to underscore that it was. This otherwise persuasive argument is, however, belied by Wettstein's actions. She was aware, after the investigatory interview, that the Grievant had contacted the Donor. She declined to terminate him at that point, deciding instead to contact the Donor. Only after discussing the incident with the Donor did she determine to recommend discharge. She asserted that she need not have called the Donor to terminate the Grievant. However, she also acknowledged that she did not decide to abandon progressive discipline until after learning of the Donor's feelings about the phone call. This course of conduct is not reconcilable to the assertion that the contact, standing alone, warranted immediate discharge.

The difficulty posed is that the conversation which dictated Wettstein's determination is not in evidence. The Union aptly notes that this denies the Grievant the ability to test the veracity of that account. It also precludes my ability to defer to Wettstein's judgment. The basis of that judgement is not apparent. There is nothing to defer to, unless the Confidentiality Policy is applied by rote. Doing so, however, ignores that the Employer declined to apply the policy in that fashion at the time the discharge was effected.

The Employer's objectives are not the sole factor applicable to determining whether discharge reasonably reflected its disciplinary interest in the Grievant's behavior. The Grievant is a ten year employe with no record of discipline. His initial attempt to lie his way through a problem of his own creation cannot be glossed over. However, without prompting, he confessed the truth. This confession put his job at greater risk under the Confidentiality Policy than the lie had. Beyond this, he credibly testified that he was ashamed of his conduct. His acknowledgment of the impropriety of his conduct is worthy of note. It is important not to overstate the significance of this point. It should not be ignored, however, that his conduct offers evidence that he can "correct . . . deficiencies" within the meaning of Section 15.1.

In sum, the evidence establishes that the Grievant wrongfully contacted the Donor, using information obtained from a Blood Donation Record. This information was confidential, within the meaning of the Confidentiality Policy, even though the Grievant did not "disclose" it to "a person not authorized to receive" it in the common sense of those terms. Even in the absence of a typical "disclosure," the Grievant's fundamental breach of donor privacy establishes the existence of conduct in which the Employer has a disciplinary interest.

Discharge does not reasonably reflect the Employer's disciplinary interest in the Grievant's conduct. His breach of donor privacy does constitute "cause" within the meaning of Section 15.2

for the imposition of discipline beyond the sequence "normally" imposed under Section 15.1. Discharge cannot be sustained, however, unless the Grievant's contact of the Donor, standing alone, warrants immediate termination under the Confidentiality Policy. Wettstein did not apply the policy in that fashion, but turned her decision on something said by the Donor. That something is not part of the record. In the absence of testimony and cross examination on that point, there is no evidentiary basis to defer to Wettstein's judgement. The type of information involved, the Grievant's work record, and his acknowledgement of the impropriety of his conduct point less to immediate termination than to discipline. Against this background, the doubt created by the absence of evidence on the contact between the Donor and the Grievant makes it impossible to sustain immediate termination. An unpaid suspension reasonably reflects the Employer's proven disciplinary interest in the Grievant's conduct.

Before addressing the issue of remedy, it is necessary to tie this conclusion to the parties' arguments. The Duke University case cited by the Employer is persuasive. It can be noted that the policy involved in that case directly addressed "privacy" interests, that the misappropriated information was medical information, and that the grievant was a short term employe. These differences should not, however, be overstated. In Duke University, the arbitrator persuasively cautioned: "The rules concerning dissemination of patient information must be strictly and

rigorously enforced." 4/ This grievance concerns confidentiality less than it concerns an invasion of privacy. Those rights also deserve strict and rigorous enforcement. The fact remains, however, that Wettstein chose to weigh the accounts of the Grievant and the Donor before acting. This makes the policy at issue here discretionary, not mechanical. The absence of evidence on the basis of Wettstein's discretion makes it impossible to defer to her exercise of discretion. In the absence of evidence on the nature of the Grievant's contact with the Donor and in the presence of his long term service, it is impossible to uphold summary termination.

I stress that this conclusion does not make the discretionary policy applied by Wettstein ill-advised or her exercise of discretion improper. That the Employer might wish to consider the conduct at issue before invoking the immediate termination option of the Confidentiality Policy is reasonable. It is a troublesome point to me that the information disclosed by the Donor to Wettstein may well have warranted the termination she recommended. No less troublesome, however, is the option of crediting an unfounded accusation. The Employer aptly notes that it faced a difficult dilemma regarding securing the Donor's testimony. That testimony is, however, crucial to establishing the reasonableness of the discretion exercised by Wettstein.

The remedy entered below does not require extended discussion. The make-whole remedy is broadly stated. The five day suspension reflects more discretion on my part than I would prefer. There is, however, no evidence on how the Employer imposes suspensions in comparable

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4/ 103 LA at 291.

situations. A suspension of any length arguably puts the Grievant on the brink of discharge under Section 15.1. It may be, however, that the Employer can administer multiple suspensions, such as a three day suspension following a one day suspension, before imposing discharge. The authorization of the imposition of up to a five day suspension is to clarify that I view the conduct at issue here to be egregious. How the Employer imposes discipline is not apparent on the record, but the five day suspension permitted below should be taken to reflect my own view that any repetition of this type of conduct would be terminal. The Employer may impose a suspension of a lesser period if such a suspension better conforms to its implementation of discipline. I have retained jurisdiction not because there is evidence of a dispute on the issue of remedy, but to afford a means to resolve any dispute which cannot be resolved otherwise.

AWARD

The Employer did violate the collective bargaining agreement when it discharged the Grievant.

As the remedy appropriate to the Employer's violation of the just cause standard stated in Articles 3 and 15, the Employer shall make the Grievant whole by compensating him for the wages and benefits he would have earned but for his discharge effective February 15. Because the Employer had cause, under Section 15.2, to issue the Grievant more severe discipline than the normal sequence specified in Section 15.1, the Employer may impose on him a suspension not exceeding five work days. The Employer shall expunge any reference to the discharge from his personnel file(s), but may amend his personnel file(s) to reflect the suspension authorized by this Award.

To address any issue regarding the implementation of the remedy set forth in this Award, I will retain jurisdiction over the grievance for the purpose of addressing any issue concerning the implementation of the remedy set forth in this Award. I will retain jurisdiction over the grievance for not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 16th day of September, 1996.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator