BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SUSSEX-HAMILTON SCHOOL DISTRICT TEACHERS' AIDE EMPLOYEES, AFSCME LOCAL NO. 3086 and HAMILTON SCHOOL DISTRICT	Case 38 No. 54995 MA-9860 Cindi Miels Termination

Appearances:

Quarles & Brady, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, by Ms. Carmella Huser, Attorney at Law, appearing on behalf of the Hamilton School District.

Wisconsin Council 40, AFSCME, AFL-CIO, Post Office Box 944, Waukesha, Wisconsin 53187-0944 by Mr. Sam Froiland, Staff Representative, appearing on behalf of the Sussex-Hamilton School District Teachers' Aides, AFSCME Local 3086.

ARBITRATION AWARD

The Sussex-Hamilton School District Teachers' Aide Employees, AFSCME Local No. 3086 (hereinafter referred to as the Union) and the Hamilton School District (hereinafter referred to as the District) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator to hear and decide a dispute concerning the discharge of Cindi Miels from her position as an aide at the Lannon Elementary School. The undersigned was so designated. A hearing was held at the Lannon School in Sussex on March 20 and April 16, 1997, at which time the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and argument as were relevant to the case. The parties submitted post-hearing briefs and reply briefs, the last of which were received on June 9, 1997, whereupon the record was closed. The parties requested that the undersigned issue an expedited Award, consisting of a statement of the issue, a very brief statement of the background, and several paragraphs explaining the essential reasoning for the result, within a period of thirty days from the close of the record.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

I. Issue

The parties stipulated that the issue before the arbitrator is:

> Was the grievant terminated for just cause? If not, what is the appropriate remedy?

II. Background

The grievant worked as a half-time teachers' aide at Lannon School in Sussex from 1992 through November 14th of 1996, when she was discharged. During her entire tenure at the school, she worked with emotionally disturbed children, first under the supervision of teacher Joanne Zeisloft and then, starting in the fall of 1996, under teacher Linda Gould. In the 1996-97 school year, the grievant was working as the morning E.D. aide. She was primarily assigned to work with two third graders, C---- and R---.

A. The District's Evidence

The grievant was discharged for allegedly slapping an E.D. student in her care. According to the District's evidence, in the late morning of November 14th, C---- came running into Principal Louise Champan's office, screaming "she hit me, she hit me". The grievant was standing in the door, saying to C---- "I did not -- I bumped you". Champan told the grievant to leave and let her calm C----, but the grievant did not leave. Instead she remained in the door and continued to argue with C----. Champan told her again to leave the room, but she kept arguing. The grievant seemed to be out of control. Champan walked over to the door and told her very firmly that she had to leave, but she did not, so Champan finally closed the door in her face. After about 45 minutes, Champan calmed C--- down to the point that he could be taken to the E.D. office. As Champan returned from taking him there, Lori Schlapman, a student teacher, approached her to report witnessing an incident involving C---- and the grievant.

Schlapman told Champan that she and another employee, half-time aide Maggie Howard, had seen the grievant and C--- in the hallway outside the third grade classroom, about 65 feet down the hall from them. Schlapman said that the grievant was holding C---'s left arm with her right hand, and seemed from the tone of her voice to be upset with him. According to Schlapman, C--- pulled away from the grievant, and she pulled him back. At the same time, she fully extended her left arm, swung around and slapped him full on the face. The slap landed with enough force to make a loud noise. C--- then put his hands to his face. According to Schlapman, the blow was clearly deliberate and did not appear to be a failed effort to hook C----'s arm or otherwise restrain him.

Maggie Howard was a newly hired afternoon E.D. aide. She essentially performed the same duties in the afternoon as the grievant did in the morning. She did not come forward to make any report, but Champan sought her out and questioned her. Howard told Champan the

same story that Schlapman had, and she too expressed the opinion that this was a deliberate blow.

The District presented additional testimony to the effect that the philosophy of the E.D. program had changed when Gould took over, with the emphasis changing from physically grabbing and restraining the children when they misbehaved to redirecting them and teaching them to control their own behavior. According to Gould, the grievant had problems with the new approach, and continued to try to physically control the children. The District also presented testimony that an assault on an E.D. student would have greater lasting damage to the student than it would for a non-disabled student, because the very nature of the disability would make it impossible for the student to later put the slap into context and get over it.

B. The Union's Evidence

The grievant denies that she intentionally slapped C----, or that she would ever strike a child. According to her testimony, she escorted C---- out of the third grade classroom because he was disrupting the reading lesson. C---- fought against leaving the room and when they got out in the hallway, C---- was yelling, and she was trying to talk over him to calm him down. He continued struggling with her and managed to get his right arm free from the grasp of her left hand. He then made himself dead weight, so she tried to readjust her grip and get behind him to use a single basket control hold that she had been trained to use. While she was trying to readjust her grip, she reached for him and the back of her left hand hit his face. He put his hand to his face and dropped to the floor. At this point he was even more worked up than he had been earlier.

The grievant got him up from the floor and walked him to Champan's office. Her door was closed, so she and C---- sat in the outer office for about five minutes. While they waited, C---- began to scratch his arms, and the grievant asked the secretary, Avis Dallman to note what he was doing, so she could not be blamed for the scratches later. When Champan was free, she and C---- walked into the office. The grievant stood in the door and told Champan that she had accidentally hit C---- in the face. She tried to explain to Champan, but Champan cut her off and told her "just leave". She continued to try to explain, but Champan again said "just leave" and slammed the door in her face. The next morning, she was fired.

Eight other staff members, including members of the teaching staff, testified that they had observed the grievant working with children and that she was consistently patient, caring and kind to the students. All expressed the opinion that the grievant could not have intentionally struck C----, because it would be inconsistent with her outlook and her past conduct. Several of the staff members recounted statements by Maggie Howard to the effect that she needed a full-time job and could not make ends meet with just a half-time aide's position. They noted that after the grievant was discharged, the E.d. aide position was made full-time and Howard was given the job. Avis Dallman testified that she had no recollection of any interactions between the grievant and Champan on November 14th, but felt sure that she would have remembered if the grievant had come into the office out of control.

Additional facts, as necessary, will be set forth below.

III. Arguments of the Parties

A. The Position of the District

The District argues that the grievant was discharged for just cause. The evidence overwhelmingly establishes that she intentionally struck a child in her care. Two eyewitnesses gave identical accounts of the incident, and both were absolutely sure that the slap was intentional. Both said that the slap was hard enough to make a loud noise. The grievant's claim that she accidentally struck C----'s face while trying to administer a single basket hold makes no sense, since one would not have to raise and fully extend the arm to apply such a hold. The Union's effort to impeach Maggie Howard, on the theory that she wanted to take over the grievant's half of the E.D. aide job is not worthy of credit. It is pure speculation, and there is not one piece of evidence to support the notion that Howard invented her story. Moreover, there is no reason for Schlapman to lie about this, inasmuch she was at the school only as a student teacher, and had no relationship with Howard or the grievant.

The grievant's conduct after the incident confirms that she lost control of herself on November 14th. She was unable to control herself even in Champan's office, and finally had to have the door shut in her face. This degree of emotional upset is not consistent with a minor accidental touching of the child's face. It is consistent with someone who realizes that they have made an enormous error, with enormous consequences. Champan has no reason to lie about the grievant, yet she must be lying if the grievant's story about calmly sitting for five minutes and then trying to present a reasoned explanation to an inexplicably hostile supervisor is to be believed. On the whole, the grievant's behavior in the office must be held to confirm the reports of Schlapman and Howard.

The District conducted a fair and impartial investigation, which gathered substantial evidence of guilt. The choice of discharge as a penalty was appropriate, given that striking an emotionally disturbed child is completely at odds with the educational aims of the District. This act had devastating consequences for C----, who afterwards suffered nightmares and exhibited self-destructive behaviors. There is no other case in which a staff member has been clearly shown to have engaged in assault on a student, so there is no relevant disciplinary standard. Given the seriousness of the charges, and the risk that the grievant could lose control again, the District was justified in terminating her.

B. The Position of the Union

The Union takes the position that the discharge was not justified, and that the grievant must be reinstated and made whole for her losses. This entire case is based on the statements of Schlapman and Howard, two new workers who viewed this incident from some 65 feet away and who did not know anything about the grievant. In their ignorance (and in the case of Howard, desire for full employment) they jumped to the wrong conclusion. Yet the record, including her formal evaluations, shows that the grievant is an exemplary employee, one whose approach to students is marked by kindness, patience and love. The District's conclusion that she is some sort of monster who would attack a defenseless child runs counter to absolutely everything that is known about her.

Unless the arbitrator concludes that the District has proved, beyond a reasonable doubt, that the grievant intentionally struck C----, the grievance must be sustained. The District has failed to meet that burden. The grievant explained, clearly and credibly, what happened on November 14th. She did, in fact, hit C----'s face with her hand, but this was an accident in the course of trying to apply a restraint hold that she had been instructed to use in such situations. An error, even one so unfortunate as this, cannot lead to discharge under a just cause standard.

Turning to the District's claim that the grievant was distraught and out of control in Champan's office, the Union suggests that this is somewhat overblown. In any event, the grievant had every right to be distraught. She was horrified at accidentally striking a child and was understandably upset when he accused her of intentionally assaulting her. Her emotional state was not helped by Champan's refusal to listen to what had happened, nor by being thrown out of the principal's office without any chance to give her side of things. Anyone would have been upset, and the arbitrator cannot draw any inferences from the grievant's behavior after this incident.

The grievant acknowledges making contact with C----'s face, and the issue here is whether she intended to harm C----. The grievant is the only one who knows what her state of mind was on November 14th. Her testimony persuasively establishes that this was an accident. The testimony of her co-workers persuasively demonstrates that it cannot have been intentional. The only contrary evidence are the statements of two workers who were a long way away from the incident, workers who could not have seen events clearly and who, not being familiar with the grievant, had no context in which to correctly interpret what they had seen.

Even if the arbitrator somehow concludes that he grievant intentionally struck C----, the evidence at the hearing showed that there have been other incidents in which District employees have used force on students. In all but one of those incidents, the penalty was a reprimand. In the sole remaining case, a staff member received a two day suspension for a second offense of using physical force. Obviously the disciplinary standard in this case has been changed and made much more severe. There is no justification for this change, and the arbitrator must find that the discharge constitutes disparate treatment under the established disciplinary norms. Thus, if the arbitrator finds that the grievant is guilty, he should reduce the discharge to a reprimand and reinstate the grievant.

IV. Discussion

On the merits, this case comes down to a question of credibility. The distance of sixty-five feet is not so great as to make the observations reported by Schlapman and Howard

impossible or even particularly difficult. Nor are the movements reported by the grievant likely to be mistaken for the movements reported by those two witnesses. All three agree that the boy pulled away from her. The subsequent pulling of the child towards her might well have been the grievant's pulling back against his weight when he went limp and became dead weight. However, the witnesses described her raising and fully extending her arm, and then swinging it at the boy to forcefully slap him. The basket hold described by the grievant involves bringing one's arms under the child's arms from behind, grabbing his left wrist with the right hand, his right wrist with the left hand, and pulling his arms across his body. In attempting this hold, one might well make contact with his face if he was squirming and struggling, but the raised, extended arm does not fit in plausibly with any effort to secure the basket hold. The grievant either tried a basket hold, in which case she did not raise and extend her arm, or she slapped the student.

In evaluating the testimony, I can find no reason for Schlapman to fabricate a story. She had no ties to the grievant, and only very attenuated ties to the school district. She was a student, finishing out her practicum, and it could not have benefited her in any way to become involved in this matter. As for Howard, the Union's theory that she was trying to get the grievant discharged so as to claim her job would be more persuasive if she had willingly come forward. She did not report the incident. It was only when Champan directly interrogated her that she told management what she had seen. Moreover, if Howard is lying, Schlapman must also be lying since their stories are completely consistent. The record simply does not support the notion that the two either made an identical mistake about what they saw, or conspired to unjustly accuse the grievant. Instead, the record supports the conclusion that the two witnesses accurately reported what occurred in the hallway.

This conclusion is buttressed somewhat by the grievant's behavior in Champan's office. Champan reported that she was emotional to the point of being out of control, arguing with the student that he had not been hit and refusing to leave when asked. This degree of emotion is hard to reconcile with the grievant's claim that nothing really happened except a physical mistake caused by a squirming, struggling child. The grievant tells a slightly different story about what happened in Champan's office, with it being Champan who was basically out of control, refusing to listen and throwing her out of the office when she tried to explain. The two versions are similar enough that the differences may be largely matters of perception, but to the extent that they go beyond perception, I find that I must credit Champan. Champan had no reason to be out of control, and there is little reason to assume that Champan is lying. She had a good relationship with the grievant, had given her good evaluations in the past and could not have been eager to find a case of abuse in her school, particularly abuse involving an E.D. child.

There is clear and convincing evidence that the grievant intentionally slapped C----. I agree with the Union's observation that this would have been completely inconsistent with her history, and I accept as accurate the testimony of the Union's witnesses, who uniformly described her as a caring person who was devoted to her students. Even normally kind and patient people can become frustrated. There was evidence that at the time of this incident the

grievant was having trouble with the changeover from physically correcting children to verbally correcting them, and was concerned about her job security under the new management of the E.D. program. It is also clear that C---- was behaving badly and was not cooperating with her in any way in her effort to remove him from the third grade room. Certainly there is nothing in the record to portray the grievant as some sort of monster or child abuser, but the evidence is compelling that, for a moment on November 14th, she did lose control and strike one of the students in her care.

The grievant is guilty of intentionally striking a very small, emotionally disturbed student. This, without question, constitutes just cause for discipline. The remaining question is whether the discipline imposed was excessive under all of the circumstances. Certainly, in the abstract, the answer is that it is not excessive. Striking a child in anger is fundamentally inconsistent with the duties of her position. This is not a case of an employee misunderstanding the rules about corporal punishment, where an argument can be made for retraining as the effective and appropriate response. Nor is there any element of self-defense or other justification present in this record. The victim in this case is already emotionally disturbed, and an assault by a caregiver will predictably have a greater impact on such a student than on another. 1/ The grievant has a good work record, but does not have a particularly long tenure with the District.

The grievant testified with great conviction that she is not the type of person who would ever intentionally harm a child, and I believe that this testimony was honest, as far as it goes. The slapping of C---- was not intentional in the sense of having been pre-planned or thought out. It did not result from some violent philosophy or basic character flaw. Instead, this was almost certainly the result of a momentary loss of self-control. The problem is that it is not possible to say that a loss of control will not be repeated, since by definition it does not result from premeditation. Given the vulnerability of the students at an elementary school, and the fact that small children are prone to provoke adults, the District is entitled to conclude that resort to progressive discipline is an unacceptable risk under these facts.

The most powerful argument for modifying the penalty in this case is the Union's assertion that it is not consistent with the penalties in other cases of physical contact between staff members and students. It is basic tenet of just cause that employees should be treated equitably, and that similarly situated employees who engage in similar conduct should receive

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1/ The characteristics of the victim and the actual degree of harm suffered are often found to be immaterial to the question of just cause. However, the nature of the student population she worked with and the vulnerability of those students may be considered an aggravating factor in reviewing the penalty. In this case the grievant had ample knowledge of the student's problems and can be held to have constructive knowledge that slapping this child would have a more serious after-effect than would slapping a non-E.D. student.

similar punishments. If, as alleged by the Union, the disciplinary norms in this workplace call for a reprimand for a first offense of physical contact, the District bears a heavy burden of explaining why this employee alone should be discharged.

The record shows six prior instances of inappropriate physical contact between staff members and students:

> 1991: Staff member elbows student in stomach area during an athletic practice. Staff member received a reprimand.
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> 1992: Staff member uses a sheaf of a dozen papers to rap a student on the top of the head. Also uses the sheaf of papers to make a striking motion toward a student's face. Staff member received a written reprimand.
>
> 1992: Staff member grabs at students, possibly causing students to hit a wall. Staff member receives a letter of reprimand.
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> 1994: Staff member grabs a student by the neck. Staff member received a letter of reprimand.
>
> 1994: Same staff member as in first 1994 incident grabs another student. Staff member receives a two day suspension.
>
> Undated: Staff member pushes a student to the ground during a soccer game. Staff member receives a verbal reprimand and is told not to engage in games with students.

The record contains little detail about these incidents, as they occurred prior to the employment of the current Director of Human Resources. The file on the first 1994 incident reflects that the grabbing was intentional. In the second 1994 incident involving that same staff member, there was a dispute between the staff member and the student as to exactly what happened, and there were no eye witnesses to the incident.

All of these incidents concern inappropriate physical contact, but not all physical contact is the same. The incident concerning a shove to the ground during a sporting event, and the incidents of grabbing at students are, on their face, different from the conduct I have found the grievant engaged in on November 14th. They may be inappropriate, but they are not a physical assault intended to punish and likely to injure. The only past incidents which appear to be somewhat comparable are the 1991 and 1992 cases. The 1991 elbowing incident took place during an athletic

practice, which raises some question as to exactly how the contact took place and what was intended. The question of acting with intent to harm is plainly a huge aggravating factor in this case, and it is not clear that this factor is present in the 1991 incident. The 1992 incident appears to involve an intentional striking, but the character of the physical contact differs in that a rap on the top of the head with a sheaf of papers would not normally be expected to cause genuine harm.

I agree that the District's disciplinary history does not show a zero tolerance policy on physical contact. However, from the scant facts about the prior incidents, I cannot conclude that the District has tolerated the intentional striking of a student where the striking is likely to cause real harm to the student. Based on both the nature of the contact and the nature of the victim, there is a reasonable basis for finding the grievant's conduct more serious than that of the staff members in the cited cases. I therefore conclude that the District did not abuse its discretion in deciding that termination was the appropriate penalty for the grievant's conduct.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The grievant was terminated for just cause. The grievance is denied.

Dated at Racine, Wisconsin this 24th day of June, 1997.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator