BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DEFOREST AREA SUPPORT STAFF/CAUN

and

DEFOREST SCHOOL DISTRICT

Case 26
No. 58539
MA-10985

Appearances:

For the DeForest Area Support Staff (DASS): **Ms. Anne F. Boley,** UniServ Director, Capitol Area UniServ-North, 4800 Ivywood Trail, McFarland, Wisconsin 53588

For the DeForest Area School District: **Attorney Heidi S. Tepp,** Lathrop & Clark, Attorneys at Law, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507.

ARBITRATION AWARD

The DeForest Area School District (hereinafter referred to as District or Employer) and the DeForest Area Support Staff (hereinafter referred to as DASS or Union) are parties to a collective bargaining agreement covering the period from July 1, 1998 through June 30, 2000. That agreement provides for binding arbitration of grievances as therein defined that may arise between the parties. On February 8, 2000 the Union filed a request with the Wisconsin Employment Relations Commission for a 5-person panel consisting of WERC commissioners and/or staff arbitrators from which panel the parties would select one person to arbitrate a grievance that had arisen between the parties. Commissioner A. Henry Hempe was selected by the parties to hear and decide said dispute. A hearing was conducted on May 17, 2000 in DeForest, Wisconsin. A transcript of the hearing was prepared. Each party filed an initial brief on June 20, 2000. A reply brief was filed by the District on July 6, 2000 and by the Union on July 7, 2000.

STATEMENT OF THE ISSUE:

The parties do not agree on a statement of the issue.

DASS suggests the issue be stated as follows: Did the District violate the contract when it suspended Barbara Anderson for one (1) day without pay as a form of discipline for an incident between two (2) District employees? If so, the District should reimburse Anderson for her lost wages, remove from her file all mention of this discipline and whatever else is deemed appropriate by the arbitrator.

The District suggests the issue be stated as follows: Did the District violate Article XIII, Section B of the Collective Bargaining Agreement by suspending Barbara Anderson for one day without pay for her actions on September 1, 1999?

If so, what is the appropriate remedy?

I adopt the following statement of the issue: Did the District violate the contract between the parties when it suspended the grievant for one (1) day without pay as a result of the grievant's action that took place on September 1, 1999?

If so, what is the appropriate remedy?

FACTS OF THE CASE

The grievant, Barbara Anderson, has been employed by the DeForest Area School District (hereinafter District or Employer) for 10 years. Until the discipline imposed leading to the filing of a grievance in this matter, Barbara Anderson has never been disciplined by the Employer, and in fact has compiled an excellent employment record. At all times material herein, Ms. Anderson was employed as the Pupil Services Department secretary.

Katherine Ashley has been employed by the District for 6 years as a school psychologist. Like Barbara Anderson, Katherine Ashley also reports to Director of Pupil Services, James Kohlmetz. From time to time it is necessary for Ms. Ashley and Ms. Anderson to work together in connection with the preparation and filing of required reports and other paperwork. Prior to September 1, 1999 Ms. Ashley and Ms. Anderson had maintained a friendly working relationship.

That changed on September 1, 1999.

On that date both Ms. Anderson and Ms. Ashley were among Pupil Services employees present for a 3:00 p.m. meeting that had been called by Pupil Services Director

Kohlmetz. The two women were seated around one of the corners of the four-table square at which eleven other meeting participants were seated. The meeting had not yet formally begun, and Ms. Anderson asked Ms. Ashley about the status of certain reports that were overdue. Ms. Ashley responded that she didn't wish to discuss the matter. Ms. Anderson persisted in her inquiry. Ms. Ashley again expressed her unwillingness to discuss the matter and added that she was "stressed out." Ms. Anderson replied, "we're all stressed out." Ms. Ashley's answer was marginally disrespectful: "what do you have to be stressed out about?" The tones of the colloquy were not pleasant at this point, and Ms. Ashley acknowledges her tone was rude. Ms. Ashley turned away from Ms. Anderson in a dismissive manner.

At this apparent snub, the grievant rose from her chair, and picked up a packet of informational brochures she had brought to the meeting. The packet was about 1 inch thick and weighed at least half a pound. Holding the packet with two hands, the grievant raised it approximately to her eye level, and smartly rapped Ms. Ashley on the top of her head with the packet of brochures.

The grievant describes her action as ". . . like a three stooges kind of thing – of okay I'll hit her with these to wake her up, you know, how dare she ask me what kind of stress I'm under."

The grievant denies her action was violent, but characterizes it as stupid. The grievant believes that she was more frustrated than angry when she struck Ms. Ashley with the brochures. The grievant acknowledges that her action was " . . . probably a little more (than in a kidding manner), now when I think about it." The grievant adds, "I intended it in a kidding manner, but it was probably a little bit harder than if I were really just, you know, tapping." The grievant acknowledged that she struck Ms. Ashley harder than she had intended.

In any event, the blow was struck with sufficient force to be heard by other meeting participants. There was a sudden pause in the private conversations going on around the table.

Ms. Ashley experienced pain from the blow. She covered her head with her hands and began to cry. Almost immediately, Ms. Anderson grasped Ms. Ashley's arm and apologized. Pupil Services Director Kohlmetz, who claims not to have witnessed the incident but heard the noise it created, observed Ms. Ashley had slumped in her chair, that her eyes were glassy, and that she was crying. He asked Ms. Ashley if she wanted an aspirin. Ms. Ashley declined the offer of an aspirin. She remained in the room and apparently participated in what turned out to be a 40-minute meeting. Shortly following the incident the grievant was called out of the meeting to attend to unrelated business.

After the meeting ended, the grievant met Ms. Ashley in the hallway and apologized for her action. She seemed both contrite and embarrassed. Ms. Ashley accepted the apology with the statement, "That's all right, Barb, I accept your apology, but you assaulted me and that's wrong." The grievant ultimately wrote a note of apology for her action to all present at the

meeting, including Ms. Ashley, and sent Ms. Ashley a box of notepaper.

Following the hallway meeting with the grievant, Ms. Ashley walked to the office of Pupil Services Director Kohlmetz. He asked if the grievant had apologized. Ms. Ashley doesn't recall her answer but did tell him that her head hurt. She again declined an aspirin Mr. Kohlmetz offered. Ms. Ashley said she turned down the offer of an aspirin because the head pain she was experiencing was not like the pain from a "normal" headache; it was, instead, like a "bruise" headache, and emanated from the point on her head where she had been struck.

Ms. Ashley then drove to her "moonlight" job at a chain bookstore on Madison's East Side, an approximate 15-minute drive. When she arrived, she said she felt nauseated and that her head hurt badly. When a co-worker led her to a back room and asked what was the matter, Ms. Ashley simply broke down and began crying. The co-worker drove Ms. Ashley to Urgent Care where a doctor examined her. The examination included some neurological tests. The doctor reportedly told Ms. Ashley that she had experienced a concussion and that her injury would have been more severe if she had not been wearing a metal headband over her hair when she was struck.

Ms. Ashley was offended, however, apparently by what she perceived as the casualness with which Pupil Services Director Kohlmetz responded to the incident. When she returned to her home that evening, she reported the incident to her high school principal, who was Ms. Ashley's immediate supervisor. He seemed shocked, and he assured her that the matter would be dealt with the following day. Still shaken, Ms. Ashley then telephoned her sister and her sister agreed to spend the night with her.

The next day, Ms. Ashley's principal suggested Ms. Ashley write an account of what had occurred, and Ms. Ashley did so. In addition, the principal referred the matter to the School District's Human Resources Director, Ann Smith. Ms. Ashley also verbally described her altercation with the grievant to the school's liaison police officer. The officer said the incident could form the basis for charges to be filed against the grievant, but Ms. Ashley did not press any criminal or civil charges.

As it happened, at the time this incident took place Ms. Ashley was experiencing a major emotional trauma in her life. Ms Ashley also suffers from hypoglycemia and depression.

Ms. Anderson also was experiencing a high level of stress at the time of the incident due to multiple, serious emotional traumas in her personal life. Ms. Anderson had survived cancer surgery the pervious year, was being treated for thyroid difficulties, and had experienced several panic attacks due to the cumulative stresses in her personal life. Each woman appears to have been unaware of the stress the other was experiencing. Each woman appears to have been unaware that the other was also under medical treatment for good and

sufficient reasons.

Following Ms. Ashley's completion of her written account, District Human Relations Director Ann Smith interviewed other witnesses to the incident, including the grievant. The grievant was ultimately disciplined for her actions with a one-day suspension without pay. The District also verbally advised Ms. Ashley that her own statements to the grievant immediately prior to being struck had been unprofessional.

RELEVANT CONTRACT PROVISIONS

Article IV – Grievance Procedure

. . .

D. Initiation and Processing

. . .

> Level Four. . . . Upon notice to the Board of same if the parties are unable to agree on an arbitrator, either party may request that the Wisconsin Employment Relations Commission appoint an arbitrator who will hold hearings on the grievance and issue a decision on the grievance in a timely fashion. The arbitrator's decision will be in writing and will set forth findings of fact, reasoning and conclusions of the issues submitted and shall be binding upon both parties. The arbitrator will be without power or authority to make any decision which requires the commission of an act prohibited by law, or which relates to any grievance that arises outside the term of this agreement. The arbitrator shall have no power to add to, subtract from, modify or amend any provision of the contract. The parties by mutual agreement may modify the contract. In the event there is a charge for the services of an arbitrator, including per diem expenses, if any, and/or actual; and necessary travel and subsistence expenses, or for a transcript of the proceedings, the parties shall share in the expense equally.

. . .

Article XIII - Discipline and Discharge

B. Non-probationary Employees.

> Employees who have completed the probationary period satisfactorily and are continued thereafter shall be entitled to all rights and protections granted by this Agreement retroactive to the original date of employment. Such employees may be disciplined for reasons that are not arbitrary or

capricious, or may be discharged for just cause.

POSITIONS OF THE PARTIES

Union

The Union points to Ms. Ashley's admission that her response to the grievant was rude. The Union describes Ms. Anderson's reaction as ". . . tapping Ms. Ashley with a packet of papers in a kidding manner," and notes that Ms. Anderson had not intended to injure Ms. Ashley. The Union adds that the grievant immediately apologized to Ms. Ashley and later checked to see no harm had come to her.

The Union points out that the grievant is a good employee with a positive work history. The Union believes the District acted in an arbitrary or capricious manner when it enacted a punishment rather than imposing a lesser progressive disciplinary measure.

The Union acknowledges that the grievant's action – again described as one done in jest without any intent to harm – caused heads to turn because of the noise caused when the packets came into contact with Ms. Ashley's head. The Union believes the noise is not an accurate indicia of the force with which the packets struck, contending that "(t)he phenomenon occurring here is Newton's Second Law: F = MA (Force equal mass times acceleration). Thus the Union's explanation for the noise is that it resulted from the air trapped between and in the tri-folded pamphlets escaping presumably when the pamphlets came into contact with the top of Ms. Ashley's head.

The Union notes that the grievant was not reprimanded by her immediate supervisor, James Kohlmetz who apparently saw no need for an apology.

Thus, the Union asserts that the District overreacted to the incident and subsequent complaint filed by Ms. Ashley.

The Union also accuses the District of failing to provide a fair and objective investigation. In this regard, the Union believes the District gave more weight to Ms. Ashley's statement than that of any other person. The Union quotes one witness as stating that no one at the meeting approached Ms. Ashley "because it didn't look like a real significant incident that had happened." The Union claims that other witnesses regarded the incident as merely embarrassing, not an act of violence. The Union further contends that the District added unwarranted weight to Ms. Ashley's complaint by requesting documentation from Urgent Care as to treatment provided Ms. Ashley.

The Union further charges that the District failed to take a written statement from the grievant and put the grievant at an extreme disadvantage by not showing her the full realm of charges written by the complainant. The Union cites arbitral authority for sustaining a

grievance when the employer does not conduct a fair and objective investigation.

The Union believes the punishment was excessive and punitive. The Union acknowledges the District took the grievant's immediate apology and expression of concern as well as the grievant's subsequent written apology into account. But the Union claims the District 1) failed to take into consideration the grievant's exemplary personnel record, 2) failed to consider the use of progressive, corrective discipline, 3) failed to consider the undue hardship a loss of wages would cause the grievant, 4) failed to consider the emotional stress of the day working on the grievant, and 5) failed to recognize the incident as merely horseplay.

The Union defines horseplay as conduct that is without malice, is playful, childish, or impulsive. Citing an arbitration hornbook as authority, the Union suggests that four questions should be asked when analyzing horseplay:

1) Was the conduct intentional or accidental?
2) Was there any risk of injury or damage to other employees or company property?
3) Was the workplace atmosphere generally conducive to playful acts?
4) Did the employee react with regret or remorse for the injury or damage he or she caused.

The Union believes the conduct was accidental, that there was no risk of injury or damage to other employees or company property, that the employer tolerated joking, kidding and playful acts by its employees, and that the grievant apologized both verbally and in writing.

District

The District points to Article XIII, Section B in which the employer is authorized to discipline employees for reasons that are not arbitrary or capricious, and argues the District's decision to impose a one-day suspension was neither arbitrary nor capricious. Citing Wisconsin case law for definitional assistance, the District contends the discipline imposed was both rational and grounded in fact. It does not shock a sense of justice nor indicate a lack of fair and careful consideration.

According to the District, it conducted a thorough investigation into the alleged incident and imposed the discipline only after giving great consideration to all of the facts.

The District believes it has met its burden of proof in this matter. The District believes the "preponderance of evidence" rule is the appropriate one for arbitrators to use in determining factual issues presented by ordinary discipline and discharge cases.

The District argues that there is no dispute that the grievant struck Ms. Ashley on the head with a banded pack of approximately 50 brochures. The District notes that witnesses

have attested to the incident, and the grievant, herself, admitted her conduct.

Contrary to the Union's contention, the District argues the evidence does not support the notion that the action in question was merely a tapping done in a joking or kidding manner. The District argues that the loud noise that resulted from the contact between the brochures and Ms. Ashley's head was described by witnesses as sounding like a "big bang" or a "clipboard." The District does not believe a simple tapping would have created such a noise.

Moreover, the District argues, the blow was made with sufficient force that it caused Ms. Ashley physical pain. Ms. Ashley's immediate reactions and contemporaneous declarations were also consistent with the notion that the blow caused pain, according to the District. In addition, the District notes, Ms. Ashley ended up seeking medical attention for the pain she was experiencing.

The District also cites the grievant's testimony as additional evidence that Ms. Ashley was struck with force sufficient to cause her pain.

The District believes the discipline it imposed was reasonable, and suggests that an arbitrator should not second-guess every disciplinary action taken by an employer. The District contends that the discipline imposed in this case was issued only after an investigation, that the discipline was related to the conduct in which the grievant engaged, and there has been no allegation of discrimination.

The District describes its investigation as detailed and exhaustive. Besides interviewing Ms. Ashley and the grievant, the District says it also interviewed all of the witnesses cited as witnesses by both women, except one.

The District argues that the discipline it imposed was extremely reasonable based on the facts. According to the District, one employee striking another is never permissible in the workplace and employers have a duty to provide a safe workplace for their employees. The District views the grievant as acting out of anger and frustration, and describes such conduct as warranting harsh discipline.

However, says the District, it did not view the grievant's conduct in a vacuum. Instead, the District states that in reaching its discipline determination it took into consideration all of the surrounding factors. These factors, according to the District, included the personal difficulties being experienced by the grievant, the grievant's prior exemplary employment record, the grievant's contrition and apologies for her conduct, and the inappropriateness of Ms. Ashley's comments that led to the striking.

But, argues the District, these mitigating factors do not negate the seriousness of what occurred.

Even if the grievant's actions were merely a joke that got out of hand as contended by the Union, says the District, the discipline imposed should be sustained. A grievant should not escape punishment for action involving involuntary physical contact between employees just because the action was not motivated by personal malice, the District concludes, citing arbitral authority it believes supportive of this proposition.

Union Reply

In its reply the Union attempts to minimize the injury to Ms. Ashley, citing testimony from James Kohlmetz that Ms. Ashley participated in the meeting following the incident. The Union seems skeptical that Ms. Ashley suffered a bruise on her head, because there is no mention of a bruise in the report submitted from Urgent Care. Since the District failed to provide a copy of the Urgent Care report to the Union before the hearing, the Union urges the arbitrator to downplay or disregard all mention of a head injury.

The Union objects to the District's reference to the grievant's "frustration and anger," and point to the grievant's testimony that characterized the grievant as "more frustrated I think than angry" at the time of the incident.

The Union again asserts its belief that "(t)he force of the blow was minimal," and again refers to Newton's Second Law and its belief that noise of the blow was caused by escaping air that had been trapped in the pamphlets

The Union is dubious that the District took the grievant's good employment record into consideration since the District's Human Relations Director testified at hearing that she had not reviewed the grievant's personnel file prior to issuing the discipline.

The Union continues to believe that the discipline imposed was arbitrary or capricious. The Union believes it reached a verbal agreement with the District as to a concept of progressive discipline, and cites arbitral authority that verbal agreements can be binding. The Union further attempts to distinguish a case cited by the District in support of its discipline on the grounds that the discipline imposed in the case cited was only a written reprimand.

The Union also believes that a list of arbitration cases cited by the District in support of the District's view that it had met its burden of proof all involved progressive discipline except for one – and in that case the arbitrator found in favor of the grievant.

The Union reasserts that the conduct of the grievant was not sufficiently egregious to warrant the one-day suspension. The Union contends that the contact was not forceful, that a simple tapping would have caused a loud noise, and that Ms. Ashley's bruise is completely unsubstantiated. The Union further argues that the grievant clarified her admission ("I'm sure it hurt her") by saying "what she did made me think that I had hurt her, and I didn't intend

that."

Finally, the Union argues the discipline imposed was not reasonable because the District viewed this action in a vacuum. The District did not review the grievant's personnel file prior to imposing discipline, did not understand Newton's Second Law, and did not consider all of the mitigating circumstances.

The Union notes Ms. Ashley had received a verbal indication that her responses to the grievant's initial inquiries were unprofessional. Therefore, says the Union, the grievant should have received only the next higher step in a progressive discipline procedure, i.e., a written reprimand. The Union cites arbitral authority in a case where both employees deserved to be disciplined in a proportionate manner.

The Union believes the grievant went overboard in her apologies and notes the employees involved work at different work sites. The Union does not believe the District has any established work rules. Neither does the Union believe the grievant has any history of breaking any District policies or rules.

District Reply

In its Reply, the District argues that the Collective Bargaining Agreement between the parties does not include the concept of progressive discipline, but provides that "employees may be disciplined for reasons that are not arbitrary or capricious." The District believes that this language is clear on its face and refutes the Union's claim that during bargaining the District agreed to use progressive discipline.

The District further emphasizes that it conducted a fair investigation of the incident and gave due consideration to all of the evidence gathered. The District acknowledges that it did not request a written statement from the grievant, and simply took a verbal statement from her. But, says the District, the Union has failed to cite any harm or disadvantage resulting to the grievant therefrom, and notes the grievant's acknowledgment that she was given every opportunity to present her side of the incident.

Neither does the District believe it overreacted to the incident. It explains that Mr. Kohlmetz had not actually seen the incident take place and therefore was unable to make an intelligent assessment as to its severity. The District denies that it chose to add extra weight to the complaint by requesting medical documentation from Ms. Ashley. Ms. Ashley, says the District, voluntarily supplied the medical information pertaining to her injury. In any event, the District dismisses the medical documentation as not constituting a critical factor in its investigation.

The District believes that one employee striking another is a serious matter. In response to the Union's argument that a one-day suspension was excessive and punitive, the

bargaining agreement. This, says the District, is contrary to the (not) "arbitrary and capricious" standard that is actually contained in the parties' agreement.

In any event, the District argues that it considered all of the facts present in reaching its discipline decision. The District points to testimony of the District's Human Relations Director that the District took into consideration that the grievant had no record of misconduct with the District. The District does not believe that a good conduct record means a suspension can never be imposed for a first offense.

The District also points to the disciplinary letter given to the grievant in which the District acknowledged that both participants in the incident were under stress prior to and at the time of the incident. The District further notes that the District's Human Relations Director specifically affirmed the District took this factor into account.

The District does not believe it was under any obligation to impose a form of "progressive discipline." According to the District, employees should recognize that certain kinds of misconduct (e.g., striking a fellow employee) are not acceptable, whether or not there is a specific rule or previous warning.

The District disagrees with the Union's assertion that it should have considered that a loss of pay would create an undue hardship for the grievant. First, says the District, the wage loss to the grievant was for only one day. Second, says the District, if it had to consider the issue of financial hardship every time it made a discipline decision, it would never to able to suspend or terminate an employee.

Finally, the District takes issue with the Union's characterization of the incident as "horseplay." The District contends the evidence shows the following sequence of events: Ms. Ashley and the grievant were having an unpleasant verbal exchange; Ms. Ashley made a comment to the grievant that the grievant found offensive; the grievant became angry and frustrated; in her anger and frustration the grievant struck Ms. Ashley on the head with the packet of brochures.

Even if this sequence of event could be characterized as horseplay, says the District, discipline is still appropriate. The District does not question that the grievant's conduct was impulsive. But, adds the District, the grievant still intended to strike Ms. Ashley on the head with the packet of brochures. When an individual forcefully strikes a co-worker on the head with a packet of brochures there is a risk of harm, according to the District. In this case, the blow did cause Ms. Ashley physical pain and resulted in a bruise on her head.

In summary, the District argues that the grievant's conduct speaks for itself. Her conduct cannot nor should be tolerated by the District. The one-day suspension imposed by the District was neither arbitrary nor capricious. It took into account the mitigating factors present as well as the District's duty to provide a safe workplace. Thus, the District

concludes, the grievance should be denied.

DISCUSSION

The Incident

By no means was it the "Perfect Storm:" 1/ it was not inevitable, it ended more quickly than it began, and the human emotions that produced it are not unique. But however brief, the September 1, 1999 encounter between two DeForest School District staff members qualifies as a squall at least, and appears to have been an unusual occurrence for District staff.

1/ The Perfect Storm, a recent book (on which a movie was based), describes an ocean storm of unusually severe violence and intensity that took place in the North Atlantic, off the North American coast. The term "perfect storm" refers to the unique meteorological conditions that then existed, which in combination with each other apparently made the occurrence of that storm inevitable.

The event was presaged by the low rumblings of an acerbic verbal exchange between two DeForest School District employees. Driven by personal anxieties and stresses unrelated to the subject of the exchange, each of the two women seemed oblivious not only to the squall warnings being hoisted by the other, but that she herself was contributing to the rising tension.

The developing squall finally erupted when the grievant, by then frustrated and irritated, picked up a one-inch stack of brochures, rose to her feet, raised the brochures with both hands to her eye level, and brought the stack down smartly on top of her protagonist's head. As a result of the blow, the woman who was struck suffered bruising and a possible concussion.

Contrary to the urging of the Union, this action cannot be accurately characterized as "playful," "joking," "kidding," "horseplay," "minimal," or a mere "tapping." Indeed, even the grievant candidly acknowledged that she had struck Ms. Ashley harder than she had intended, probably harder than if she had been "just tapping," and that the blow probably represented more than kidding.

The blow was impulsive. It was not malicious, but neither was it playful. Clearly, any blow such as this creates a risk of injury to the person being struck, and the grievant should have known this. Quite obviously, in this case the blow the grievant administered was struck with enough force to injure its recipient. It wasn't trapped air escaping from the 1-inch stack of pamphlets that caused the bruise on Ms. Ashley's head, it was the force of the blow. 2/ Force, indeed, equals mass times acceleration, of which the bruise suffered by Ms. Ashley is some evidence. In providing acceleration to that mass and directing that mass to Ms. Ashley's

head, the grievant went beyond the pale of acceptable expression of disagreement.

2/ The Union argues that the Urgent Care report received into evidence without objection makes no mention of a bruise on Ms. Ashley's head. That is true, and I regard the report as merely corroborating Ms. Ashley's testimony that she obtained medical treatment. But Ms. Ashley also testified that the blow struck by the grievant caused a bruise, and I find her testimony both competent and credible. Her testimony on this point, moreover, is supported by other evidence and testimony: the force of the blow caused a noise loud enough to be heard in the entire room and stop conversation; Ms. Ashley's assertion that she experienced pain following the blow to her head; following the blow Ms. Ashley immediately put her hands on the afflicted spot of her head and began weeping (a normal enough reaction from someone experiencing pain); the uncontested testimony of one witness (Kohlmetz) that Ms. Ashley appeared "glassy-eyed" when he viewed her immediately after hearing the sound of the blow. That Ms. Ashley was able to regain her composure, remain in the room and subsequently even participate intelligently in the discussion being conducted at the meeting, in my opinion, does not mean she experienced no pain or suffered no injury: I rather credit this to her courage, determination, self-discipline, and reawakened professionalism.

The Union also complains that it did not receive a copy of the Urgent Care report until the hearing was in progress. However, the report did not contain any sophisticated medical diagnosis that required expert analysis, and the Union was able to review fully the extremely sparse medical data the report contained. The report does serve as independent corroboration that Ms. Ashley obtained medical examination and treatment as a result of the blow, but that fact does not appear to have been in serious issue, if at all. Presumably, the Union already knew this through other documentation the District had provided in response to an earlier Union demand. In any event it does not appear that the Urgent Care report was considered by the District in determining the discipline to be imposed. Neither is it clear at what point the District even received a copy of the report. Certainly, it would have been better practice to include the report in the materials pertaining to the discipline decision that the District did provide the Union, assuming the District had custody of it. Under all of the aforesaid circumstances, however, it does not appear the Union was disadvantaged tactically or strategically by its belated receipt of the report.

Under these circumstances, some form of discipline was appropriate.

The Discipline

The District imposed a 1-day suspension on the grievant.

The Union attacks this discipline as arbitrary and capricious. The Union describes the discipline as excessive, contending that the District failed to consider the grievant's exemplary work record, failed to consider "the emotional stress of the day working on the grievant," failed to consider that the 1-day suspension constituted an undue financial hardship to the grievant, and failed to consider that the grievant's protagonist (Ms. Ashley) received only a verbal reprimand. The Union argues that under the precepts of progressive discipline

Ms. Anderson should have received no more than a written reprimand, and that the discipline imposed was punitive, not corrective.

The parties' collective bargaining agreement requires that discipline not be arbitrary or capricious. (The exception to this is that discharge from employment must be supported by "just cause"). Based on this contract language, the District urges that any discipline imposed that is not arbitrary or capricious must be sustained even though it may not meet a "just cause" standard. Under the District's analysis, "not arbitrary or capricious reasons" is necessarily a lesser standard than "just cause."

I agree. For example, as a general proposition discipline imposed without giving the employee fundamental due process would probably not meet the "just cause" standard, but is not necessarily arbitrary or capricious. 3/

3/ At the same time, although the "not arbitrary or capricious reasons" standard is a lesser standard than "just cause," it is also an included element of the higher standard: discipline that meets the "just cause" standard by definition cannot be arbitrary or capricious.

But analysis of District action taken after the incident occurred does not support Union charges that the 1-day suspension was arbitrary or capricious. Union attempts to support these charges by alleging the discipline was excessive are not persuasive. 4/

4/ The District suspects that Union allegations that the discipline was excessive reflect a Union effort to erect a "just cause" standard. Certainly a "just cause" standard would not tolerate excessively harsh discipline. But the "not arbitrary or capricious reasons" standard does not necessarily appear to tolerate it either. Evidence that an employee was disciplined by a measure not reasonably related to the facts or seriousness of the offense uncovered by the employer's investigation, or that the discipline followed an investigation that was egregiously less than thorough or complete, or that the discipline has been applied in a patently discriminatory manner could conceivably lead to the conclusion that the employer's reasons for the discipline were arbitrary and capricious.

For in contrast to the apparent initial casualness displayed by Mr. Kohlmetz, other District management persons seem to have regarded the incident with the utmost gravity. Following its occurrence, it appears the District's Human Relations Director conducted a thorough, indeed exhaustive, examination of what had occurred. She interviewed a number of witnesses to the event, including Ms. Ashley. Contrary to the Union's charge, I find no

evidence that undue weight was accorded to Ms. Ashley's version of the events by any District representative.

Neither do I find the District's failure to ask the grievant for a *written* statement or account of the incident to be either unusual or insidious. Indeed, the absence of a *written* statement by the grievant as to the event in question may be arguably to the grievant's advantage. However, a *verbal* account was requested and received from the grievant.

The Union complains that the District failed to show the grievant a copy of Ms. Ashley's written account before giving her own version. But the account prepared by Ms. Ashley was not a formal legal document to be answered or otherwise responded to. The District was in an investigatory stage and was entitled to obtain the grievant's observations, undiluted and uninfluenced by the statements of other witnesses.

All in all, the District's investigation of the facts of the incident appears to have been conducted in a fair, impartial, and professional manner.

No discipline was imposed until the District had concluded its investigation, and weighed the facts, including mitigating circumstances. According to the District's Human Relations Director those mitigating factors specifically included the absence of any previous discipline in grievant's work history, the emotional stress affecting the grievant, 5/ and the apologies expressed by the grievant. Absent consideration of those mitigating factors, a more severe District response to the grievant's act of physical assault may well have been justified and imposed. Thus, I cannot find the discipline excessive on the basis that the District ignored any mitigating circumstances, for the record shows otherwise.

5/ The District's letter imposing the discipline included a direct reference to the stress both the grievant and Ms. Ashley were experiencing prior to and at the time of the incident.

The Union also argues that since Ms. Ashley, in effect, received a verbal reprimand for her unprofessional responses to the grievant's initial inquiries, the grievant should have received no more than a written reprimand.

But the Union overlooks the fundamental difference between Ms. Ashley's conduct and that of the grievant. The grievant physically struck Ms. Ashley with a 1-inch stack of pamphlets, causing her physical injury and discomfort. Although Ms. Ashley's initial responses to the grievant were rude and unprofessional, at no time did Ms. Ashley physically strike anyone. In my opinion, this difference is significant and justifies a more disparate

response than that suggested by the Union. Thus, I cannot find the discipline excessive on the basis of that greater disparity.

The Union describes the 1-day suspension as constituting an undue hardship on the grievant. The grievant and her husband had suffered a relatively recent financial embarrassment. It further appears that the grievant is now a single parent and is helping to maintain two children in college. I do not doubt that the grievant is a responsible parent and has challenging financial burdens. However, I am not persuaded that the loss of a single day's pay would appreciably increase those burdens. I cannot find the discipline excessive on this basis.

The Union also argues that the District should have applied the precepts of progressive discipline, noting that 1) the District has no work rule against "horseplay," and 2) this was the grievant's first offense. I have already indicated that I regard the incident as something considerably more serious than horseplay. It was a deliberate action that represented a danger (albeit, not intended) to the safety of another that the grievant should have recognized. It was arguably disorderly and certainly disruptive to the good order and conduct of legitimate business in the school district. The tenets of progressive discipline do not require a minimal response to deliberate, disruptive actions that endanger the safety of others. Based on the conduct involved, the District was entitled to deviate from a progressive discipline approach.

Finally, the Union attacks the discipline as "punitive" instead of "corrective." But correction of an erring employee is not the only legitimate element of discipline. Other legitimate elements include 1) deterrence of other employees from similar actions, 2) safety of the work community, 3) protection of property, and 4) retribution (but only to a small degree, and not to be confused with "vengeance"). As a practical matter, any discipline more severe than a written reprimand may be deemed punitive, for it punishes or exacts a penalty.

In the instant matter, Barbara Anderson committed what I do not doubt was for her an aberrant action. I have no apprehension that Barbara Anderson will ever again lose control of her emotions as she did when she struck Ms. Ashley with the stack of brochures. In my view she will continue to be a valuable District employee. Moreover, I find her contrition to be genuine and praiseworthy, as well as her understanding that her action was unacceptable. Arguably, Ms. Anderson needs (and needed) no further education (or correction) on that point. 6/

6/ I am also satisfied that the grievant was appalled by her action, as evidenced by her instant apology to Ms. Ashley. The grievant was then called out of the room and remained out on an unrelated matter, but after the meeting had ended renewed her apology when she saw Ms. Ashley walking down the hall. The grievant later sent a written apology for her action to all persons present at the meeting (including Ms. Ashley), and further sent Ms. Ashley a box of notepaper.

In fact, so prolific were Ms. Anderson's apologies that the Union suggests that the grievant went "overboard" in offering them.

I do not agree.

In my view Ms Anderson's apologies and small gift to Ms. Ashley identify Barbara Anderson as a woman of inherent decency, honesty, and graciousness. Her apologies and obvious contrition were appropriate and on the mark. For notwithstanding the attempts of the Union to convert Ms. Anderson's striking of Ms. Ashley into jocular horseplay, Ms. Anderson understood almost immediately that her act was one of physical aggression, unacceptable regardless of any verbal provocation that preceded it. This is demonstrated by her subsequent apologies, which were also (appropriately) expressive of her genuine regret and contrition for that action.

But as the District points out, it has a responsibility to provide a safe workplace for its employees. It cannot tolerate physical conflict between its employees, for not only is that sort of activity disruptive to the conduct of school business, but it sets a bad example for District students who may witness or learn of it, and creates a potential financial liability to the District in case of serious injury. This is the message I believe the DeForest School District Administration was attempting to give in dealing with the Anderson-Ashley incident. At the same time, it tempered that message by taking into account the mitigating factors that both contributed to the incident and followed it.

Based on the record of this case, I cannot find the discipline imposed was arbitrary or capricious. On the contrary, the discipline appears to have followed a thorough, fair investigation and consideration of all relevant factors uncovered by the investigation. It bore a reasonable relationship to those factors and does not appear to be discriminatory in any sense.

What is needed now is closure of the incident in the minds of both Ms. Ashley and Ms. Anderson. As this opinion makes clear, the record justifies a finding that each is a woman of excellent credibility, work habits, and character. Ms. Anderson's action was unusual, aberrant conduct for her; Ms. Ashley bears some responsibility for escalation of the incident. Each woman has paid a consequence for her unthinking insensitivity to the other. It is time for each to move on to other matters.

AWARD

The grievance is dismissed.

Dated at Madison, Wisconsin this 27th day of September, 2000.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator

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