

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**BROWN COUNTY MENTAL HEALTH CARE CENTER REGISTERED
NURSES, LOCAL 1901-D, WCCME, AFSCME, AFL-CIO**

and

BROWN COUNTY

Case 641
No. 58703
MA-11038

(Timothy Lang Termination)

Appearances:

Mr. David Campshure, Staff Representative, Wisconsin Council 40, AFSCME, 1566 Lynwood Lane, Green Bay, WI 54311-6051, appearing on behalf of Local 1901-D.

Kenneth J. Bukowski, Brown County Corporation Counsel, by **Mr. John Jacques**, Assistant Corporation Counsel, 305 East Walnut Street, Green Bay, WI 54305-3600, appearing on behalf of Brown County.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Brown County Mental Health Center Registered Nurses, Local 1901-D, AFSCME (hereinafter referred to as the Union) and Brown County (hereinafter referred to as the County) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen to serve as arbitrator of a dispute regarding the discharge of Timothy Lang. The undersigned was so assigned. A hearing was held on May 24, May 25 and June 6, 2000, at the Brown County Mental Health Center in Green Bay, Wisconsin, at which time the parties were afforded the full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. Transcripts of the hearing were prepared, the last of which was received by the undersigned on June 15th. The parties submitted post hearing briefs and reply briefs, the last of which was received on October 2, 2000, whereupon the record was closed.

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

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties agree that the issues before the Arbitrator are:

1. Did the County have just cause to terminate the Grievant?
2. If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

The collective bargaining agreement provides in Articles 1 and 24, that employees may be discharged for just cause. Additionally, Article 1 reserves to management the right to make and enforce reasonable work rules, and to manage the facility and the work force.

BACKGROUND

The Employer provides general governmental services to the people of Brown County, Wisconsin. Among these services is the operation of a mental health center. The Union is the exclusive bargaining representative for the Center's staff of registered nurses. The Grievant, Timothy Lang, was employed as an RN at the Center from June 22, 1999, until his discharge on March 17, 2000. His discharge was triggered by the County's judgment that his actions concerning a homeless young man who was a patient at the Center in early February of 2000 were inappropriate. Specifically, he was accused of refusing to let the patient's mother have contact with him, of persisting in seeking a blood test, including through coercion, after being told he had no right to secure one against the patient's wishes, with escalating a confrontation with the patient, and with violating the patient's right to privacy and humane treatment by removing the door to his room and all of the furnishings from the room.

The patient, M.S., was involuntarily admitted from Door County in the evening hours of February 7th. He was transported to the Center by law enforcement personnel after he said he was afraid he would hurt someone. The Grievant was on-duty at the time, and was one of three staff members who did the admission for M.S. He found him uncooperative, somewhat

delusional and hostile to doctors. M.S. was not accompanied by any medical records, but the Grievant noticed an insulin kit among his belongings, and asked about it. M.S. told him he was diabetic, but refused to provide any details. He told the Grievant that he took insulin when he wanted, and in whatever dosage he wanted. M.S. consented to a blood test, and it showed a blood sugar level of 278. The normal range is 80 to 120.

When the admission was completed, the Grievant telephoned the patient's mother at her home in Deerbrook, about two and a half hours from Green Bay. He made the call at about 9:00 p.m., for the purpose of securing additional information about the man's condition. The substance of this conversation and one on the following day are a matter of dispute. According to the Grievant, on the 7th he told the woman her son had been admitted, and confirmed the diabetes. When she asked if she could speak with her son, he told her that her son was still very agitated, and that it might not be a good idea, but that she was welcome to if she wished. She agreed that it might be best to wait. She asked if she could come down and see him, and he told her that visiting hours were over, but she could come the next day. He also advised her that her son would be seeing a doctor and a social worker in the morning, and gave her the telephone number of the Social Worker, Paula DuTour.

According to M.S.'s mother, the Grievant called her at about 9:00 p.m. on the 7th and told her that her son had been admitted to the Mental Health Center, and that he was the nurse assigned to him. He told her her son had been acting out, was violent and aggressive, and might be suicidal. She asked to speak with her son, but the Grievant said it was not a good idea, because he was not in any shape to speak on the phone. She asked if she could come to the Center to see him the next day, and the Grievant told her "no." He explained that her son was schizophrenic, and was having hallucinations, and that since the Center could not guarantee her safety, there would be too much liability in allowing her to visit. He told her that many people aged 18 to 22 were schizophrenic, paranoid and suicidal, and asked if there was any family history of mental illness. She asked him if the condition might be insulin-related, and he said that he was trained to tell the difference between medical conditions and mental conditions, and that her son's condition had nothing to do with the diabetes. He told her a doctor and a social worker would see her son the following morning and that one of them would call her. He also told her that, although she could not speak with her son, she should call him if she had questions or needed information.

After the Grievant spoke with M.S.'s mother, Door County authorities faxed in his medical records. The records showed, among other things, a hospitalization the previous July for a variety of ailments, including diabetic ketoacidosis. This is a serious condition that can develop when diabetes goes untreated for a period of time, and is marked by nausea, vomiting, lethargy, rapid breathing, weakness, inappropriate behaviors and a fruity odor to the patient's breath. When this condition develops it is considered to be a medical emergency.

At 11:45 p.m. on the 7th, the patient refused to take insulin from the medical staff, insisting that he would take it when he wanted, and in the amount that he wanted. The

Grievant told him could not prescribe his own dosage, and he became upset, throwing papers about and yelling at the medical staff. Thereafter, he went into his room, and stayed there all day Tuesday, coming out only for lunch. He refused to meet with either the doctor or the social worker. He also refused to allow anyone to administer an Accucheck, the test of blood sugar levels, although he did consent to a blood screen at 6:30 a.m. When the Grievant came on duty that afternoon, he and a nursing assistant went to M.S.'s room to ask if they could do a blood test. M.S. was very abrupt with them. He refused the test, telling them "I don't need this shit." At about 4:30 p.m., the Grievant spoke with his supervisor, Bruce Anderson, about whether they could force him to submit to an Accucheck, and Anderson said it could only be done involuntarily if, in his judgment, the situation was life threatening.

At 5:30 p.m. the Grievant summoned three male CNA's and brought them to the patient's room, along with the Accucheck machine. He told M.S. that he wanted to get a blood test, and that he could do it by himself or he could have the nursing assistants help. M.S. became very upset and picked a chair up, holding it over his head. Pat Jeffrey, the other unit RN who was at the Nurses' Station, could observe what was going on through the video monitoring system installed in the room. She called Bruce Anderson to come to the unit because the Grievant was demanding a blood test from M.S. Jeffrey also called down the hall to the other personnel to stop, and to get out of M.S.'s room, and told CNA Gerald Holschuh to go down and tell them to get out of the patient's room. The Grievant said Anderson had approved it, and Jeffrey said she had just spoken with Anderson. The CNA's and the Grievant left the room as Anderson arrived on the unit. Anderson told the Grievant to leave M.S. alone.

A few minutes later, the Grievant observed that the light in M.S.'s room was off. Since there is no window in the room, use of the video monitoring system requires that the light be on or the door to the hall be open. The Grievant told M.S. he had to leave the light on or the door open, whereupon M.S. slammed the door shut and turned off the light. Over the next 45 minutes or so, the Grievant and Gerald Holschuh each went to M.S.'s room twice to turn the lights back on after M.S. turned them off. The final time, the Grievant told M.S. that if he kept closing the door and turning off the lights, he would have the door to the room removed. M.S. then turned off the lights, and barricaded the door with his furniture. The Grievant called the maintenance department and asked that the door be removed. He also summoned six CNA's to accompany him into the room.

Jeffrey again called Anderson to report to the unit. One of the CNA's retrieved a long metal bar with handholds on it that had been specially fabricated to remove barricades. They slid the bar under the door, shoved the furniture out of the way, and pushed into the room. The maintenance man arrived as they were opening the door, and Anderson arrived at about that same time. Anderson nodded to the maintenance man that he could proceed, and he started removing the door. The nursing staff entered the room holding a mattress in front of them for protection, and M.S. grabbed a chair and tossed it in their direction. The staff, including the Grievant, started removing the furniture from the room, and the Grievant asked

Anderson to call the doctor and get a prescription for a sedative. M.S. hid on the floor next to the bed. When all of rest of the furniture was removed, the medical staff took the mattress off the bed, and M.S. jumped up. The Grievant took him to the ground, and he and several aides held him down and administered a sedative to him. They placed a mattress on the floor and put him on it. Once he settled down, they left him in the room. Meanwhile, the maintenance man also removed the bathroom door.

While the confrontation was going on in M.S.'s room, the other patients became very agitated. One of them told Jeffrey they could take the staff if they wanted because there were more of them than there were of staff. After M.S. was subdued, Jeffrey, Holschuh and others spent some time calming the other patients.

At about 8:00 p.m., M.S.'s mother called the Grievant. He was on break in the lunchroom, and asked her to call back in 30 minutes or so. According to the Grievant, when she called back, he explained that he could not discuss her son while he was in the lunchroom, because of confidentiality concerns. He advised her that her son had been violent earlier in the evening, and described the barricading incident to her. She became very upset, and asked if she could come down. He told her that visiting hours were over, but that she would be welcome to come the next day.

Again, M.S.'s mother disputes the Grievant's version of the conversation. She recalled that when they spoke, he told her her son had become very violent and had been throwing furniture, lunging at passers-by and had tried to attack the doctor and the social worker. He described needing six aides to hold him down while they sedated him, and two different medications to calm him down. When she asked if she could see him, the Grievant told her he was too violent, and that she should wait until a commitment hearing on Thursday. He predicted that her son would be committed for at least 30 days for treatment.

After the phone conversation with M.S.'s mother, at about 9:30 p.m., the Grievant told Jeffrey he was going to go back and try once again to get an Accucheck. He and an LPN entered the room and the Grievant asked M.S. for his arm, but M.S. did not respond, and they left without getting the Accucheck.

Early on the morning of the 9th, Director of Nursing Shirley Gruender arrived on the unit. A nurse told her to look at M.S.'s room, and Gruender observed that the door was removed and all of the furniture was missing. She immediately ordered the maintenance department to reinstall the doors and return the furniture. Gruender reviewed the nursing notes from the nights before, and spoke with the staff. She prepared a notice of investigation, and had it served on the Grievant when he reported for work. He was suspended with pay pending a fact-finding meeting at the end of the week. Later that day, Social Worker Paul DuTour received a call from M.S.'s mother, who described the conversation with the Grievant. DuTour suggested she call Gruender. M.S.'s mother did call Gruender, and told her that she was very distraught about the Grievant's report of her son's violent behavior, since she had

never observed that in him before. She also told Gruender that the Grievant had told her she could not speak to or visit her son. Gruender checked the nursing notes, and found that neither call had been charted in the notes.

Gruender, Hospital Administrator Earlene Ronk and representatives of the Human Resources Department interviewed the personnel who were on duty during the incidents with M.S. The Grievant told Gruender that it was Pat Jeffrey who had suggested that he remove the door to M.S.'s room, and he repeated this to Ronk. At the conclusion of the investigation, Gruender recommended that Anderson be reprimanded for not halting the removal of the door, and that the Grievant be terminated for his conduct. On March 17th, Ronk served the Grievant with a letter of termination, setting forth the Center's view of events:

. . .

On Monday, February 7, 2000 a 21-year-old male client was admitted to Brown County Mental Health Center. You document that the client's thought process was paranoid and his behavior and attitude during the interview was shy/withdrawn, guarded/suspicious, defensive, angry and fearful.

You called the client's mother at 8:50 PM to let her know that her son was safe. When the client's mother asked if she could speak to her son you admit that you told her that her son was on 72-hour hold and that he was on General Suicide Precautions and that it was best that no one talk to him. A complaint was received from the client's mother stating that when she asked if she could come down and see her son, you told her that she wouldn't be able to see her son. Although you deny that you did not tell her she wouldn't be able to see her son, there is no documentation in the medical record to substantiate your conversation with her. This is in violation of HSF 94.20 "The right to make and receive telephone calls [sic] and HFS 94.21 "The right to receive visitors each day".

On Tuesday, February 8, 2000 at 4:30 PM you went to the client's room to get an accu-chek. When the client refused, you called the House Manager and asked him what the legalities/MHC policies were regarding getting an accu-chek from a client who refuses. The House Manager told you that you could get a blood sugar against the client's will only if it were critical and the client's life and safety were in jeopardy. Although it was not a medical emergency and you admit that a RN and LPN told you that the client has the right to refuse, you said that you felt you should push it. At 5:30 PM you called several staff to accompany you to the client's room where you stated "you have the choice of agreeing to an accu-chek or I'll have these guys help me". This show of force agitated the client to the point of grabbing a chair and putting it over his head

and threatened to throw it at staff. This jeopardized the client and staff's safety. This is in violation of HFS 94.09 "The right to refuse medications and any other treatment unless ordered by the court. [sic]

The client was fearful and angry and wanted to be left alone so he shut the light off and he shut the door. You threatened that you would remove the door if he didn't keep the light on or open the door. This was unnecessary because there are 15-minute checks done by CNA's to monitor clients who are on GSP and it caused the client to barricade his room. You called maintenance to have the client's doors removed. After entry was gained to the client's room, you directed the staff to remove the furniture and the client was restrained until doctor's orders were received to sedate him. This escalated other clients on the Unit who were afraid, and threaten [sic] the staff with violence. This is in violation of "Clients Rights [sic] and in violation of HSF 94.24 "The right to a humane psychological and physical environment, including reasonable privacy".

The client's mother called you at approximately 7:15 PM and you told her about the incident. She requested to speak to her son but you told her that he was sedated and you didn't want to go to his room. The client's mother said that she could be there the next day by mid-afternoon. You told her that because of the attack you couldn't allow her to visit because the County couldn't take the liability or responsibility of her getting hurt. Although you deny making that statement and state that the client refused to speak to his mother, there is no documentation in the client's medical record to substantiate your conversation with the client's mother and that the client refused to speak to his mother. The client's mother spoke to her son the next day and the client denied not wanting to speak to his mother. This violates HFS 94.20 "The right to make and receive telephone calls" and HFS 94.21 "The right to receive visitors each day".

Conclusion: You have been oriented and trained in the Brown County Mental Health Center's policies on "Client Rights".

Our investigation leads to the conclusion that there was a deliberate violation and disregard for the client's rights, and the client's mental and emotional needs. You used poor judgment and decision making by failing to respond appropriately to an escalating emergency situation and you failed to provide a safe environment for the client and staff by placing them at risk unnecessarily. There was no documentation in the client's medical record to substantiate that you did not refuse the client's telephone and visitation rights. The client rights violated were HFS 94.09 "The right to refuse medications and any other treatment unless ordered by the court", HFS 94.20 "The right to make and receive telephone calls", HFS 94.21 "The right to receive visitors each day", HFS 94.24 "The right to a humane psychological and physical environment, including reasonable privacy."

Lack of documentation violates N6.03 Wisconsin Administrative Code Standards of Practice for Registered Nurses, Brown County Mental Health Center Department of Nursing Standards of Care and the American Nursing Association Standards of Clinical Nursing Practice: Data collection involves the client, significant others and health care providers when appropriate. Relevant data are documented in a retrievable form.

Because of these violations, the County must terminate your employment effective today, March 17, 2000.

...

The instant grievance was filed, protesting the termination. It was not resolved in the lower steps of the grievance procedure, and was referred to arbitration. In addition to the facts recited above, the Grievant testified at the arbitration hearing that he never told M.S.'s mother that she could not speak to her son or visit her son. He expressed the opinion that she was a gold digger who was hoping for some financial settlement from the County, and noted that she never did come to the Center to see her son, even after DuTour and Gruender told her that she could. He also expressed the opinion that M.S. was afraid to tell his mother that he had specifically asked not to speak to her. He agreed that he had not charted the phone calls with the mother, but said he did send detailed notes of them to Paula DuTour. He remarked that many things were not charted and that there were many holes in the charts.

The Grievant acknowledged that he was persistent in seeking an Accucheck from M.S., but asserted that he was simply concerned about his medical condition. M.S. had a history of ketoacidosis, had elevated blood sugar levels and was not taking insulin. He was not being cooperative with staff, the nursing notes did not indicate that other staff had been trying to observe him for any symptoms, and the Grievant had not been able to closely observe him for signs of ketoacidosis. Moreover, the doctor's order from the time of admission called for Accuchecks three times per day. Given all of this, the Grievant felt he had to keep asking for the test, in hopes that M.S. would consent. The Grievant denied that he had the three aides accompany him into the room in order to intimidate M.S. into giving a blood sample, though he observed that the difference between coercion and aggressive patient care could be a fine line. He admitted knowing that the patient normally had the right to refuse tests and procedures, but recalled that Anderson had told him it was up to him to determine whether M.S.'s life might be in danger. His remark to the patient that the three CNA's would help get the Accucheck was not a threat. He was merely concerned that M.S. might be uncomfortable with him, and thought he might prefer to have one of the others administer the test.

The Grievant testified that the closing of the door and the turning off of the light in M.S.'s room were interfering with the staff's observation of him as part of the general suicide precautions. While he knew the patient just wanted to be left alone, he could not permit that

desire to trump his duty to provide care. He agreed that the suicide protocol only required direct observations every 15 minutes, but said that Pat Jeffrey was adamant that the light remain on or the door remain open. When M.S. refused to comply with his requests, it was Jeffrey who told him he should have the door removed from the room. He called down for the maintenance man to remove the door, but did so knowing that Bruce Anderson would be there in plenty of time to give the final approval for it. As for the removal of the furniture, the Grievant did not order this. The aides started doing it as soon as they entered the room, and he simply assumed that this was standard operating procedure whenever a barricade was removed. Likewise, he did not order the removal of the bathroom door, and had no idea why it was taken off. At the time he asked for the removal of the door to the room, he did not know that the staff had a metal bar available to move barricades, and he thought removing the door was the only way to insure regular observations of M.S.

Patricia Jeffrey testified that she was present when Anderson told the Grievant he could not force M.S. to submit to an Accuchek and that when she subsequently saw him go into the room with three aides, she called Anderson because she knew he was wrong. She also warned the aides and the Grievant that the patient had a right to refuse the Accuchek. Jeffrey said that she never told the Grievant to remove the door to M.S.'s room, and that she had never ordered any doors removed from any patient's room. She agreed that the video camera would not be useful if there was no light, but said that the general suicide precautions required a direct visual check anyway, so that the video camera was more a convenience than a critical part of the monitoring.

Additional facts, as necessary, are set forth below.

The Position of the County – Initial Brief

The County takes the position that the Grievant was terminated for just cause. The Grievant took it upon himself to isolate patient M.S. from his family, and to insist on a course of medical tests that the patient did not want and had a right to refuse. When the patient's mother sought to speak with him on the telephone, the Grievant refused to put her calls through. When she asked if she could visit him, he told her she should not because of liability issues. This is utterly inconsistent with his statutory right to receive phone calls and visitors.

In addition to isolating patient M.S., the Grievant elected to insist on medical procedures that were not requested by doctors, required by the patient medical condition, or desired by the patient. Despite the fact that patients have the right to refuse treatment, the Grievant insisted on obtaining an Accuchek test of the patient's blood. He stooped to blatant coercion, and in so doing, escalated a situation to the detriment of his safety, the safety of other staff, and the safety of the patient. After the patient exercised his right to refuse the test, the Grievant had a group of CNA's gather in his room, and told him that he could either agree to the test or the CNA's would help him get one. This is clearly a threat of force, and an immediate confrontation was avoided only when RN Pat Jeffrey and Nurse Manager Bruce Anderson told the Grievant to leave the patient alone.

The Grievant refused to leave the patient alone, and instead almost immediately confronted him about his desire to turn his light off. The need to have the light on existed only in the Grievant's mind, since the patient could be adequately monitored without leaving his room light burning. This unnecessary confrontation was caused solely by the Grievant's desire to assert his power and authority over the patient. Predictably, it led to violence, including an injury to one of the CNA's who were summoned to aid the Grievant when the patient slammed the door on him and the Grievant forced his way into the room. After this, despite having been told in no uncertain terms to leave him alone, and knowing that the patient was violently opposed to any blood test, the Grievant went a third time to try to obtain the Accucheck. This course of action demonstrated a persistent refusal to honor the patient's right to decline treatment, as well as violating his right to privacy and his right to humane treatment. The Grievant's actions, taken as a whole, were grossly inconsistent with even the minimum required standards of nursing practice. Afterwards, he refused to take responsibility for any of his actions, variously blaming Anderson, Jeffrey and the patient. The inappropriateness of his actions is compounded by his inability to recognize or admit that he did anything wrong.

Faced with a short term employee who was insensitive, even hostile, to the statutory rights of a patient, who took it upon himself to violate those rights in numerous ways, and who then lied to investigators and denied responsibility for his actions, the County had not only the right but the obligation to take action. The decision to terminate the Grievant was amply supported by just cause, and accordingly, the Arbitrator should deny the grievance.

The Position of the Union – Initial Brief

The Union takes the position that the Grievant was not terminated for just cause, and that he must be reinstated and made whole. At the outset, the Union observes that the County has the burden of proving these allegations by clear and convincing evidence, since they imposed the most severe sanction available and accused the Grievant of behavior that carries with it a serious professional stigma. The evidence here cannot meet that standard, nor even the lower "preponderance of the evidence" standard used for lesser forms of discipline.

In order to uphold the County's actions, the Arbitrator must determine that (1) the Grievant is guilty of the conduct charged and (2) that the penalty is appropriate to the conduct. Neither conclusion is possible in this case. There is simply no evidence that the Grievant prevented or even interfered with the patient's right to have visitors or phone calls. The patient's rights include the right to refuse outside contacts, and the patient told the Grievant he did not wish to talk to anyone. Indeed, in the initial evaluation with the social worker and physician, two days after he was admitted, he continued to say he did not want his mother contacted. Had the Grievant put through the mother's phone calls in the face of the patient's express wish to be left alone, he would have violated his rights.

The allegation that he refused to let the mother visit the patient is likewise not proved. The Grievant admitted telling the mother that she should not drive down to Green Bay when she could not possibly get there before visiting hours ended, but that is simple common sense. Looking back, through the prism of her dismay at her son's condition, perhaps feeling guilt at not visiting her son at all during his stay, the mother seeks someone to blame, and has settled on the Grievant. However upset she may have been, however, that cannot translate into misconduct by the Grievant.

Neither can the Grievant's treatment of M.S. be grounds for discipline. He readily admits seeking to obtain an Accucheck of this diabetic patient's blood. He did so because he was concerned about his medical condition and his history of not regulating his blood sugar levels. He also admits using every means available to persuade M.S. to consent to an Accucheck. The fact remains, however, that no one ever forced M.S. to have an Accucheck and no Accucheck was ever obtained by the Grievant. It simply not true that M.S. was forced to undergo any medical procedure, treatment or test against his will.

The Grievant concedes that he had the patient's room door removed, but he did so out of sound medical concerns. M.S. was on general suicide precautions, and had an uncertain medical condition. He refused to leave his light on so that he could be monitored by camera, and he barricaded his door so that he could not be monitored by direct observation. Removal of the door was the option he selected. It is worthwhile noting that the Grievant's supervisor, Bruce Anderson, observed the removal of the door and allowed it to proceed. Indeed, he gave the maintenance man the go-ahead to remove the door, and is listed on the work request form as the person who asked that the door be removed. The door remained off its hinges until the following day. Anderson received a verbal reprimand for giving this order. The Grievant was terminated. If the removal of the door was so clearly wrong, how can the disparity in penalty in this case be explained?

The Grievant acknowledged at the arbitration hearing that he could have handled this situation differently, but the issue here is not whether he made the best choices available. The issue is whether the choices he made constituted dischargeable misconduct. Plainly they did not, and he should, therefore, be reinstated and made whole for his losses.

The Position of the County – Reply Brief

The County points out that the Union's brief essentially admits misconduct. The Union concedes that the Grievant engaged in a show of force to get the patient to agree to an Accucheck. The other phrasing for this would be coercion. The Union concedes that the Grievant went back a third time to get consent for an Accucheck after the patient was sedated. Trying to get informed and voluntary consent to a procedure from a sedated patient is plainly a bad faith circumvention of the patient's rights. The Union admits that it was the Grievant who called maintenance and ordered the patient's door removed. Granting that Anderson shared in

the blame for not stopping this, it was the Grievant who initiated the action. The County notes that Anderson admitted his mistake, admitted he was wrong, and learned from the discipline he received. This stands in stark contrast to the Grievant, who continues to believe there is nothing wrong with what he did, and continues to point blame at everyone else, without acknowledging any fault himself.

The Union also concedes that the Grievant failed to chart his telephone conversations with the patient's mother. This goes beyond a mere procedural error. In the course of the first call, he obtained medical information that would have been important for doctors and other nurses to know. More significantly, his failure to chart the calls reflects his understanding that he was doing something wrong in the course of the calls. It is a reasonable inference that he did not chart them because he wanted no record of the contacts. He wanted no record because he understood that he was exceeding his authority in denying the patient's mother access to her son. The Union's attempt to compare this with Gruender's failure to chart her conversations with the patient's mother is a false analogy. Her calls were unrelated to patient care and she was not providing care to the patient. Instead, the calls were investigative inquiries, following up on the mother's inquiries. There was no reason to chart them.

The Union also tries to suggest that the nursing assistants saw nothing wrong with the Grievant's decision to display force to the patient, and that the assistants, unbidden by the Grievant, decided on their own to remove the furniture from the patient's room. A simple review of their testimony shows that they were uneasy about his orders, and that they were acting under his direction and control when the furniture was removed.

The Grievant had sufficient training and experience to know that what he was doing was wrong. He concedes that he was fully aware of the rights of a committed patient. His actions toward M.S. were undertaken in conscious disregard of patient rights and established standards of care. No amount of retraining or corrective discipline will insure that he does not again mistreat the patients under his care. The County is entitled to be rid of him, and the grievance should be denied.

The Position of the Union - Reply Brief

The Union reiterates its basic point – that the door that was removed was removed with the approval of the Grievant's supervisor, and that every action he undertook was in pursuit of the doctor's standing orders. It was the doctor, not the Grievant, who ordered that an Accucheck be taken three times a day. It was the doctor, not the Grievant, who ordered that the patient be directly observed every fifteen minutes as a precaution against suicide. The Grievant was persistent in seeking the Accucheck because he knew the patient was diabetic, knew his sugar levels were elevated, and knew he had not had insulin. The Grievant was vigilant in seeking to observe the patient, despite the patient's efforts to block observations,

because he knew he was a suicide risk. Perhaps he used poor judgment in asking that the door to the room be removed, and perhaps he used poor judgment in gathering the nursing assistants for a show of force. However, these actions were undertaken to insure the welfare of the patient, and misguided zeal is not the same as misconduct.

The County errs in crediting the patient's mother over the Grievant. There was no reason at all for the Grievant to deny the patient's mother access to him. He did discourage her from coming to the Center late at night, after visiting hours, because such a trip would have been fruitless. However, he also said she was free to come during the day. He shielded the patient from the initial calls she made because he had said he did not want to speak to anyone, including his mother. He made this request when he was admitted, and again two days later, when he spoke with the Social Worker, Paula DuTour. Just as the patient has the right to make calls, he has the right to refuse to take calls, and the Grievant should not be disciplined for respecting that right.

The County alleges that the Grievant conducted himself as if there were a medical emergency, when in fact there was no emergency. Hindsight is always 20/20. The pertinent question is what the Grievant knew at the time. He knew the patient was diabetic, with high sugar levels in his blood, no recent medication and a history of ketoacidosis, a very dangerous condition. He knew he was delusional, and was feeling and seeing a "presence" that others could not sense. Again, perhaps his response was more aggressive than the situation required, but the Grievant genuinely believed that a critical problem, if not an actual emergency, was in the offing. The penalty for misjudging a situation should be correction and retraining. The only purpose served by a discharge is to punish the Grievant. He may deserve some sanction here, but the Arbitrator should understand that the County's response is a gross overreaction.

DISCUSSION

The Grievant was employed for seven months as an RN at the Center before being discharged. The discharge was based on the County's conclusion that he had (1) violated patient M.S.'s right to receive calls and visitors by telling M.S.'s mother she could not speak to or see her son; (2) violated charting procedures by not making a record of his telephone conversations with the patient's mother; (3) violated the patient's right to refuse treatment by trying to coerce him into having an Accucheck; (4) violated professional standards by escalating a confrontation with the patient; and (5) violated the patient's rights to humane treatment and privacy by having the doors and the furniture removed from his room. The Grievant admits having failed to chart the conversations with the patient's mother, and admits some failures of judgment in the other instances, but generally denies the charges.

A. The Telephone Conversations With the Patient's Mother

The Grievant completely denies M.S.'s mother's claim that he told her she could not see or speak to her son. While he cannot explain her claim, he speculates that she made it in

hopes of receiving some financial settlement from the County. This is certainly a possibility, but there is no evidence of any legal claims or settlements arising out of M.S.'s stay at the Center, and the mother made this charge to both DuTour and Gruender while her son was still at the Center, and before she knew the details of the Grievant's other problems with him. If this was a scheme, it was a peculiar one.

The Union suggests that the mother made this allegation because she felt guilt at not having seen her son while he was at the Center, or for many months before that. The connection between that and this allegation is not clear, but it is clear that she called her son several times after DuTour and Gruender told her she could speak to him, which raises the question of why she did not call him before then. One possible explanation is that she had been told she could not.

The other side of the coin is that it is not completely clear why the Grievant would have told the mother that she could not see or visit her son. The County's theory is that he had a desire to exercise authority and control over M.S., and that this extended to controlling his contacts with the outside world. While this is every bit as speculative as the Grievant's theory and the Union's theory, as discussed below, it is consistent with the Grievant's approach to other aspects of M.S.'s care during his stay.

At base, this allegation comes down to a credibility judgment. Neither story is impossible. As I conclude that the Grievant lied about several other material points in his testimony, I find that it is more likely than not that he is also lying about his conversations with M.S.'s mother.

B. The Show of Force

The Grievant wanted M.S. to submit to an Accuchek, and M.S. would not. The Grievant felt strongly enough about this to go to Bruce Anderson, and ask if he could force M.S. to have the test. Anderson told him he could only do that if the patient's life was in danger. Almost immediately after this, the Grievant gathered together three male nursing assistants and took them to M.S.'s room with him. The nursing assistants generally agreed that the Grievant told M.S. that he could submit to the Accuchek or the nursing assistants "could help." At the hearing, he explained that this was not a threat or an effort at coercion, but merely an offer to have someone else get the blood sample if the patient was not comfortable with him. This explanation strains credulity to the breaking point. Even the Grievant was not able to completely maintain this story throughout his testimony, admitting on re-cross examination that it might have appeared coercive to the patient, and that there was a fine line between coercion and helping a patient. No reasonable person could look at the Grievant's actions here as something other than an attempt to coerce M.S. to give up his right to refuse the Accuchek.

In his defense, the Grievant cites his concern that M.S. might develop serious complications from his diabetes, and his conviction that an Accucheck had to be taken to monitor his sugar levels. The balance of the testimony of medical professionals in this case – including doctors, registered nurses, licensed practical nurses, and aides – is that they saw nothing in M.S.’s condition that indicated any serious physical illness, and no symptoms of diabetic acidosis. Neither could the Grievant actually identify anything specific that indicated this condition, although he explained that he was never able to examine M.S. closely during the day and did not believe that anyone else had either.

The Grievant, for whatever reason, was determined to have his way in obtaining an Accucheck from M.S., despite being told that M.S. had every right to refuse, despite the fact that M.S. adamantly refused to agree to the test, and despite the fact that there was no urgent medical necessity for the test. His last line of defense on this allegation is that he never actually took an Accucheck from M.S. against his will. That is true, although it is also true that one reason for that is that M.S. became so upset that he brandished a chair at the staff members. While they were regrouping, Jeffrey called Anderson to the unit, and both Jeffrey and Anderson ordered him to leave the patient alone. Whether they would have taken the Accucheck against his will but for the intervention of other nursing staff is a matter of speculation, but it is absolutely clear that the Grievant was determined not to let M.S.’s demand to be left alone stand in the way of his desire to have the test taken. This course of action not only ignored the patient’s legal right to refuse treatment, it served to provoke him. M.S. had already expressed a deep mistrust of medical personnel. The show of force prompted him to threaten staff with a chair, and shortly afterwards, to barricade himself in his room.

As the Union points out in its brief, hindsight is always 20/20, and it is not fair to judge a course of action solely on the basis of outcomes. Here, however, the Grievant was told by two more experienced RN’s – Anderson and Jeffrey – to leave M.S. alone and respect his decision not to have the Accucheck. Given the patient’s mistrust of medical personnel and the warnings of other staff, the confrontation over the Accucheck and the subsequent barricading of the door were not remote possibilities that no one should have contemplated. The essence of a show of force is a physical challenge – the threat of direct action if the patient does not acquiesce. Anyone who initiates a show of force must necessarily contemplate physical resistance as a likely response. Thus, it is not just hindsight to say that there was a very good chance that the patient would respond violently to the Grievant’s chosen course of action.

C. The Barricading and Removal of the Door

Immediately after the show of force, the patient started turning off his light and closing his door. This prevented the nursing staff from observing him on the video monitor. The protocol for general suicide precautions calls for a direct physical observation every 15 minutes. The video monitor is an additional precaution, but it is not required.

Notwithstanding this, the Grievant and one of the aides went to the patient's room four times and turned the lights back on. On the last of these occasions, the Grievant told him he would have the door removed if he persisted in closing it, and the patient then slammed the door in the Grievant's face, and barricaded it with furniture. In response to this, the Grievant called maintenance and asked that the door be removed. He also assembled a team of six male aides to assist him in removing the barricade and subduing the patient.

The Grievant explained that his persistence in demanding that the light be left on and the door be open resulted from Pat Jeffrey's instructions. According to him, Jeffrey was adamant that the light be left on, and told him that he should remove the door to the patient's room. No one else heard Jeffrey say this, and Jeffrey denies it. I find it very unlikely that Jeffrey gave these instructions. Minutes before this, Jeffrey had intervened in the confrontation in the patient's room, ordering the aides to get out and telling them to leave M.S. alone. This is inconsistent with the notion that she would have followed up on this by telling the Grievant to start provoking M.S. again, particularly since the video monitoring was not a required part of the suicide precautions, and there was no reason to insist that the lights be on or the door be open. As was pointed out in testimony at the hearing, the patient was not restricted to his room, and was free to go into the halls and the common areas, beyond the range of the video camera. Moreover, once the Grievant did call for the door to be removed, Jeffrey called Anderson to the unit. If the removal of the door was her idea, it would not make a great deal of sense for her to summon Anderson in response. Instead, I conclude that the removal of the door was initiated by the Grievant on his own, and was another part of the test of wills between him and this patient.

It is true, as the Union points out, that Anderson ultimately okayed the removal of the door when he arrived on the unit, and did nothing to stop the removal of the furniture from the patient's room. It is also true, though, that by the time Anderson appeared on the unit, the confrontation was already fully realized. Anderson was not the one who provoked the patient and was not the one who prompted the patient to barricade the door. He was not the one who called maintenance to come to remove the door. He erred in supporting the Grievant's chosen course of action, but that does not make him primarily or even equally at fault. The most egregious aspect of the events of February 8th was not the removal of the door and furniture, but the Grievant's election of a course of behavior that almost inevitably would lead to a violent response by this patient. Whatever the reason for his need to assert his will over this patient, in pursuing it he trampled on the patient's right to make his own decisions. This had the effect of not only escalating the patient's behaviors, but inflaming other patients and putting them and staff members at risk of harm.

D. Conclusion on the Merits of the Charges

In conclusion, on the substance of the charges against the Grievant, I find that he is not telling the truth, and that he did in fact tell M.S.'s mother that she could not speak to or visit her son. This violated the patient's right to have calls and visitors. I also find that he gathered three aides together for the purpose of coercing M.S. into allowing an Accuchek, using an

implied threat of force, in violation of his right to refuse treatment. I also find that he was the moving party in having the furniture and doors removed from M.S.'s room, and was primarily responsible for the resulting violation of the patient's right to privacy and humane treatment. He concedes that he is familiar with the rights of the patients in these regards, and the fact that he did not testify credibly on these incidents indicates that he understood that his actions were not appropriate. All of these actions provide cause for some measure of discipline, and the remaining issue is whether discharge is an inappropriate penalty under the circumstances. 1/

1/ It is also apparent that he failed to chart his telephone conversations with the patient's mother, which is a violation of procedures. However, the failure to chart these conversations would not, by itself, trigger substantial discipline and I have not weighed this charge in evaluating the appropriateness of the penalty.

E. The Appropriateness of the Penalty

The Union concedes that the Grievant may have used poor judgment in his dealings with M.S., but argues that progressive discipline is the most appropriate vehicle for correcting errors in judgment. The Union also points out that Anderson was merely reprimanded, even though he was the one who approved the removal of the doors from the patient's room. Both of these points have validity, but on this record I cannot find them sufficient to render the choice of discharge an abuse of discretion by the County.

Addressing first the issue of the penalty imposed on Bruce Anderson, a verbal reprimand is far more lenient than the discharge suffered by the Grievant. However, Anderson has appreciably more service with the County than does the Grievant. He also had substantially less involvement in the overall sequence of events. He played no part in denying M.S. access to his mother. He acted appropriately in telling the Grievant he could not compel M.S. to submit to an Accuchek, and then ordering the Grievant to leave M.S. alone after the show of force. He played no part in escalating the confrontation with M.S., and as discussed above, appeared on the scene only after the bulk of the damage was done. In addition to his lower degree of culpability, management was entitled to give weight to his forthrightness in admitting his actions and taking responsibility for them. Unlike the Grievant, who blamed others for virtually every problem he had with M.S., Anderson conceded his role and accepted that he was wrong. Given all of this, the decision to impose a relatively light sanction on Anderson while imposing a heavy sanction on the Grievant was not arbitrary.

As for the argument that progressive discipline is the appropriate course in work performance cases, this is true, as far as it goes. However, the Grievant's single-minded pursuit of control over M.S. has elements that go beyond mere lapses in judgment. He knew that M.S.'s mother had the right to speak to her son and to visit him. The fact that he denied telling her she could not speak to him demonstrates that he knew he was wrong. He knew that M.S. had the right to refuse treatment. He clearly believed that it was a mistake to let M.S.

refuse the Accuchek, but this was not because he somehow misunderstood the patient's rights. He had been directly told that he could not force the issue a few minutes before he tried to coerce M.S. into giving up his rights through a show of force. Having been faced down by Jeffrey and Anderson in that effort, he then made an issue of having the lights on in M.S.'s room, ultimately threatening him with the removal of the door, and then following through when M.S. resisted him. The overall impression from the sequence of events is that the Grievant was unwilling to let M.S. prevail over him in a contest of wills, even though M.S. was within his rights in the choices he was making. This goes beyond poor judgment.

In addition to the fact that there were several distinct violations of the patient's rights, and the fact that the Grievant seemed to be deliberately provoking trouble with the patient, the County is entitled to weigh his response to management when he was called to account for his actions. Just as Anderson was given credit for not evading responsibility, the Grievant is entitled to a harsher disciplinary response for having denied any responsibility. As late as the arbitration hearing, he was still insisting that he brought the three aides with him to the room, not as a means of coercing M.S., but as either a safety measure against a patient who was not particularly violent, or as a means of giving M.S. a choice among the medical personnel for the taking of the blood sample. Likewise, he continued to insist, against the weight of the evidence, that it was Jeffrey who was really behind the removal of the doors. And, as discussed above, he continued to deny the substance of his conversations with M.S.'s mother. In the face of these denials of responsibility from an employee with only seven months of service, management could reasonably have concluded that progressive discipline would not be a sufficient response.

In concluding that the Grievant was appropriately discharged, I would stress that I do not believe that he had some dark motives for his conduct. His pursuit of the Accuchek was almost certainly the result of his belief that it would be in M.S.'s best interests to have the test. The lack of an evil motive does not excuse his blatant disregard for the patient's rights, nor the very poor decision to ignore the orders to leave M.S. alone, and instead escalate the confrontation with him to the point where a violent confrontation was almost certain to result.

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

AWARD

The County had just cause to terminate the Grievant. The grievance is denied.

Dated at Racine, Wisconsin, this 19th day of February, 2001.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator