BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WYALUSING ACADEMY YOUTH CARE WORKERS, LOCAL 2276, AFSCME, AFL-CIO

and

WYALUSING ACADEMY

Case 6
No. 59695
MA-11379 1/

(Patrick Nelson Discharge Grievance)

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of the Union.

Leib & Katt, S.C., by **Attorney Kelly B. Watzka,** River Bank Plaza, Suite 600, 740 North Plankington Avenue, Milwaukee, Wisconsin 53203, appearing on behalf of Wyalusing Academy.

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1/ The Commission has designated this case as MA-11379, though the Commission's docket books and the record indicate the Employer is a private sector employer.

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ARBITRATION AWARD

Pursuant to a request by Wyalusing Academy Youth Care Workers, Local 2276, AFSCME, AFL-CIO, herein "Union," and the subsequent concurrence by Wyalusing Academy, herein "Academy" or "Employer", the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on April 13, 2001, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on May 15, 2001, at Prairie du Chien, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on July 9, 2001.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUES

1. Is the grievance appropriately before the arbitrator for the decision on the merits pursuant to the terms of the collective bargaining agreement?

2. Did the Employer have just cause to discharge the grievant, Patrick Nelson, from his employment at Wyalusing Academy on October 25, 2000? If not what is the appropriate remedy?

FACTUAL BACKGROUND

General Background

Wyalusing Academy is a residential treatment center for juveniles who have displayed behavioral problems and who are generally placed there pursuant to an adjudication of delinquency or a CHIP's petition. Because the Academy is licensed by the State of Wisconsin, it is subject to regulations, reporting requirements and inspection. Consistent with state regulations, the Academy has written policies and procedures regarding staff conduct in order to insure the safety and well-being of its residents.

The Academy has adopted a progressive disciplinary process which contains four steps: verbal notice, written notice, suspension and discharge. Gary Adams, Director of Youth Care Services, testified that the progressive disciplinary process was adopted to insure a fair process for dealing with employee conduct requiring corrective action.

Patrick Nelson, hereinafter the "Grievant," was employed by the Academy on October 26, 1998, as a Youth Care Worker. On June 16, 1999, the Grievant received a written disciplinary notice for using "excessive force" with a resident while working on Unit 3. On February 2, 2000, the Grievant received a notice of a one (1) day suspension without pay for "gross misconduct" which included swearing and being belligerent with a supervisor. The Grievant did not appeal either of these disciplinary actions.

Nelson's Employee Performance Log indicates that between March 15, 2000 and May 21, 2000, the Grievant was "counseled" for being tardy for group activities, failing to fully participate in group activities, being punitive with residents, speaking in a condescending and belittling manner to residents, and getting into power struggles with residents.

Events Giving Rise to the Instant Dispute

On October 22, 2000, the Grievant reported to work on Unit 1, which housed adolescent girls, at 11:00 a.m. On that day, which was a Sunday, a number of the residents had received a group outing as a privilege for good behavior. Those residents along with other staff from Unit 1 left for their outing shortly after noon. Approximately 4 or 5 girls remained on the Unit that afternoon. The Grievant was the only staff member assigned to the Unit during the afternoon of October 22, 2000. The Grievant acknowledged he had "primary" responsibility for the conditions on the unit.

Later that afternoon, the Grievant called Ron Atkinson, who was the Assistant Core Staff Supervisor at the time, and asked him to come up to the Unit to cover for him while he took a break. Atkinson greeted the Grievant at the staff desk of Unit 1 and relieved the Grievant of his duties. The Grievant exited Unit 1 to go on his break. Atkinson testified that the Grievant's demeanor was good and that he was "joking" around. The Grievant did not say anything to Atkinson about not feeling well.

At the time, the remaining girls on the Unit were watching television in a room adjacent to the staff desk. One of the girls told Atkinson that she needed to use the restroom. Atkinson told the girls that they would all have to walk to the bathroom together because he could not leave the rest of them unattended. All of the girls and Atkinson walked down the hallway towards the bathroom. Atkinson testified that when they reached the bathroom door, he noticed that it was open and unlocked.

Atkinson testified that leaving a bathroom door open and unlocked constituted a serious safety violation. Wyalusing Academy Policy and Procedure No. YC-27, provides, in relevant part:

. . .

> All unit bathrooms will be locked at all times when not in use. Anytime a resident is in the bathroom, a staff is required to be in close proximity to the doorway area. . .Staff must check the bathroom after each usage to check for damage and flooding. Staff will lock the bathroom door after it has been checked.

. . .

> Shower areas are required to be locked upon completion.

. . .

There are residents at Wyalusing Academy who are sex offenders and there has been a prior incident involving inappropriate sexual contact between residents. The above policy was enacted, in part, to ensure the safety of residents, including protecting them from inappropriate sexual contact. The policy regarding locking of shower and bathroom doors was well known among staff. The Grievant acknowledged that he was familiar with the policy.

Atkinson testified that he confronted the Grievant about the open and unlocked bathroom door when he returned from break. Atkinson testified that the Grievant denied leaving the door open and said it must have been "left open before." The Grievant denied that Atkinson said anything to him about the bathroom door when he returned from break.

Atkinson testified that he saw the shower door open when he was sitting at the desk. He also testified that he saw the shower door open when he took the girls to the bathroom. Atkinson added that he specifically checked that door on his way out because he suspected it might be open after finding the bathroom door in that condition.

The Grievant testified that Atkinson never addressed the above problems with him on the Unit that afternoon. Rather, the Grievant testified that he heard about it later when the Unit manager told him that Atkinson informed him that he left the doors open.

The Grievant went to see Atkinson of his own volition later that day. When he met with Atkinson, he first said, "I didn't leave those doors open." After hearing that Atkinson was going to report this violation, the Grievant responded, "If this is what you say happened, then I guess I'll turn my keys in now." The Grievant acknowledged that he had been warned in February of 2000 that he would be discharged for any future violations. When asked why he gave up so easily given the fact that he was facing termination, the Grievant responded that he didn't "have any witnesses" and didn't think that he could prevail in this dispute with management. When asked why he didn't ask the girls that were on the Unit that afternoon to corroborate his story, he testified that he didn't think the girls would tell the truth.

Atkinson reported this incident to his immediate supervisor, Steve Mergen. Gary Adams, Director of Youth Care Services/Trainer, testified that he received a phone call at home from Mergen on October 22, 2000 regarding the incident. Adams testified that he investigated the incident when he talked to various supervisors upon his return to work on October 23, 2000. After conducting his investigation, Adams discussed the matter with David Hernesman (Executive Director of the Academy) and it was their collective decision that the Grievant had not supervised the Unit properly and that he should be discharged for this safety violation. Adams testified that in reaching this decision, they considered the seriousness of the violation, as well as prior disciplinary action taken against the Grievant.

On October 25, 2000, the Grievant reported for work as scheduled at 1:00 p.m. When he arrived, Atkinson informed him that Adams wanted to speak to him in the front office. The Grievant, Adams, Bonita Reed and Vicki Taylor then met to discuss the October 22, 2000 incident. At that meeting, the Employer had a signed termination document already prepared. Adams testified that he could have "ripped it up" if he had heard anything to change his mind. Adams informed the Grievant that he was being discharged for leaving the bathroom and shower doors open and unlocked. The Grievant testified that he thought to himself "this isn't possible" because he had not done this before and would never knowingly leave those doors open. The Grievant insisted to Adams that he was not responsible for leaving any doors open or unlocked.

The Grievant testified that he next asked Adams to consider giving him a medical leave, instead of firing him, because he was having some medical problems. He explained that he hadn't been feeling well when he was working on October 22, 2000. The Grievant acknowledged that he was feeling well enough to report to work on October 22, 2000, but that he started feeling bad in the afternoon.

According to a memo dated October 27, 2000 from Gundersen Lutheran, the Grievant was diagnosed with hyperthyroid and is "currently under care to help have that under control including lab work and medication." The Grievant explained to Adams that he was under treatment for this condition and was still experimenting with the proper drug dosage to treat it.

Adams terminated the Grievant on October 25, 2000 for lack of proper supervision on October 22, 2000. In the Employee Disciplinary Form, the Employer noted that when Atkinson was called to Unit 1 on October 22nd, he "observed the shower room and bathroom unlocked and unsupervised. Mr. Nelson was the only staff present on the unit. This is a violation of Wyalusing policy and procedures."

Filing and Process of the Grievance

The Union filed a grievance, on behalf of Patrick Nelson, on November 6, 2000. In the grievance, the Union alleged a violation of Article VI, the just cause provision of the agreement, and for a remedy asked that the Grievant be returned to work and made whole.

On November 14, 2000, Adams formally responded to the grievance. In doing so, Adams asserted that 1) Nelson's grievance was filed untimely; 2) Nelson had been discharged with just cause for his lack of supervision on October 22, 2000; and 3) his discharge was further justified by previous disciplinary actions involving serious misconduct which included a written and verbal warning on February 2, 2000, that any future violations would result in his discharge. Adams also indicated that he had referred Nelson's grievance to David Hernesman for the next step in the grievance procedure.

Hernesman testified that Gary Adams had informed him about Nelson's grievance. He testified that Wednesday before Thanksgiving, Pam Ellifson, the union representative, spoke to him regarding Nelson's grievance. Hernesman testified that he told Ellifson he would meet with Nelson, but also that "I will not change my mind." Ellifson testified that she remembered having this conversation with Hernesman. She also testified that she was going to set up a time to meet with Hernesman but was unable to do so before he went on vacation. (Hernesman was on vacation from December 6 to December 21, 2000.) Ellifson further testified that she called Hernesman after he returned from vacation and that he told her that "as far as he was concerned it was a dead issue." Ellifson understood that Hernesman essentially had his mind made up and, therefore, no meeting with him was necessary.

By letter dated February 13, 2001, Daniel Pfeifer, Staff Representative for the Union, filed a request with the Wisconsin Employment Relations Commission for arbitration to resolve the dispute.

Audit

Subsequent to the Grievant's discharge in October of 2000, the Department of Health and Family Services conducted an audit of Wyalusing Academy which included a review of employee personnel files. The auditor discovered documentation of Crawford County's 1999 finding that the Grievant had used excessive force with a resident and the disciplinary action that was taken by the Academy in response to that finding. Adams was advised that, as a licensed child care institution, it could not employ the Grievant after 1999 unless he successfully completed the rehabilitation process mandated by the State of Wisconsin in Sec. 48.685 and 50.065 Stats., and Chapter HFS 12, Wisconsin Administrative Code.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV
GRIEVANCE PROCEDURE

4.0 DEFINITION: Any grievance is defined as a dispute which may arise between the parties, concerning the application, meaning or interpretation of specific provisions of this Agreement, and shall be settled in the following manner.

4.1 CONTENTS: Only one subject matter shall be covered in any one grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved.

4.2 TIME LIMITATIONS: All grievances must be presented promptly and no later than twenty (20) calendar days from the date the grievant first became aware of, or should have become aware of, the cause of such grievance.

4.3 REPRESENTATION: An employee must have an appropriate Union representative with him/her at any step in the grievance procedure.

4.4 STEPS IN PROCEDURE: Grievances shall be filed and processed through the following procedure:

STEP ONE: An employee having a grievance shall orally present it to his/her immediate supervisor. If satisfactory settlement is not reached in three (3) business days:

STEP TWO: The employee shall reduce the grievance to writing as outlined in 4.1. The steward, employee and/or the union representative shall take the matter up with the Director of Youth Care Services within ten (10) days of the answer in Step One. The Employer's response to the Union shall be in writing within ten (10) days of the meeting. In the event resolutions of a grievance cannot be obtained at this point, either party may petition the Director of Wyalusing Academy to arbitrate said grievance, and said Director shall be given a period of ten (10) days to arbitrate and discuss said grievance with both parties and offer a solution which may or may not be accepted by both parties.

4.5 ARBITRATION REQUEST: In the event a grievance, as defined in 4.0 has been timely processed through Step Two of the Grievance procedure without agreement, the Union, or the Employer, shall have the right at any time within twenty (20) days following the receipt of the Employer's answer in Step Two, to request arbitration.

4.6 ARBITRATION SELECTION: In the case of any dispute or misunderstanding relative to the provisions of the Agreement which may arise and cannot be adjusted by the two parties to this Agreement, the parties shall attempt to select an impartial arbitrator with the cost born equally. If an agreement cannot be obtained, then either party may request WERC to appoint one of their staff members as sole arbitrator, with the cost split equally between the Union and the Company, and such decision shall be accomplished by written notification to both parties within thirty (30) days of such arbitration.

4.7 DISCHARGE GRIEVANCES: A grievance involving the termination of an employee shall start at Step Two of the Grievance Procedure. The grievance shall be presented in written form, signed by the employee terminated and the stewards.

. . .

4.10 LIMITATIONS: The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement.

4.11 FINAL AND BINDING AWARD: The decision of the arbitrator shall be final and binding on all parties including the employees involved.

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ARTICLE 6

DISCIPLINE

6.0 JUST CAUSE: The Employer may discharge or discipline an employee for just cause, but in respect to discharge, shall give a warning of the complaint against such employee, except that no warning notice need be given to an employee if the cause of discharge is dishonesty, theft, extreme carelessness in the care of a resident, insubordination, excessive absenteeism or excessive tardiness, or physical, sexual, or other substantial harm to a resident of the institution, or refusal to obey a reasonable directive from a supervisor, use of alcoholic beverages or narcotics while on duty or reporting for work with clear evidence of having used, or in possession of, such beverages or narcotics, failure to report for work without proper notice or good reason, or misconduct after receipt of one (1) warning notice, and said warning notice shall be placed in the employee's permanent file.

An employee shall be entitled to the presence of a designated grievance representative at an investigatory interview if the employee has reasonable ground to believe that the interview may be used to support disciplinary action against him/her.

Unless Union representation is present during a performance evaluation, disciplinary action cannot be taken at such performance evaluation meeting. The occurrence of a performance evaluation meeting shall not be used as the basis for, or as, evidence in any subsequent disciplinary action. Such a meeting can be used to establish that an employee has been made aware of the circumstances which resulted in the performance evaluation.

If the supervisor and the employee meet to explain or discuss the discipline, a Union representative shall be present.

. . .

6.2 NOTICE: The Union will be promptly notified when a member is disciplined, only in the event that discipline could result in discharge (sic) does result in discharge, or results in a written warning notice, then, in that event, said Employer will notify the union within forty-eight (48) hours of such disciplinary action.

. . .

6.4 WARNING NOTICE: When an employee has worked twelve (12) consecutive months from the date of the warning notice, said warning notice shall not be used against the employee in any disciplinary proceedings.

6.5 ORAL WARNING NOTICE AND PROGRESSIVE DISCIPLINE: Except when the Employer need not provide a warning notice before discharge for just cause as specified in 6.0, oral warnings appropriately documented shall precede written warnings when discipline is needed. The Employer recognizes the concept of progressive discipline and will utilize such in appropriate cases. An employee may be disciplined only after the employee has received basic due process. Any discipline levied will be done within seven (7) calendar days of the time that the Employer knew of the incident.

. . .

POSITIONS OF THE PARTIES

Union's Position

The Union argues that it filed the grievance in a timely manner and that its actions have been reasonable under the circumstances, especially in light of the "Employer's actions that caused all of the confusion in the processing of this grievance." The Union also argues that its actions in processing the grievance have not unduly prejudiced the Employer in any manner.

The Union next argues that the Grievant was not given due process because the Employer had already made up its mind to terminate his employment when he was called in to discuss what happened on October 22, 2000.

The Union further argues that the Employer did not have just cause to discharge the Grievant. In support thereof, the Union first argues that the Employer did not prove that the Grievant was guilty of the conduct complained of. The Union also argues that even if the Arbitrator finds that discipline is appropriate, the discharge should be reduced to a lesser discipline because the written warning dated June 16, 1999, no longer exists pursuant to Section 6.4 of the Agreement. The Union adds that the aforesaid discipline was not related to this discipline which involved leaving doors open and/or unlocked. The Union concludes that if the discipline is upheld, the Grievant would be discharged for a first offense of leaving doors open and/or unlocked.

Finally, the Union argues that the Employer did not take into consideration the Grievant's medical condition.

Based on the record and the above arguments, the Union requests that the Arbitrator order that the Grievant be reinstated to his former position with a "make whole" remedy and that any references to this incident be deleted from his personnel files. If the Arbitrator finds that the Grievant would not be eligible to return to work at the Academy until he completes "rehabilitation", the Union asks that the Grievant be "made whole" from the time of the discharge until the time that the Union was given written notification of the Grievant's "rehabilitation" requirement because if the Grievant had been informed of this requirement, he could have been participating in "rehabilitation" during the pendency of this issue.

Employer's Position

In its brief, the Employer first argues that the matter is not appropriately before the Arbitrator for decision on the merits because the Grievant and the Union did not follow the grievance procedure. In this regard, the Employer claims that the Union did not file the grievance at Step 2 within ten (10) days notice of discharge as required by the agreement. The

Employer also claims that neither the Grievant nor any union representative ever met with David Hernesman as required by Step 2. Finally, the Employer claims that neither the Union nor the Grievant ever requested arbitration as required by Section 4.5 of the agreement which provides that the Union "shall have the right at any time within twenty (20) days following receipt of the Employer's answer in Step 2, to request arbitration." In this regard, the Employer states that the Union and the Grievant "waited well over two months" to request arbitration.

The Employer also argues that it had just cause to discharge the Grievant. In this regard, the Employer points out that its Policy requires the locking of bathroom and shower doors, that the Grievant was aware of this policy, and that the Grievant failed to properly supervise the Unit in question when these doors were left open and unlocked under his supervision. The Employer further argues that the Grievant's poor work record, prior disciplines and prior verbal warning that his job was on the line are further support for his discharge.

Finally, the Employer argues that due to his 1999 use of excessive force with a resident, the Grievant is not eligible for reinstatement and he is not entitled to back pay.

In its reply brief, the Employer argues that the Grievant did not exhaust his remedies under the agreement because in addition to not completing Step 2, he never sought to have a mutually acceptable arbitrator selected by the parties as required by the agreement.

The Employer also argues that it did not deprive the Grievant of due process by assuming the Grievant was the "guilty party" without fully investigating the matter. In this regard, the Employer argues that it conducted a full investigation of the incident.

The Employer also states there is no persuasive evidence to support the Union's claim that the Grievant's prior disciplinary problems or behavior on the date in question were due to his hyperthyroid condition.

The Employer claims that the Union's argument that it is unfair to discharge the Grievant for a first offense of leaving a door open/unlocked misses the point. The Employer notes that this was not his first "offense" and that he was discharged not only because this was a serious safety violation, but because prior disciplinary action taken against him, consistent with the progressive disciplinary process, had not succeeded in correcting his behavior.

Based on the foregoing, and the record, the Employer requests that the grievance be denied.

DISCUSSION

Procedural Issues

At issue is whether the grievance is appropriately before the Arbitrator for decision on the merits pursuant to the terms of the collective bargaining agreement.

The Union argues that it is properly before the Arbitrator, while the Employer takes the opposite position.

The Employer first claims that the Union did not file the grievance at Step 2 within ten (10) days notice of discharge as required by the agreement.

Section 4.7 of the collective bargaining agreement provides that "a grievance involving the termination of an employee shall start at Step Two of the Grievance Procedure." Step Two provides that the employee has within ten (10) days of the answer in Step One to reduce the grievance to writing and present it to the Director of Youth Care Services. Section 4.2 of the agreement provides that all grievances must be presented promptly and "no later than twenty (20) calendar days from the date the grievant first became aware of, or should have become aware of, the cause of such grievance."

The Employer argues that the purpose of the agreement is to move the grievance process along for the protection of the discharged employee. As a result, the Employer opines that the most reasonable interpretation of Section 4 of the agreement, as a whole, is that the employee has 10 days within notice of discharge to reduce the grievance to writing and present it to the Director of Youth Care Services as required by Step Two.

The Union, on the other hand, interprets the above provisions to mean that it had twenty (20) days to file the grievance, but because it was a discharge grievance, it should be presented to the Director of Youth Care Services at Step Two, rather than to the supervisor at Step One. The Union points out that it did submit the grievance, in writing, to the Director of Youth Care Services within the twenty (20) day time limit. (In fact, Pam Ellifson presented Nelson's written grievance to Gary Adams on November 6, 2000, twelve days after his termination.) The Union takes the position that its interpretation of the language is not an unreasonable interpretation.

On the issue of "timeliness" of a grievance, it has been said that "[a]s a general statement, forfeiture of a grievance based on missed time limits should be avoided whenever possible. . ." (cite omitted). Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th Edition, 1997), p. 501. "While it is not for an Arbitrator to rewrite the contract, if the contract is ambiguous insofar as time limits are concerned, since the law abhors forfeitures, the ambiguity should be resolved in favor of timeliness." Elkouri and Elkouri, *Id*.

The contract does not specifically state how many days within notice of discharge an employee has to present it at Step Two. Section 4.2 provides that all grievances must be presented promptly and no later than twenty (20) calendar days from the date the grievant first became aware of, or should have become aware of, the cause of the grievance. Except for discharge, grievances are filed at Step One. However, if the grievance is not resolved in a satisfactory manner in three (3) business days of filing at Step One it may be appealed, in writing, to Step Two "within ten (10) days of the answer in Step One." (Emphasis added). However, there was no Step One answer in the instant case because the Union started the discharge grievance at Step Two as provided in Section 4.7 of the agreement. Because there was no answer at Step One, it would not make sense to apply the ten (10) day limit found in Step Two. If the Arbitrator applied the ten (10) day notice requirement as argued by the Employer, it would render meaningless the language of Step Two noted above requiring the grievance to be filed "in writing within ten (10) days of the answer in Step One." (Emphasis added). It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect. Elkouri and Elkouri, *supra*, p. 493 and cases cited therein. Therefore, in order to give meaning to all the words and clauses in Section 4 the Arbitrator finds that the time limitations of twenty (20) days to file a grievance found in Section 4.2 apply to the filing of a discharge grievance at Step Two. It is undisputed that the Grievant complied with this requirement.

The Employer also claims that neither the Grievant nor any Union representative ever met with David Hernesman as required by Step 2.

The record indicates that shortly before Thanksgiving, Pam Ellifson, the Union representative, spoke to Hernesman about Nelson's grievance. Hernesman told Ellifson that he would meet with the Grievant, but that he would not change his mind. Ellifson was going to set up a meeting with Hernesman, but was unable to do so before he left on his vacation. When she called him upon his return from vacation to set up a meeting, he told her that "as far as he was concerned it was a dead issue." Ellifson understood that Hernesman had made his mind up and, therefore, no meeting with him was necessary.

As noted above, Hernesman is the Executive Director of Wyalusing Academy. Step 2 provides that in the event resolution of the grievance cannot be obtained between the Director of Youth Care Services and the Grievant "either party may petition the Director of Wyalusing Academy to arbitrate said grievance." (Emphasis added). Said provision states that the Director shall be given ten (10) days to arbitrate and discuss said grievance with both parties and offer a solution which may or may not be accepted by both parties. Here, since the Union knew the Employer's answer to the grievance ahead of time there was no need to have the meeting. Since a meeting with Hernesman was optional at Step 2 – the Union "may petition"

for such a meeting – the Union did not violate the language of Step 2 for failing to request such a meeting.

The Employer also argues that neither the Grievant nor any Union representative ever requested arbitration as required by Section 4.5 of the agreement.

Section 4.5 provides that in the event a grievance has been timely processed through Step Two of the grievance procedure without agreement, the Union, or the Employer, shall have the right at any time within twenty (20) days following the receipt of the Employer's answer in Step Two, to request arbitration.

The record indicates that the grievance was referred to the Executive Director of Wyalusing Academy, Dave Hernesman, for the next step in the grievance procedure. (Joint Exhibit No. 4). However, there is no evidence in the record that the Executive Director "arbitrated" said grievance or discussed the grievance with both parties or offered a solution "which may or may not be accepted by both parties" as provided in Step Two. Nor is there any persuasive evidence in the record that the Employer made the necessary "answer in Step Two" which would trigger the twenty (20) days period for requesting arbitration contained in Section 4.5. Finally, there is no evidence in the record that the parties have strictly enforced the time limits in Section 4.5 in the past. Based on the foregoing, the Arbitrator also rejects this procedural argument of the Employer.

Finally, the Employer argues that the Grievant did not exhaust his remedies under the agreement because he never sought to have a mutually acceptable arbitrator selected by the parties as required by the agreement.

Section 4.6 of the agreement provides that in the event of a grievance that cannot be resolved by the parties, "the parties shall attempt to select an impartial arbitrator with the cost born equally." The section continues: "If an agreement cannot be obtained, then either party may request WERC to appoint one of their staff members as the sole arbitrator. . ."

In the instant case, following the Union's request for arbitration, the Arbitrator contacted the Employer to obtain concurrence to proceed to arbitration. The Employer agreed. The Employer never raised an issue with the Arbitrator that it wished to first attempt with the Union to jointly select an arbitrator to decide the dispute. If the Arbitrator had received such a request, he would have honored it. Therefore, the Arbitrator finds that the Employer has waived its argument herein by its actions in agreeing to proceed to arbitration. Furthermore, the Employer offered no evidence that it has been prejudiced in any way by the parties' failure to jointly attempt to select an arbitrator in the instant case. In view of the foregoing, the Arbitrator likewise rejects this procedural argument of the Employer.

Based on all of the above, the Arbitrator finds that the answer to the first issue stipulated to by the parties is "YES", the grievance is appropriately before the Arbitrator for a decision on the merits, pursuant to the terms of the collective bargaining agreement.

Discharge

At issue is whether there was just cause to discharge the Grievant.

The Employer argues that there was just cause for the discharge while the Union takes the opposite position.

Standard

There are two fundamental, but separate, questions in any case involving just cause. 2/ The first is whether the employee is guilty of the actions complained of which the Employer herein has the duty of so proving by a clear and satisfactory preponderance of the evidence. If the answer to the first question is affirmative, the second question is whether the punishment is contractually appropriate, given the offense.

2/ Each disciplinary action involves two issues: whether there was just cause for the imposition of discipline for the particular wrongdoing, and whether there was just cause for the penalty – the quantum of discipline – imposed on the Grievant. Labor and Employment Arbitration, Volume 1, Tom Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 14, "Just Cause and Progressive Discipline" by Arnold Zack, s. 14.03[1], 14-5 (1998).

Basis for Discipline

Applying the above standard to the instant case, the Arbitrator first turns his attention to the question of whether the Grievant is guilty of the actions complained of.

According to the Employee Disciplinary Form dated October 25, 2000, "On 10/22 Mr. Atkinson was called to Unit 1 to cover a break. At this time, Mr. Atkinson observed the shower room and bathroom unlocked and unsupervised." The Form states that the Grievant "was the only staff present on the unit. This is a violation of Wyalusing policy and procedures." The recommendation was for the Grievant to "be terminated for lack of supervision" on said date. The Grievant was subsequently discharged on October 25, 2000.

The applicable policy and procedure states that all bathroom and shower areas are required to be locked at all times when not in use. The Grievant was aware of this policy and acknowledges that it was not unreasonable.

The Grievant testified that he did not leave the bathroom or shower room doors open. There is no direct evidence in the record that proves that it was the Grievant who left the doors open. The Grievant testified that he did not come on duty until 11:00 a.m. and that the other employees left at approximately 1:00 p.m., leaving him alone on the unit with several female residents. He further testified that from 1:00 p.m. until 2:30 or 3:00 p.m. none of the girls requested to use the bathroom or shower room, therefore he would not have checked them. The Union argues that it could just as reasonably be assumed that one of the other employees could have left the doors open. The Arbitrator agrees. Nevertheless, the Grievant acknowledged that he was the person responsible at the time for the conditions on the unit. Therefore, the Arbitrator finds that there is some factual basis on which to discipline the Grievant, although perhaps not as much as claimed by the Employer.

Appropriateness of the Disciplinary Action

A review of this question may be undertaken within the context of the other issues raised by the Union in arguing against discharge as well as the other arguments by the Employer supporting termination.

The Employer argues that it enacted the aforesaid policy, which requires the locking of bathroom and shower doors, in order to protect the safety of its residents and in order to be in compliance with state regulations. The Employer argues that enforcement of this policy is absolutely necessary based upon the presence of residents who have a history of inappropriate sexual behavior and given a prior incident involving inappropriate sexual contact between residents. The Arbitrator agrees.

The Employer cites as reasons for the discharge the Grievant's poor work record and his conduct on October 22, 2000. In particular, in the Employee Disciplinary Form the Employer stated as bases for the termination the Grievant's written warning on February 28, 1999 for the use of excessive force, and his suspension on February 2, 2000 for insubordination. The Form also stated that, "Pat will be terminated for lack of supervision on 10/22/00." In Gary Adams' communication to the Union President dated November 11, 2000 regarding the instant grievance, Adams stated that this was "clearly a case of insubordination as listed in Section 6.0 and a violation of Staff Rules of Conduct PP 11." Adams added that the Grievant received a written warning on June 16, 1999 for use of excessive force with a resident; a suspension on February 2, 2000 for gross misconduct; "and is terminated for the 10/22/00 incident for lack of supervision. Wyalusing Academy's progressive discipline process is noted under article VI, 6.5., in the contract."

As noted above, the record supports a finding that the Grievant was guilty of a lack of supervision on the date in question. However, the Union raises an issue regarding the culpability of the other supervisors who had left on a group outing which the Employer never

persuasively addresses. Therefore, the Arbitrator finds that while the Grievant bears responsibility for the doors being left open others may have shared in this violation. This raises a question as to whether the discipline imposed on the Grievant may have been too harsh.

The Union also argues that the discipline imposed was too harsh based on the other reasons cited by the Employer in support of the Grievant's discharge.

The Grievant received a written warning dated June 16, 1999 for using excessive force with a resident. The Employer cited this as one of its bases for discharge. However, as pointed out by the Union, Section 6.4 provides: "When an employee has worked twelve (12) consecutive months from the date of the warning notice, said warning notice shall not be used against the employee in any disciplinary proceedings." Therefore, according to the aforesaid clear contract language the aforesaid warning notice cannot be used as a basis for the discharge.

The Employer argues, however, that it used progressive discipline in discharging the Grievant. However, as noted above, the Employer may not use the prior written warning dated June 16, 1999 as part of its progressive discipline because it was issued more than twelve (12) months earlier. In addition, the Grievant did not receive six verbal warnings for misconduct between March 15, 2000, and May 21, 2000 as alleged by the Employer. According to the Employee Performance Log (Employer Exhibit No. 3), the Grievant was "counseled", not verbally warned, regarding his conduct during this period of time.

The Union argues that the Grievant was not given due process. In support thereof, the Union points out that on October 25, 2000, the termination document was written and signed and the Employer had already made up its mind to terminate the Grievant's employment when he was called in on the 25th to discuss what happened on October 22, 2000.

The Union is correct in pointing out that the Employer had already made up its mind to terminate the Grievant prior to meeting with him on October 25, 2000. Prior to that date, the Employer had not talked to the Grievant as part of its investigation. (Atkinson had talked informally with the Grievant about the matter but Adams who, according to the Employer, "conducted a full investigation of this incident" never bothered to discuss the incident with the Grievant prior to making his recommendation to terminate the Grievant's employment.) Adams testified that he "could have ripped the termination notice up" at the October 25th meeting if he heard something to change his mind about discharging the Grievant. However, it is clear that the Employer had made up its mind to terminate the Grievant at said meeting, not only for the events of October 22, 2000, but for his prior work record, and nothing the Grievant could say would change its mind.

Due process is more than a technical requirement. In the instant case, Section 6.5 of the agreement provides that an employee may be disciplined "only after the employee has received basic due process." (Emphasis added). Despite compelling evidence of the grievant's serious misconduct which would have made it "possible, even probable" that the discharge would otherwise have been sustained, Arbitrator Mikrut nevertheless found that the Company had treated the grievant as "guilty until proven innocent," and reinstated him to his job because:

> quite simply. . .the Company's handling of this matter was woefully lacking several of the more fundamental due process considerations which are normally applicable in this particular type of situation. GREAT MIDWEST MINING CORP., 82 LA 52, 56 (Mikrut, 1984).

Likewise, the Employer's handling of the instant dispute lacks one or more of the fundamental due process considerations in violation of Section 6.5. As noted above, the Employer failed to interview the Grievant as part of its investigation of the matter. The Employer also made up its mind to terminate the Grievant before meeting with him on October 25, 2000 to give him the termination notice.

In addition, Section 6.0 and Section 6.5 provide that the Employer may discharge an employee for just cause if it gives a warning notice before discharge except in certain specified instances not applicable herein. The Arbitrator finds no persuasive evidence that the Grievant ever received a prior written warning notice for lack of supervision – the offense for which the Grievant was terminated herein – before his discharge.

The Employer claims, however, in Adams' response to the grievance dated November 14, 2000, that the Grievant's conduct was "clearly a case of insubordination as listed in Section 6.0. Section 6.0 provides that the Employer may discharge an employee for just cause, but shall give a warning of the complaint against such employee, except that no warning notice need be given to an employee if the cause of the discharge is insubordination.

The above clause does not define insubordination. *The American Heritage Dictionary of the English Language, New College Edition* (10th Ed., 1981) p. 667, defines "insubordinate" as "Not submissive to authority: has a history of insubordination." The question then is whether the Grievant was insubordinate when he failed to see that the bathroom and shower doors were left open on the date in question or whether he simply was guilty of a "lack of supervision" as noted on his Employee Disciplinary Form dated October 25, 2000. Based on the entire record, the Arbitrator finds that his behavior on that date is more appropriately described as a lack of proper supervision as originally noted by the Employer when it wrote up his discipline.

Based on all of the foregoing, the Arbitrator finds that the answer to the second issue stipulated to by the parties is "NO", the Employer did not have just cause to discharge the Grievant, Patrick Nelson, from his employment at Wyalusing Academy on October 25, 2000.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Remedy

A question remains as to the appropriate remedy for the Employer's unjust discharge of the Grievant.

The Employer argues that due to his 1999 use of excessive force with a resident, the Grievant is not eligible for reinstatement and he is not entitled to back pay. The Union, on the other hand, argues that if the Grievant's eligibility to return to work mitigates the "make whole" remedy, the Grievant should be "made whole" from the time of discharge until the time that the Union was given written notification of Mr. Nelson's "rehabilitation" requirement because if the Grievant had been informed of said requirement, he could have been participating in "rehabilitation" during the pendency of this issue.

The record is undisputed that the Grievant would have to be successful in his application for rehabilitative review before he could resume working for the Employer as a youth care worker. Despite a lack of proper notice to the Grievant regarding his ineligibility for employment as a youth care worker for the employer, the record does not support a finding that it was the Employer's fault. The Employer was not aware of this requirement until an audit was conducted by the State of Wisconsin subsequent to his discharge. Nor is the record clear that the Employer, rather than the State of Wisconsin, had the obligation to inform the Grievant of his ineligibility. Therefore, the Arbitrator rejects this argument by the Union.

However, if the Grievant successfully completes his rehabilitation requirement he would be eligible for reinstatement and certain "make whole" remedies.

Based on all of the foregoing, it is my

AWARD

1. The grievance is sustained.

2. The discharge of the Grievant is reduced to a thirty (30) day suspension.

3. Upon successfully completing his "rehabilitation" requirement, the Employer shall immediately offer the Grievant reinstatement as a youth care worker and make him whole for all losses he incurred as a result of the Employer's actions, minus the thirty (30) days suspension and all wages the Grievant earned in the interim that he would not have received except for his discharge and any benefits he may have received from unemployment compensation.

The Arbitrator will retain jurisdiction over the application of the remedy portion of the Award for at least ninety (90) days to address any issues over remedy that the parties are unable to resolve.

Dated at Madison, Wisconsin this 24th day of August, 2001.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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