

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHIPPEWA VALLEY TECHNICAL COLLEGE TEACHERS' ASSOCIATION

and

CHIPPEWA VALLEY TECHNICAL COLLEGE

Case 192

No. 59553

MA-11331

Appearances:

Attorney Anthony L. Sheehan, Staff Counsel, and **Attorney Rebecca L. Ferber**, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Chippewa Valley Technical College Teachers' Association.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Christopher R. Bloom**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Chippewa Valley Technical College.

ARBITRATION AWARD

Chippewa Valley Technical College Teachers' Association, hereinafter Association, and Chippewa Valley Technical College, hereinafter College, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration on January 12, 2001. Commissioner Paul A. Hahn was appointed to act as arbitrator on March 12, 2001. An arbitration hearing was scheduled and took place on June 5 and June 6, 2001. The hearing took place at Chippewa Valley Technical College in the City of Eau Claire, Wisconsin. The hearing was transcribed. The parties were given the opportunity and filed post hearing briefs. The parties' post hearing briefs were received by the Arbitrator on August 6 (Association) and August 7, 2001 (College). The parties were given the opportunity and filed reply briefs. The parties' reply briefs were received by the Arbitrator on August 16 (Association) and August 17, 2001 (College). The record was closed on August 17, 2001.

ISSUE

Association

Whether just cause exists under Article II, Section D of the collective bargaining agreement to discharge the Grievant, and if not, what is the remedy?

College

- I. Did the College have just cause under Article 2, Section D of the collective bargaining agreement to discharge the Grievant, Ralph Edwards?
- II. If not, what is the remedy?

Arbitrator

Whether the College had just cause under Article II, Section D of the collective bargaining agreement to discharge the Grievant? If not, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

Section D – Just Cause

No teacher shall be discharged, disciplined, or nonrenewed except for just cause; provided, however, that teachers hired after January 1, 1973, shall serve a three-year probationary period with regard to nonrenewal only. During said three-year period, a teacher shall not be nonrenewed unless there exists a basis in fact therefor.

ARTICLE IV – GRIEVANCE PROCEDURE

Section A – Definitions

1. A grievance is a complaint by any employee in the bargaining unit, or by the Union, where he/she or the Union feels a policy or practice is considered improper or unfair; where he/she or they allege there has

been a deviation from, or the misinterpretation or misapplication of, a practice or policy; or where there has been a violation, misinterpretation, or misapplication of any provision of any agreement existing between the parties hereto.

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Section B – General Applications

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Step 4. If the aggrieved party is not satisfied with the decision rendered by the Board, the party or the Union must appeal within ten school days this decision directly to the Wisconsin Employment Relations Commission for arbitration or their right to appeal is waived.

- a. The arbitration shall be held under the rules of arbitration of the Wisconsin Employment Relations Act.
- b. The decision of the arbitrator shall be binding upon both parties and shall be final except for a decision which would reduce or eliminate aids provided for school operation from the state or federal government or other sources, or change or abridge a mandatory school law.
- c. Nothing in the foregoing shall be construed to empower the arbitrator to make any decision amending, changing, subtracting from, or adding to the provisions of this agreement.
- d. Arbitration is limited to terms and conditions set forth in this agreement.

Article V – Working Conditions

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Section M – Teacher Files

1. A complaint made about a member of the bargaining unit will be promptly brought to the member's attention.
2. No material derogatory to a teacher's conduct, service, character, or personality shall be placed in the file unless the teacher has had an opportunity to read the material. The teacher shall acknowledge that he/she has read such material by affixing his/her signature on the actual copy to be filed, with the understanding that such signature merely signifies that he/she read the material to be filed and does not necessarily indicate agreement with its contents.

. . .

6. No secret file or any material or record shall be kept on a teacher by the Board or the administration for any reason.

STATEMENT OF THE CASE

This grievance involves the Chippewa Valley Technical College Teachers' Association and the Chippewa Valley Technical College. (Jt. 1) The Association alleges that the College violated the parties' collective bargaining agreement by discharging the Grievant from his position as a full-time College teacher on December 31, 2001. (Er. 17)

The College teaches an emergency medical services program that offers three levels of instruction: basic Emergency Medical Technician (EMT); basic Emergency Medical Technician Intermediate (EMT-I); and Emergency Medical Technician (Paramedic). Paramedic is the most advanced of the three levels of certification as an Emergency Medical Technician. In addition, the College offers required refresher courses at each level for rescue squads and fire departments. The Grievant, who was hired as an EMS instructor in 1990, has been the lead instructor for the EMS and Paramedic program for the program's entire existence at the College and was hired specifically to start an EMS program. The Paramedic program has been in existence for four years at the College. The EMS and paramedic course of instruction, for which the Grievant was the coordinator and lead instructor, services 26 emergency ambulance services in an eleven county area, as well as fire departments in Eau Claire, Chippewa Falls and Menomonee Falls. The program also works in conjunction with two Eau Claire hospitals that provide the clinical settings necessary for instruction of students in the three levels of EMS programs. Grievant did not teach all of the courses by himself, but retained teaching assistants to aide in the instruction, particularly the skills portion of the EMS educational program.

At the time of his hire, the Grievant was educated as an Emergency Medical Technician, an EMT-Paramedic and a Registered Nurse and held licenses as an EMT-Paramedic and a Registered Nurse. Outside of his employment, the Grievant was actively involved with State and local EMS. The Grievant was Secretary of the Wisconsin EMT Association, he lobbied for mandating continued education for EMT's, as well as for confidentiality of ambulance records and, in conjunction with others, he wrote the Eau Claire County Paramedic Plan for the Eau Claire County EMS Council.

In order to have certified paramedic programs through the Wisconsin Department of Health and Family Services, the College is required to have a training plan; a Medical Director who is a current physician; and a lead instructor approved by the Medical Director. While the Medical Director must approve the lead instructor for the Paramedic course, his approval is not necessary for the EMT basic and EMT intermediate level courses. Clinical settings are provided through Sacred Heart Hospital and Luther Hospital in Eau Claire; the Medical Directors for the EMS program at the College have been physicians associated with one of the two hospitals.

During the last five years, and particularly with the paramedic program, certain problems arose in the relationship between the Grievant and various ambulance services and the medical community. Concerns about the program also arose between the College and the medical community, particularly with Eau Claire's two hospitals. These problems or concerns regarding the Paramedic program and the Grievant did not lead to any discipline of the Grievant and the College was supportive of the Grievant. In 1998, then Medical Director Keith Wesley resigned his position as Medical Director due to concerns regarding the Paramedic program at the College and concerns with the Grievant and the direction of the program. Without a Medical Director, the College could not sponsor or teach a Paramedic Program. In 1999 the College named a new Program Director, Margaret Dickens-Grosskopf, as Director of the Emergency Medical Services Program at the College, and Dickens-Grosskopf was given, as part of her position, supervision of the Grievant and the Paramedic Program. One of the first efforts of Dickens and College Operations Vice President Bruce Barker was to hire a new Medical Director which after some effort they did; Sheff Massey volunteered to be the Medical Director of the Paramedic program which solved the concerns of the Wisconsin Department of Health and Family Services and allowed the Paramedic Program to be certified.

Dickens met with local clinical providers and the medical community and Grievant to discuss the paramedic program and the concerns that had been expressed to her regarding Grievant's leadership and instruction of the paramedic course. Dickens laid out a program for the Grievant to follow in certain areas and felt that after her meetings with the Grievant relationships between the College and the medical community were improving. Further, Grievant was following Dickens' directions as to certain improvements she arranged and directed for the program.

During the 1999-2000 school year the Grievant and several Teaching Assistants taught a paramedic course to a class of students that did not have previous experience either as an EMT or a firefighter, which was not the normal situation for paramedic classes. On March 17, 2000, a complaint was filed by one of the Grievant's students. (Jt. 2) The complaint alleged unfair treatment and foul language used by the Grievant who made the student do extra work because of the amount of class time missed by the student. The complaint was resolved by the College and no action was taken against the Grievant. (Jt. 2) One of the students in the 1999-2000 paramedic class was Linda Avery-Patz who filed a complaint against the Grievant in October of 2000, several months after completion of the 1999-2000 paramedic course. The complaint alleged that the Grievant used profane language toward students, and treated the students in the 1999-2000 paramedic class, particularly women, in a demeaning and derogatory manner. (Er. 1) The Grievant denied the allegations in the complaint (Assn. 10), and the College undertook an investigation to determine the truth of the complaint. The College, through Dickens, conducted a telephone survey of ten of the twelve students in the same class as Avery-Patz. None of the students, including the complainant, were interviewed face-to-face. In varying degrees, the students supported complainant Avery Patz. (Er. 2 and 12)

Based on the results of the telephone survey and solicitation of written documentation from agencies outside of the College that had expressed concerns with the Grievant and the program, the College, through Vice President Barker and Brenda Finn, another Vice-President at the College, determined that the likely course of action was to discipline Grievant for his behavior in the 1999-2000 paramedic class which the College believed confirmed his problems with communication and which the College considered to be gross conduct toward students.

The College met with Grievant and his union representatives in late October and early November of 2000 and advised him of the results of the survey of the complainant's classmates as well as other concerns now placed into writing, after which the College made a determination to discharge the Grievant. One of the key reasons for this determination was that the current Medical Director, Sheff Massey had stated that if the Grievant continued as the coordinator and lead instructor for the paramedic program, he would resign. (Er. 10) This resignation would result in loss of certification for the paramedic program and would have a serious affect on other aspects of the College's EMS courses of instruction. The College advised Grievant in the early November meeting of the decision to terminate and offered him the option to resign. The College ultimately asked Grievant to finish the classes he was teaching until the end of the semester and terminated him effective December 31, 2000. (Er. 17)

The parties processed the grievance through the grievance procedure of the parties' collective bargaining agreement. The Association appealed the matter to arbitration. Hearing in the matter was held by the Arbitrator on June 4 and June 5, 2001 at the College in Eau Claire, Wisconsin. No issue was raised as to the arbitrability of the grievance.

POSITIONS OF THE PARTIES

Position of the Association

The main argument of the Association is that the College's procedural mishandling of the Grievant's employment and termination precludes a finding of a just cause discharge. Citing Elkouri and Elkouri, How Arbitration Works, the Association argues that just cause requires due process and that the College failed to give the Grievant due process. The Association cites Carroll R. Daugherty's seven tests for due process in his WHIRLPOOL CORP. decision and takes the position that failure of any one of the seven tests proves that the Grievant was denied due process. The Association argues that the College failed to meet several of the tests.

The Association takes the position that as regards the complaint from Linda Avery-Patz that started the process toward Grievant's discharge the College did not conduct a thorough and impartial investigation. The Association further argues that the phone interviews were not

conducted in a fair and impartial manner. Rather, the Association argues, Dickens did not focus on the veracity of the specific allegations made by Avery-Patz but instead conducted a “broad, scatter shot investigation” of the Grievant. Dickens, who took notes from each conversation with a student in Avery-Patz’ class (Er. 12) formulated the responses into a summary document. (Er. 2) The Association argues that there are several inconsistencies between the two documents and that the testimony from three students who were in the class and witnessed the incident complained of in Avery-Patz’ complaint did not substantiate that the Grievant acted in the manner alleged by the Complainant.

Michelle Moats testified that the negativity in the class was not Grievant’s fault but the class’s fault and testified that “there was a lot of bickering back and forth definitely.” The Association points out that student Doug Vogler denied that he made the statements attributable to him by Dickens and that he did not remember the Grievant ever calling it his dumbest class and never felt that he felt he was not treated with dignity and respect. The Association argues that Dickens failed to consider the credibility of Avery-Patz, a troubled student. As testified to by Teaching Assistant Mark Mernintz and the Grievant, Avery-Patz had significant personal problems that affected her ability to do the course work and pass the various exams, including a trauma exam given in the Spring semester of the 1999-2000 paramedic class that led to the allegation of disrespect by the Grievant and his use of foul and obscene language. The Association takes the position that Avery-Patz had a reason to get back at the Grievant because after performing a serious medical error by giving an elderly patient a potentially lethal dose of morphine, the Grievant required her to do an extra 60 hours of ambulance ride-along. The Association argues that Avery-Patz was never even interviewed on a face-to-face basis and was not called to testify at the hearing, seriously calling into question the impartiality and thoroughness of the investigation. The Association also argues that Dickens made no attempt to take into account that this was a difficult class made up of students that did not have the normal EMS background of paramedic students in the past and that Dickens only conducted the survey to find out if any student would corroborate Complainant Avery-Patz not to weigh the objectivity and credibility of Grievant’s accusers.

Further, the Association argues that after the complaint was filed by Avery-Patz and during the course of conducting the survey, Dickens solicited comments and written documents from EMS providers that she knew would give her a negative response regarding the Grievant and never contacted the numerous EMS providers who were satisfied and pleased with Grievant’s performance. The Association also points out that Dickens, a Registered Nurse, who was Grievant’s supervisor, never observed his class, even after receiving complaints from Medical Director Massey and EMS providers. The Association argues strongly that the Grievant was never put on notice that his conduct would lead to discipline and points out that the College had supported the Grievant for nine of the ten years that he was an instructor at the College, and that it was only after Dickens took over as his supervisor that his performance was questioned. The Association argues that neither the two medical directors nor the customers who complained ever told the Grievant directly regarding their concerns. The

Association takes the position that the College compounded this lack of due process because when it received complaints about the Grievant the College did not inform Grievant of them. The Association points out that when it did hear of concerns, the College never took any corrective action, including discipline.

The Association argues that the only discipline in the Grievant's record was a reprimand from February of 1997 and that the conduct therein was unrelated to the conduct for which he was discharged. The Association notes that following the reprimand the Grievant successfully completed an improvement plan addressing the enumerated concerns in the 1997 reprimand. The Association argues that it was only three years later in the Fall of 2000 that the Grievant was put on notice at his two termination meetings, in October and November of 2000, that the College was dissatisfied with his performance. The Association avers that the Grievant could not reasonably be expected to discern from his interactions with the College administration prior to these meetings that he was in trouble and could expect disciplinary or corrective action much less be discharged. The Association argues that the College committed a dual failure of reasonable due process when it, one, failed to give the Grievant an opportunity to respond to the allegations made against him in the October and November disciplinary meetings and, two, the decision to discipline him was made before the October meeting and the decision to discharge him was made before the November meeting and that Grievant had no opportunity to respond to e-mails and letters that he saw for the first time at these meetings.

Following its major due process argument, the Association argues that the College did not overcome this lack of due process by facts that would sustain the discharge despite the failure to afford Grievant due process. Taking the five reasons for Grievant's discharge set forth in the letter of termination (Er. 17), the Association argues the facts are not there to support discharge.

As to the finding that the Grievant engaged in unprofessional classroom behavior as it relates to the Linda Avery-Patz complaint, the Association again points out that the College failed to call Avery-Patz as a witness and failed to call a single witness who corroborated Avery-Patz' version of events surrounding the meeting about the failed trauma exam where Grievant is alleged to have used obscene and foul language. The Association argues that its witness Michelle Moats, a student who was in the room at the time when the profanity and degradations of students allegedly occurred testified that she did not remember anything that Avery-Patz said as being said and did not remember any foul language at all. The Association argues that the entire telephone survey is replete with hearsay comments and in and of itself is total hearsay. The only witness the College produced to testify first-hand as to Grievant's unprofessional behavior was Sarah Smith who recalled one occasion over the entire school year where the Grievant used profanity after students failed a test. The Association submits that the evidence indicates that Grievant's classroom behavior was professional and supports this argument with several exhibits of positive student evaluations that were taken toward the end

of different classes. (Assn. 6, 7, 8, 9) Furthermore, the Association avers that students and a teaching assistant from the 1999-2000 paramedic course testified that Grievant did not engage in unprofessional behavior, that they never heard the Grievant use profanity in class or degrade students in class.

As to the allegation that the Grievant created a negative learning environment, the Association argues that the evidence supporting this is again the unreliable hearsay telephone survey evidence and the testimony of Sarah Smith that on one occasion Grievant did not answer a question as asked. The Association argues that the Grievant's un rebutted testimony proves that he is not against questions but that often students will ask questions merely to get off the subject and that Grievant has only so much time to teach the class. This testimony was corroborated by witness Doug Volger, a student in the 1999-2000 paramedic class, who testified that Grievant would answer questions in class to the best of his ability. Secondly, it is clear that Grievant's students had an outstanding pass rate for the National Register Paramedics exam. Another aspect of the negative environment allegation was that women were treated differently. The Association argues that Sarah Smith was the only student who so testified and her only complaint occurred when she was working with two other female students on a mock extrication scenario, with one male bystander, and she requested help from the male bystander. The Grievant stated to her that she and the two women should perform the extrication without assistance, pointing out that if she and another woman were assigned to an ambulance, that it would be up to them and them alone, possibly without external assistance, to remove someone from a car. When told by Smith of her feeling, the Grievant apologized and told her that he had no intent to offend her, but it was important that she practice the skill on her own. The Association argues that the record simply does not support a finding that Grievant treated women differently. Student Moats testified that she noticed no difference in Grievant's treatment of women.

As to the allegation that the Grievant was unable to maintain a positive relationship with EMS providers, the Association submits that the complaints solicited by Dickens and investigated by the Association and the testimony from those who complained do not support this reason for discharge. As to the complaint from the Ellsworth Ambulance Service, Bob Rhiel, Assistant Director of the Ellsworth Ambulance Service, testified that the scheduling problem that had been complained about with Grievant was resolved when the Grievant explained that he was unable to attend the meeting due to an illness in the family. Rhiel went on to testify that he was pleased with Grievant's instruction and that he had a positive working relationship with Grievant. As to the complaint of the Cornell Rescue Squad that it no longer wished Grievant to teach the class, the Grievant testified that while he was instructor of record for the course, most of the class was taught by other individuals and that the student evaluations from the class were very positive. (Assn. 2, 3) As to the allegation regarding a poor relationship with the Menomonee Fire Department, this complaint related to a course that the Grievant taught in the 1997-98 school year which the Association points out was two years before the complaint filed by Avery-Patz on October 23, 2000. Further, the Grievant was

presented with this complaint for the first time during the meeting in which he was told to resign or be discharged in October of 2000. Grievant testified, similar to the Cornell class situation, that while he was instructor of record, most of the class was taught by another individual. As to the complaint by the Menomonee Fire Department that Grievant was unable to prepare the employees for the National Registry exam, the Association argues that the criticism was unwarranted given the documented high pass rate of Grievant's students of the National Registry exam. (Assn. 5) The Association submits that Medical Director Massey admitted during his testimony that Grievant excelled in the area of preparing his students for the National Registry Exam.

The fourth complaint, by the Chief of the Eau Claire Fire Department, was again solicited by Dickens and presented to Edwards at the meeting in which he was told to resign or be discharged; this shocked the Grievant because his longstanding interactions with the Eau Claire Fire Department had been positive and the first opportunity the Grievant had to respond to this document of complaint from the Chief of the Eau Claire Fire Department was at the arbitration hearing. The Association notes that neither the Fire Chief nor anyone else from the Eau Claire Fire Department was called to testify and that as to the complaint that he did not have enough pre-hospital experience to adequately teach paramedics, the Grievant testified that of his own initiative after hearing this concern from the medical community he took a leave of absence to receive more field experience. The Association points out that not once during the course of his eleven years with the College did the College ever inform the Grievant that his qualifications were insufficient or that his paramedic field experience was inadequate.

As to the allegation that Grievant's relationship with the Medical Directors was poor, the Association argues that the record proves that the Grievant never refused to do anything that they asked, nor did he attempt to ever undermine their role as overseer of the EMS program. Until his discharge, the Grievant was never disciplined, corrected or advised that his relationship with the Medical Directors was anything but reasonable and in line with what the College wanted and that it is more accurate to state that the Medical Directors did not personally like the Grievant rather than they did not like Grievant's job performance. Grievant interacted socially with Medical Director Wesley and was never told by Wesley that he was unhappy with Grievant until Wesley resigned his position from the College. The Association argues that the Grievant had minimal contact with Massey, none of which was negative and that it is difficult for the College to state that Grievant did not have a positive relationship with the Medical Directors when the Medical Directors failed to communicate their concerns directly to the Grievant and if they communicated their concerns to the College, the College Administrators failed to intervene or even consult with the Grievant as to this situation.

The Association takes the position that Medical Director Massey's reasons for refusing to authorize Grievant to teach the paramedic course, and threatening to resign if Grievant remained the lead instructor, are not supported by any reasonable evidence by Massey that

would justify his opinion. Massey never directly communicated his concerns to the Grievant. Massey only observed Grievant's class on four occasions during the course of the paramedic class. The Association argues that Massey's refusal to authorize Grievant as a lead paramedic instructor is not a valid reason for Grievant's discharge. Massey agreed that Grievant meets all State and National requirements for the position of lead paramedic instructor and that the College hired Grievant with his existing qualifications allowing him to develop the paramedic program.

As to the last allegation for Grievant's discharge, the Association argues that the record does not support a finding that the Grievant was unable to improve his job performance despite past disciplinary action and an improvement plan. The Association argues that when Grievant was disciplined with a written reprimand, by his then supervisor Gary Allen on February 14, 1997 he was placed on an improvement plan which addressed areas of concern which included failure to comply with a direct request, insubordinate behavior, inappropriate use of equipment. The Association argues that the Grievant corrected those areas of concerns to supervisor Allen's satisfaction. The Association further argues that the conduct criticized in the reprimand is not similar to that described in the discharge letter. The Association argues that the issue is not Grievant's relationship with medical directors or EMS providers and is not his classroom conduct. If there were any deficiencies in those areas, they were not brought to the Grievant's attention until the time of the discharge. The Association argues that it is the role of management to make employees aware of their deficiencies and Dickens herself testified that when she raised her concerns with Grievant she believed that he improved and that the program was turning around.

The Association argues that the record supports a finding that the true reason for Grievant's discharge was the fact that the College was under political pressure from the small Eau Claire medical community to drop the Grievant as lead instructor of the paramedic program because physicians simply do not like him. The Association takes the position that the College refuses to acknowledge that this is the true reason for the discharge and instead has set forth a contrived argument. The Association takes the position that the College recognizes that discharge was not likely to be sustained upon its true reason as an employer could never justify a discharge based on the subjective, undocumented concerns of a third party about an employee. The Association argues that the Grievant cannot reasonably receive the most severe form of discipline because, unbeknownst to him, some physicians in a small medical community do not like him for personal reasons unrelated to his performance as an instructor. However, the Association takes the position that if the Arbitrator is concerned that the College's EMS program cannot operate as effectively with the Grievant as paramedic instructor, the Arbitrator should consider awarding front pay in lieu of traditional reinstatement with full backpay.

In conclusion the Association states that the finding of just cause to discharge the Grievant cannot be sustained and asks the Arbitrator to reinstate the Grievant to his position at the College and that he be made financially whole with backpay with interest or to award the Grievant with front pay.

Position of the College

The College argues that the Grievant commenced having performance problems in 1994 when he was advised of certain deficiencies by a representative of Eau Claire Sacred Heart Hospital which was a clinical provider for the College's paramedic program. Those concerns related to Grievant's organization of the various aspects of the course, Grievant's failure to maintain contact with the preceptors at Sacred Heart Hospital and Grievant's failure to adequately organize schedules for participating guest instructors and his failure to organize the details of clinical rotations with the hospitals. Those problems, the College argues, continued in the 1996-1997 academic year during which Grievant's supervisor requested that Grievant prepare a staff development plan due to continued organizational and coordination problems. The improvement plan specifically directed Grievant to work on treating faculty and staff with respect, use positive communication skills to work out issues with fellow teaching team members and to speak positively about other faculty in public. The College then posits that despite the improvement plan, Grievant failed to improve and on February 14, 1997 the Grievant was given a written reprimand by his immediate supervisor. The College points out that both the Ellsworth Ambulance Service and the Cornell Rescue Squad in 1997 requested that Grievant not be one of its instructors. The College also submits that the medical director for the paramedic program, Keith Wesley, Medical Director from 1995 through 1998, was concerned about the level of instruction provided by Grievant due to communication, organizational and scheduling problems, as well as delivery of the entire educational system. The College takes the position that Wesley resigned in 1998 from his position as Medical Director due to the lack of confidence in the paramedic program at the College and due to the lack of Grievant's pre-hospital experience as well as concerns regarding Grievant as lead instructor for the paramedic program.

The College argues that the College continued to try and work with the Grievant by showing that in the summer of 1999 Margaret Dickens-Grosskopf became Program Director for the Emergency Medical Services Program at the College and undertook to improve the situation between the College and the medical community by meeting with local medical providers and the Grievant to find a solution to the situation. Dickens in her meetings with Grievant discussed the concerns regarding Grievant and set forth certain procedures for the Grievant to follow to ensure improvement in the program. At that time, the College retained another Medical Director, Sheff Massey, from Eau Claire Luther Hospital who observed the paramedic program during the 1999-2000 school year and on approximately four occasions noticed similar deficiencies in Grievant's performance as did Medical Director Wesley.

The College argues that Grievant's poor communication skills in the 1999-2000 school year spread to the students of the paramedic class as demonstrated by a complaint filed by a student who alleged that the Grievant was treating him unfairly. Although the problem was resolved, the College argues that the behavior on the part of the Grievant is indicative of Grievant's negative communication to students in the courses that Grievant was instructing.

The College takes the position that Grievant's performance failings resulted in the loss of customers for the College, such as the Menomonee Fire Department which in the summer of 1999 asked that the Grievant not be assigned to teach their EMT Intermediate class. In addition the Eau Claire Fire Department indicated orally and in writing that they no longer wished the Grievant to be their instructor. Finally, the Medical Director of the EMS program, Dr. Massey, stated that he had concluded that students graduating in the paramedic program from the College did not have the depth of knowledge as paramedics from other programs and, as a result of his observations, he recommended the College replace Grievant as lead instructor and that failure to do so would result in Massey resigning, resulting in the College not having a Medical Director for the paramedic program, and subsequent decertification of the paramedic program by the State of Wisconsin.

The College then argues that Grievant's actions during the 1999-2000 paramedic course constituted gross misconduct which would and should support a decision to discharge. During the course of the 1999-2000 paramedic course, one of the students was Linda Avery-Patz. In October of 2000, several months after completion of the 1999-2000 course, Avery-Patz filed a complaint that was ultimately forwarded to Dickens, arguing that the Grievant had used abusive and obscene language in class. This complaint resulted in the College and Dickens conducting a telephone survey of the students who had been in the class with Avery-Patz. The College submits that a number of students in the class supported the complaint that Grievant had used profanity and derogatory language in the class. The College argues that this telephone survey was supported by witnesses testifying at the hearing.

Following this complaint the College began to formalize concerns in October and November of 2000 that had been orally related to the College. The Eau Claire Fire Department, by Chief Ron Brown, wrote the Vice President of Operations, Bruce Barker, to formalize the reasons why the Eau Claire Fire Department would be contracting with Sacred Heart Hospital instead of the College to provide paramedic refresher training. Among the Fire Chief's complaints was the Grievant's lack of real experience as a paramedic resulting in a lack of confidence in Grievant's instruction.

The College then sets forth in its argument that the Arbitrator should regard Grievant's testimony as not credible due to the fact that it is motivated by his self-interest and that Grievant's testimony reflects a completely different view of the facts than any of the other fourteen witnesses who testified at the arbitration hearing. The College argues that the overriding message from the Grievant's testimony is that if there were deficiencies in his performance they were somebody else's fault and not his. The College argues that Grievant's hearing testimony is not reliable and his continued denial of any of the complaints against him, including performance deficiencies, abusive language, off-color jokes and obscene language is not credible.

The College begins the conclusion of its argument by taking the position that discharge is the contractual appropriate level of discipline for the Grievant. The College lists four reasons that the Arbitrator should make this decision. The first is that the Grievant's performance deficiencies caused a material loss to the College in that various customers of the College were beginning to not contract with the College to provide instruction for their ambulance service or Fire Department members. Along this line, the College takes the position that it is critical for the College to have a good relationship with the local medical community because it provides the clinical setting for the paramedic students, and the College relies on the medical community to develop curriculum. Further, the College must have a physician from the medical community to be the Medical Director without which it cannot have a paramedic program. Secondly, the College argues that the Grievant was given numerous opportunities to correct his deficiencies and despite being advised of his deficiencies by representatives of the medical community and the College and receiving performance goals by Dickens in 1999, the Grievant did not improve his performance.

Thirdly, the College argues that even though the Grievant passed an adequate number of his students through the state and national registry exams, his teaching did not result in a broader knowledge to improve the skills of the students in his class resulting in the graduates from the College not being as well trained as others throughout the State. The fourth reason that the College argues discharge should be upheld was Grievant's conduct during the 1999-2000 paramedic class when Grievant used obscene and derogatory language and taught a course of instruction that was less than desirable for a class of students who did not have prior EMT service. The College points out that Dr. Massey and several TA's observed that Grievant was not giving the best possible instruction to the students by his failure to answer questions and not giving them proper lecture instruction before they went to practice their skills with the teaching assistants.

The College concludes its argument by stating that the College gave the Grievant innumerable opportunities to improve his performance, and that even on the verge of losing the certification of its paramedic program at one point, the College went one step further and gave Grievant another chance, with specific instructions from Dickens on how to improve his performance. The Grievant, the College submits, returned the College's favor by using profanity, derogatory and demeaning language toward paramedic students in the 1999-2000 class and that in the face of the individual evidence corroborating the student complaint, the College had to decide the degree of discipline. Although the collective bargaining agreement contains no provision requiring progressive discipline, that was considered by the College but because of the validation of the Avery-Patz' complaint and the probable loss of Medical Director Massey if Grievant was retained as lead instructor of the paramedic course and the complaints of various customers of the College, suspension was rejected and the College made the determination that discharge was the only appropriate remedy.

The College asks that, for the reasons set forth in its argument, the Grievance be denied and the discharge upheld.

DISCUSSION

This is a discharge case. The Grievant was employed by the College in 1990 and was discharged by the College effective December 31, 2000. The College in its letter of termination (Er. 17) gave five reasons for Grievant's termination:

1. Unprofessional behavior including the repeated use of profanity, telling lewd or off-color jokes, referring to students in profane or derogatory terms, and the inability to maintain your composure.
2. Creating a negative learning environment where student questions go unanswered, instruction is limited to only areas that would be on tests, and certain students, especially female students, perceive that they are being treated differently.
3. Inability to maintain a positive working relationship with medical and EMS providers in our district.
4. Failure to maintain a positive working relationship with area Medical Directors and our current Medical Director's refusal to authorize you as the Program Coordinator.
5. Inability to improve your job performance despite past disciplinary actions and an Individual Improvement Plan.

The Association argues strongly that the termination should not be upheld because of the lack of due process afforded to Grievant and because the facts themselves do not support discharge for cause. The labor agreement between the parties requires that terminations must be for "just cause." (Jt. 1) The College argues that Grievant had a consistent record of performance problems and that the last student complaint about Grievant involved gross conduct which could only result in termination. Just cause is not a phrase without meaning, and although there are many definitions of the elements of just cause, I believe just cause requires a due process for an employee and due process requires notice of the employee's deficiencies, an opportunity to correct those problems and progressive discipline if the faults are not corrected, which includes the warning in the progressive discipline procedure, that future failings will lead to more severe discipline including discharge. There may be actions of an employee that require immediate termination but that is not the case in the matter before

me. I also believe that in the case of a teacher, the situation here, that much of the evidence is subjective which requires that the Grievant in this case receives due process. Lastly, just cause requires that the College has met its burden to prove the reasons for the termination and finally that discharge is the appropriate response under the terms of the labor agreement. 1/

1/ See Generally Chapter 6. Discipline and Discharge, in the Common Law of the Workplace. National Academy of Arbitrators, BNA 1998.

A significant aspect of this case is the substantial amount of hearsay evidence introduced by the College to prove its case. I support the practice that hearsay evidence should be allowed into an arbitration record in order to avoid procedural debates and to give the advocates the opportunity to present their entire case. The issue for me, as I clearly stated on the record in this case, is how much weight do I give this hearsay evidence. I believe the appropriate definition of hearsay evidence is found in the federal rules: "(c) a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A statement is defined as ". . . (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." 2/ A review of the Wisconsin rules of evidence allows exceptions to the hearsay exclusionary rules if the declarant is unavailable.

The Wisconsin Supreme Court has held that hearsay evidence should not be received over objection where direct testimony as to the same facts is obtainable. The Court has cited Ralph Hoyt's Law Review article on the Wisconsin Administrative Act. "Nevertheless, the courts have never permitted these bodies [administrative agencies] to ground their findings upon testimony which violates fundamental principles of probative force -- for instance, upon uncorroborated hearsay or rumor." 3/ Arbitration treatises seems to follow the courts in holding that hearsay should be accepted by an arbitrator with the admonition that it will be given weight "commensurate with its relevance and reliability." 4/ In this case, I will consider the weight to be given hearsay testimony based on its reliability and trustworthiness which can be established by creditable corroboration and where the corroborated evidence is material and relevant.

2/ Federal Rules of Evidence SS 801(c) cited in "The Use of Hearsay in Arbitration" by James A. Wright, *Proceedings of the Forty-fifth Annual Meeting, National Academy of arbitrators May 1992, BNA, 1993 pg. 289, 292.*

3/ *OUTAGAMIE COUNTY V. TOWN OF BROOKLYN, 18 WIS.2D 303, 312 (1962).*

4/ "The Use of Hearsay in Arbitration," *supra* at 296-299.

The College stated five reasons for Grievant's termination; I will address each in turn.

The first reason for Grievant's discharge is essentially his use of profane and derogatory language toward students. The key element in this reason for discharge is the complaint filed in October of 2000 by a student, Linda Avery-Patz, who was a student in Grievant's 1999-2000 paramedic class. Avery-Patz was one of several students who failed a trauma exam during the Spring semester of the paramedic course. During a meeting with the Grievant about the exam this student claimed among other things in her e-mail complaint to the College that the Grievant had called this paramedic class "the stupidest class he's ever had" and used profane language "this is the fucking stupidest class I have ever seen". (Er. 1) Another complaint was filed against Grievant in March of 2000. In that complaint, Grievant is alleged to have used language telling the student that he, Grievant, didn't give "a shit" about the student's reasons for being late to class and if the student did complain he, Grievant, was a "union man" and nothing would happen. This dispute arose over the Grievant's making the student do additional work during a paramedic refresher course because the student was late to several classes. (Jt. 2) Lastly there was evidence proffered by the College that the Eau Claire Fire Department Chief had heard from his members that Grievant told off colored jokes in class. (Er. 7)

Upon receiving the Avery-Patz complaint, which was the catalyst that led to Grievant's discharge, Dickens, Grievant's supervisor and director of the EMS program, was directed by College Operations Vice President Barker to conduct a survey of other students in the class to see if they would verify Avery-Patz's complaint that Grievant had used such language in the class. Dickens conducted the survey by telephone which resulted in responses to her questions that verified, from the College's point of view, that Grievant had used profane language in class and on the basis of other questions asked by Dickens the allegation that the class was negative and Grievant failed to answer student questions. (Er. 2 and 12)

There is no question that the complaint of Aver-Patz and the document resulting from the telephone survey are hearsay as they are clearly offered by the College for the truth of the contents in the statements. I believe and so find that absent reliable corroboration that I cannot accept the statements for the truth of the matters stated therein. I find that the College's failure to produce Avery-Patz for the arbitration hearing adversely affects the College's case in a significant manner. The College produced no evidence that Avery-Patz was unavailable and could not be served by subpoena. Not allowing her to be cross examined by Grievant's representatives was prejudicial to the Grievant. I also take into account that Avery-Patz was a student with problems in her personal life (Tr. B 197) and filed her complaint several months after the failed trauma exam that led to Grievant's alleged remarks and the completion of the 1999-2000 paramedic course on the encouragement of Medical Director Massey who ultimately threatened to resign as Medical Director if Grievant remained as the lead instructor of the paramedic program.(Tr. B 161)

Only three students testified about the 1999-2000 paramedic class. Michelle Moats, called by the Grievant, testified that Grievant was a good instructor, that the classroom environment was good, that she never heard profanity in the classroom and did not remember the statements described by Avery-Patz related to the trauma exam as ever happening. (Tr. A 135-140) While her hearing testimony was somewhat at odds with her responses to Dickens' survey summary, I find her testimony at hearing credible, and I note that she testified that she answered all of Dickens' questions but that several of her responses were missing from the sheet tabulating her responses. Douglas Vogler, called by the Grievant, also took the paramedic class and testified that Grievant never used profanity in the class or called any one a name. Vogler did not believe Grievant made the statements alluded to Grievant in Avery-Patz's complaint. (Tr. B 205, 206 and 212) Vogler admitted that his responses to the telephone survey were somewhat different than his testimony, but he was adamant that he could not believe he made some of the responses to Dickens alluded to him in her summary of her conversation with him. (Tr. B 210)

I believe this shows the inherent weakness of a telephone survey over actual testimony and the fact that both of these witnesses testified that they did not believe their responses were accurately recorded makes the telephone responses even less reliable. Though I found Dickens to be a creditable witness, the fact that she did not interview any of these students face to face and did not interview Avery-Patz other than by phone, is a serious failing in the College's effort to provide Grievant with due process. Sarah Smith, another student in the paramedic class at issue, testified for the College that Grievant did call the class "basically a bunch of fucking morons" as it related to the students who had failed the trauma exam; she stated that this was the only time that she heard profanity used by the Grievant. (Tr. B 96 and 97) Two teaching assistants, Mark Mernitz and Lizbeth Kinning testified that they were teaching with the Grievant in the Spring of the 1999-2000 paramedic class and never heard any profanity used by the Grievant. (Tr. A 187-188 and B 198) Mernitz, along with another Teaching Assistant, taught the Trauma class and was with Grievant when he met with the students. (Tr. B 196)

I have spent some time and effort on the Avery-Patz complaint as it is a key component of the College's case. The other student complaint cited above, supporting the foul language allegation, was resolved with no action taken by the College. The Eau Claire Fire Chief's letter wherein some of his department members mentioned off color jokes by Grievant is again hearsay and neither the Chief nor any of his employees testified. I note that this was a rather minor point in the Chief's letter to Dickens which was solicited by her after the College began its investigation of the Avery-Patz complaint. (Er. 7) Grievant wrote an extensive denial to the Avery-Patz' complaint (Assn. 10) and creditably testified at hearing. Even accepting to some degree, as I would in any discharge case, that the discharged employee has self interest in the outcome that might make him less than creditable, given the basically hearsay evidence to support this complaint I am inclined to believe the Grievant. It is also doubtful that one instance of profanity by a teacher would, without more, uphold a just cause discharge.

The College argues that I should follow the arbitrator in SKAALEN SUNSET HOME, INC., where the arbitrator upheld the discharge of a care giver who called a patient a “fucking pig”. But in that case the employee who heard the language testified and the survey done by the Union in that case among the discharged employee’s fellow employees was done face to face by the Union representative who had the employees sign the statements which were accepted by the arbitrator as affidavits and in addition several of those employees testified. 5/ I agree with the College that profanity and verbal abuse by a teacher toward students could be grounds for discharge; I do not believe the evidence in this case is sufficient to sustain discharge.

5/ SKAALEN SUNSET HOME, INC., WERC CASE 45, No. 55487, A-5610 (1998).

The second reason for Grievant’s discharge again relates to the 1999-2000 paramedic class and the evidence gathered by Dickens through her telephone survey following the Avery-Patz complaint. Grievant is accused of creating a negative learning environment by not answering student’s questions, by instructing only in the areas that would be on tests and by treating certain students differently, particularly female students. First of all, there is ample evidence in the record that this class of 13 paramedic students was less experienced than previous paramedic classes. Generally, previous students had some experience as EMT’s which gave them a leg up when studying to be a paramedic. (Tr. B 194) Doug Vogler who took the class testified that students in the class did a lot of whining and that Grievant answered questions but often those questions seemed to be an attempt to get off the subject. (Tr. B 203 and 205) Vogler also testified that contrary to the comments of students to Dr. Massey, Grievant was willing to open the classroom on off days so students could receive more skills practice. Michelle Moats testified that she felt the negativism in the class was caused by the students and not the Grievant. (Tr. A 149) She further testified that Grievant was a good instructor. (Tr. A 135) Sarah Smith testified that her primary educational complaint came during a training exercise where she and two other women students who were extricating an injured person from a car asked a male observer for help. Grievant told them they should do it themselves as in real life there might be just two female paramedics on an ambulance and they would have to do it themselves. Smith found this demeaning and offensive. (Tr. B 101 and 102) There was little other evidence that Grievant treated females differently and one hardly upholds a discharge on hearsay perceptions from students in a telephone survey.

Grievant readily admits that he taught to the test and testified that there are limited hours to teach the paramedic course, and it is a key goal of the College to ensure that students are certified. This is why, as Grievant testified, he often had to cut off questions that were straying from the topic. (Tr. B 271 and 272) It should be noted here that Medical Director Massey credited Grievant with a high passing rate for Grievant’s students on the National

Registry Exam for paramedics. (Tr. B 19) Lizbeth Kinning, a teaching assistant, also responded to Dickens request for information and also testified at the hearing. (Er. 3) Most of Kinning's responses to the same questions that Dickens gave the students are based on the hearsay statements of what students said to her. I give no weight to those responses. However, Kinning did testify and stated that she rarely saw Grievant when he was teaching. Her view of the class and Grievant, which I will come back to, is that Grievant was burned out and had lost interest in the class which substantiated what she said on the survey response to Dickens. (Tr. A 186)

The Association introduced a number of class evaluations from classes that Grievant had taught over the years both at the College and at other locations. These were in essence all positive and would refute that Grievant was a problem instructor or that his teaching was poor. (Assn. 2, 3, 5, 6, 7, 8 and 9) These evaluations are typically requested by the College and administered at the end of the class by instructors, in this case Grievant, and then turned over to the College and tabulated with the results returned to Grievant. (Tr. B 274-276) I give some weight to these documents as they are prepared at the request of the College and are more in the way of business records. What the record shows me as to this allegation for discharge is that this was a troubled class for many reasons not solely the fault of the Grievant. I also note that Dickens never evaluated or witnessed one of Grievant's classes and Medical Director Massey only witnessed one of Grievant's classes over a whole school year of instruction. (Tr. B 9) None of Grievant's students complained to administration during the actual course in spite of the suggestion by teaching assistant Kinning that they do so if they had a complaint.

I now turn to the third reason for discharge, the allegation that Grievant was unable to maintain a positive relationship with medical and EMS providers in the district served by the College. Employer exhibit 14 was a highly critical critique of Grievant's teaching and organizational skills from a representative of one of the Eau Claire hospitals that provided clinical support. It is dated June 14, 1995 and also alludes generally to problems between the medical community and the College. However, there is no evidence in the record that this letter was ever sent to Grievant's supervisor to whom it was addressed or that the College ever received the letter. Grievant creditably testified that he was confident that if his supervisor, Gary Allen, had received the letter he would have shared it with the Grievant. (Tr. B 292) John Prince testified that as human resource director at the hospital he had been shown a draft of the letter and encouraged the writer to send it but had no evidence that it had ever been signed or sent to the College. (Tr. B 93) While Prince testified that the concerns in the letter were what he had been hearing, Prince never spoke to Grievant about any problems and he did not believe in relying on second hand information. (Tr. B 89) Prince did give the letter (Er. 14) to Dickens in a packet of material he gave her when he retired. Grievant never saw the letter until his disciplinary hearings in the Fall of 2000. While Vice President Barker gave the material in the letter little weight because it was five years old, he did consider it in his discharge decision as he considered it a pattern of conduct by the Grievant. (Tr. B 177) The writer of the letter never testified and, given the circumstances surrounding it, I give it little weight.

Another example of a problem with Grievant's performance is the Ellsworth Ambulance situation where Grievant scheduled a meeting and did not show up. Grievant learned of the Ellsworth Ambulance concerns in an e-mail from his supervisor, Allen, who had been called by a representative of the Ellsworth organization. (Er. 9) Grievant explained that he was sick and thought that it had been resolved. But it evidently had not been as the crew of the Ellsworth Ambulance contracted with another technical College for training. This occurred in August of 1997. There is no evidence in the record that any thing was done by the College to punish or correct the Grievant for this situation. Bob Rhiel, Assistant Director of the Ellsworth Ambulance Service, testified on behalf of the Association that the relationship with the Grievant was good, explained the 1997 scheduling incident and would recommend Grievant to another organization and had asked Grievant to teach again. (Tr. B 186-190)

The next example offered by the College of Grievant's problems with the medical community is a letter in 1998 from Scott Capek, Training Officer for the Cornell Rescue Squad, to Allen, Grievant's supervisor, asking the College for another instructor because of concerns about Grievant's teaching, his paramedic background and the crew members concerns about being prepared for exams. (Er. 5) This letter from the Cornell Rescue Squad was shown to Grievant by Allen but did not result in any action against the Grievant. However, it should have given Grievant knowledge of concerns in the medical community even if the College did not take any specific action against him based on the letter. I also note the high scores given to Grievant for his teaching by members of the Cornell Rescue Squad in evaluations performed by the College. (Assn. 2 and 3)

In the Fall of 2000, after the Avery-Patz complaint, Dickens solicited negative input from customers of the College's EMS program with whom she had previously spoken when she took over supervision of the program in 1999. (Tr. A 80-82) One of those concerns was from Hank Kunkel of the Menominee Fire Department who wrote Dickens on October 23, 2000 that as EMS coordinator he was requesting an instructor other than Grievant due to concerns about Grievant's teaching ability and failure to prepare the crew for the necessary exams. (Er. 4) Kunkel testified by telephone and discussed his letter to Dickens. He admitted that all he was doing was relaying concerns of his EMS crew and not anything that he had observed. Kunkel stated that he had had no prior complaints about Grievant. (Tr. A 171 and 175) Grievant's un rebutted testimony was that he only learned of this letter in one of the disciplinary meetings and never had an opportunity to respond until the arbitration hearing. (Tr. B 244)

The last statement of medical community and customers concerns about the Grievant was from Chief Brown of the Eau Claire Fire Department, one of the College's largest customers. In an e-mail and subsequent letter to Dickens, Chief Brown notified Dickens that he was setting up a refresher course for his employees through Sacred Heart Hospital in Eau Claire and that he had heard comments from his employees about off color jokes by the Grievant and a general lack of confidence in Grievant's teaching ability. The Chief was also

aware of conflicts between Grievant and the medical directors for the EMS program. (Er. 6 and 7) In the letter, Brown also praised the Grievant for establishing the higher level EMS programs and preparing students for the National exams and for a high level of emergency service delivery by his students after graduation. The Fire Chief never testified, and I am again confronted with the problem of how much weight to give the letter. I give it some weight as it is a more even letter as it relates to the Grievant, and the letter clearly does not hold Grievant solely responsible for the problems between the College and the medical community and the EMS services. (Er. 7) Grievant's un rebutted testimony was that he was surprised by this letter because he had never heard these concerns and only learned of the concerns at the disciplinary meeting with Barker where he was asked to resign and never had a real opportunity to respond. (Tr. B 246)

Again, while the College presented evidence to support its third reason for discharge, it is evidence that was primarily hearsay and evidence to which Grievant for the most part was not aware of until a decision to discharge Grievant had virtually been made. While Grievant testified that the first time that he heard the customer community was unhappy with him was at the discipline meetings, I find this somewhat hard to accept as Dickens creditably testified that she discussed customer concerns with Grievant when she took over the EMS program in 1999. (Tr. A 43)

The fourth reason given by the College for Grievant's discharge was Grievant's failure to maintain a positive relationship with Medical Directors Wesley and Massey and Massey's refusal to authorize Grievant as the paramedic program lead instructor and coordinator. Wesley testified that he was Medical Director for the first three paramedic classes in 1995, 1996 and 1997. (Tr. B 45) Wesley primarily was concerned about Grievant's lack of pre-hospital experience. He was also concerned about Grievant's absence from the clinical sites in the hospitals which Wesley believed caused students to re-do the clinicals. (Tr. B 42-44) Wesley testified that College exhibit 14 summarized his concerns about Grievant's teaching of the paramedic course and that the reason he resigned from being Medical Director was that the College did nothing to correct those concerns. Wesley testified that after the 1995 class he talked with Grievant about his concerns and that Grievant needed to receive more pre-hospital experience. (Tr. B 65 and 67) Wesley admitted that he never gave Grievant any specific directives and that he never discussed his 1995 concerns or the concerns expressed in exhibit 14 with Dickens or the College. Wesley testified that the termination of Grievant was not the reason why he was willing to come back as Medical Director. (Tr. B 71) What is clear from Wesley's testimony is that his concerns about Grievant and the program in general were never acted upon by the College and that the College's lack of response was what was unsatisfactory to Dr. Wesley. (Tr. B 77)

The current Medical Director, Massey, started as medical director in late 1999 and made four visits to Grievant's paramedic classes. The concerns to which Massey testified were Grievant's absence from the hospital where students were doing their clinicals and Grievant's

failure to teach students knowledge beyond what was necessary to pass the exams. (Tr. B 15, 18-19) Some of Massey's concerns came only from statements with students which he did not discuss with the Grievant, and Massey admitted that he passed his concerns on to the College but did not know if it went further. Massey spoke with the Grievant at the end of the 1999-2000 paramedic class but admitted Grievant would not have had any opportunity to correct or improve his job performance. (Tr. B 29 and 30) Massey was asked during the time Grievant was being investigated for discipline to express his concerns in writing which he did, further indicating that he would not approve Grievant as instructor coordinator for the paramedic course which he knew would result in Grievant's termination. (Er. 10, Tr. B 30 and 31)

In his testimony Grievant states that he had a good, even social relationship with Wesley and believes that Wesley turned against him because he held Grievant some what responsible for Wesley not being employed by the College as the EMS program coordinator. (Tr. B 252 and 253) In 1998 Grievant, in response to a request from his supervisor Allen and in response to concerns expressed by Wesley, put together a document summarizing the successful history of the College EMS program, the high passing rates for the students and his and the College's development of the EMS program. (Assn. 5) This was also done in response to Wesley's belief that the College shouldn't run another paramedic program, a position which the College opposed. (Tr. B 257 and 258) As for his relationship with Massey, it was brief, as by the time Massey assumed the medical directorship in late 1999, the paramedic course was half over and the half that Massey saw in 2000 was taught mainly by teaching assistants. As for Massey's concerns about Grievant not being present at the hospitals for the clinicals, Grievant testified that he was following the clinical program Dickens had laid out for him and that Massey never checked with Dickens. As to other complaints in Massey's letter to Dickens, (Er. 10) Grievant testified on his alleged failure to answer questions and not letting students do more than the required number of IV's , that these were decisions on his part as a teacher, and none of these things did Massey directly observe. (Tr. B 260-264)

There is little question that Massey's decision not to certify Grievant as the lead instructor for the paramedic program weighed heavily in the College's decision to discharge the Grievant. This is a problem for the College I understand, but the only aspects of Massey's decision I can consider as a basis for discharge are Grievant's performance problems and the record is weak as to any real problems cited by Massey other than he felt Grievant wasn't the best for the job and Massey admits that he gave Grievant no opportunity to act on his concerns. Wesley's concerns went unaddressed by the College and assuming, as I do, that Grievant was aware of some of them, Grievant could reasonably believe that what he was doing after his meeting with Wesley in 1995 was agreeable with the College as it did nothing to correct him or put him on notice that he needed to improve or was doing anything wrong.

The fifth reason stated by the College for Grievant's discharge was his alleged inability to improve his job performance despite past discipline and an individual improvement plan. In its discharge letter, the College refers to past disciplines. Although in the plural, the record reveals one written reprimand in February of 1997. (Jt. 3) That letter from his immediate supervisor, Allen, sets out four concerns: inappropriate utilization of teaching assistants, failure to comply with a direct request to develop an EMT course for the Cornell Rescue Squad, insubordinate behavior for Grievant's repeated refusal to teach the EMT-basic course for the Cornell squad and inappropriate utilization of equipment of other faculty. Attached to the reprimand was an individual improvement plan covering the areas of the reprimand and setting forth specific goals for Grievant to meet if he was not to suffer additional discipline. (Jt. 4) Some of the reasons for the discipline of Grievant resulted from a running battle early in 1997 between Grievant and Allen over the scheduling of the course in Cornell and Grievant's argument that it would give him an overload prohibited by the labor agreement. (Jt. 3 and Er. 8) Grievant ultimately did teach the Cornell course. (Tr. B 306) Grievant testified that he successfully completed the improvement plan required in the letter of reprimand and there is nothing in the record to indicate otherwise. (Tr. B 230 and 231)

The only other letter in Grievant's personnel file was a communication from Allen to Grievant admonishing Grievant for being more concerned about his personal preferences than about responding to needs of students in outlying areas. (Er. 8) This letter or e-mail is dated April of 1998. There is no testimony in the record discussing this e-mail warning, and it could not be considered discipline and again it is hearsay as Allen was never called to testify nor was there any evidence introduced that Allen was unavailable to testify. I have already discussed above the College's exhibit 14, the harsh statement in 1995 from Eau Claire's Scared Heart Hospital, and I won't repeat my concerns with that document. It is apparent too that in a meeting in 1995 the then College president did not agree with members of the medical community that there was anything wrong with Grievant or the College's EMS program. (Tr. B 83 and 84) And as I have ruled, there is little Grievant or the College could do to correct the alleged concerns in that document if neither the College nor Grievant ever received the letter.

The College has directed me to an arbitration case of a special education teacher whose discharge for just cause for poor job performance was upheld by the arbitrator. 6/ A careful reading of that case, however, demonstrates the type of corrective action that should in my mind have been followed in this case. 7/ I find that in 1999, Ms Dickens, who testified that when she took over the EMS program she considered the past the past, commenced the type of corrective action with Grievant that arbitrators including this one find necessary to uphold a just cause discharge for job performance failings of a teacher, particularly where that teacher has been employed for ten years and essentially in this case built the EMS program. (Tr. A 51) Dickens set a program for Grievant to follow in his relationship with the medical director, handling the clinicals at the hospitals and discussed team teaching to cut down on Grievant's teaching load. (Tr. A 45-50) As importantly, Dickens testified on direct for the College that

the situation of the EMS program she believed was improving. (Tr. A 51) Upon learning of the complaint of Avery-Patz that started the investigation leading to Grievant's termination, Dickens first reaction was to try and correct Grievant's behavior if the complaint was substantiated; she did not consider discipline which was, as she testified, the immediate reaction of higher level administrators. (Tr. A 66 and 67)

6/ MICHIGAN DEPARTMENT OF MENTAL HEALTH, 82 LA 1311, 1312 GIROLAMO (1983):

This employee was issued a Written Reprimand on 10-5-82, a Conditional Interim Rating on 12-7-82, and finally, this Unsatisfactory Interim Rating on 3-7-83. This Employee has shown a repeated and consistent inability and/or failure to do the job, work cooperatively with others, and adjust to the work. He has been informed of shortcomings, explicitly shown and told how to improve performance, and warned that a Conditional or Unsatisfactory Interim Rating may be given. Despite ongoing training, written and oral warnings, weekly supervisory conferences, ongoing consultations, opportunities to observe and assist other teachers, being provided with professional reading materials, peer assistance and demonstration teaching, performance continues to be below standards. Given these factors, this Unsatisfactory Interim Rating is being issued.

7/ Common Law of the Workplace. National Academy of Arbitrators, Discipline and Discharge SS. 6.7, page 174.

I find that there is not enough evidence in the record to substantiate that Grievant, prior to Dickens' involvement in 1999, was put on notice and failed to improve his job performance. The one letter of reprimand has nothing to do with his performance as a teacher and doesn't relate to the reasons for Grievant's discharge and in that case Grievant successfully corrected his performance. It is clear Grievant was doing what Dickens asked of him and Grievant was allowed to teach the 1999-2000 paramedic class and returned to teach classes in the Fall of 2000 and even after being notified he was terminated in early November of 2000 was asked by the College to complete the semester.

I have not commented on or addressed all of the parties' arguments in this decision, but I have considered them and the cases that the parties argued in support of their respective positions. I have, as discussed above, given little weight to hearsay evidence where it was not corroborated. I have taken into consideration the requirements of due process to uphold a just cause discharge and in this case have found them lacking. I do not regard the Grievant's actions to be so extreme as to justify the lack of progressive discipline and due process, and I believe discipline and/or corrective action less than discharge can protect the College's interests. I find that it was the decision of Medical Director Massey to not certify the Grievant

credit Operations Vice President Barker, that he considered other things, mainly what he considered a pattern of poor performance on the part of the Grievant. But Barker testified that he gave little weight to any discipline, complaints or corrective action more than two or three years old. (Tr. B 177) Barker testified that Massey's decision was a significant factor in deciding to recommend discharge to the College's board of directors. (Tr. B 180) Barker also stated he did not take part personally in the investigation of the complaints against Grievant and based some of his knowledge on Grievant's relationship or lack of it with the medical community on Barker's previous experience as an employee of one of the Eau Claire hospitals. (Tr. B 141-142) Barker further never met with the Grievant until the discipline meetings of October and November, 2000.

I also find that the record evidence does not support the allegation that because of the Grievant the College has lost customers on any permanent basis. Fire Chief Brown of the Eau Claire Fire Department stated in his letter to Barker that he looked forward to a continuing relationship with the College.

I do not find that by a preponderance of the evidence that the College had just cause under the labor agreement, which guides my authority in this case, to discharge the Grievant. However, I believe there is enough evidence in the record to uphold lesser discipline or corrective action. I find that Grievant reasonably had to have known from conversations with Allen, Wesley and customers that there were issues about his paramedic experience on a recent level, that there were concerns about his teaching and his relationship with the medical community. I do not agree with the Association that the lack of previous discipline except for the one written reprimand means that the College could not in 2000 have disciplined the Grievant with something less than discharge which was considered initially by Barker and his immediate supervisor Dickens. Massey's letter was the decisive factor and results in a problem for the College and for me if I return Grievant to his position and Massey resigns as medical director.

I further agree to some extent with the College that Grievant is too willing to put the blame for foul ups on others, and I do not accept his total denials of concerns about him in the medical community and among customers given the evident close interaction of Grievant with all of these entities. I believe as it relates to the 1999-2000 paramedic class where this case before the parties started, that Ms. Kinning may have described it best and I accept her testimony that Grievant was burned out, particularly with a difficult class. I also believe that even giving little weight to the hearsay evidence, the evidence suggests that Grievant perhaps has developed too much ownership of the EMS program and has become less than willing to accept direction and concerns from others, though I credit that according to Dickens the program was doing better after she took it over and that Grievant was complying with her directives. Had the College not placed so much stock in the complaint of a troubled student filed months after the end of the 1999-2000 paramedic class and given Dickens more opportunity to work with the Grievant and the medical community and customers perhaps the situation could have been salvaged and due process established.

Since I have found that the grievance as it relates to discharge must be sustained, I turn to the appropriate remedy. I find nothing in the agreement between the parties that requires the College to assign Grievant to any particular courses in the EMS program. Grievant was teaching a full load in the Fall of 2000 without teaching a paramedic course. Dr. Massey testified that his concerns were with Grievant as lead instructor of the paramedic course and that Grievant could teach other courses without his approval. I therefore order the reinstatement of the Grievant to a full time teaching position in the EMS program without ordering the College to assign Grievant to teach the paramedic course. This does not mean that Grievant can never teach that course again but only that the College has the right to ensure and determine that Grievant will be assigned to teach the paramedic course when he is again acceptable to the College and its then medical director, an assignment that cannot be unreasonably denied. I also am not awarding Grievant any back pay or benefits as I believe discipline less than discharge was warranted. Grievant will receive seniority credit and accrued benefits for the period of his discharge.

Based on the foregoing and the record as a whole, I issue the following

AWARD

The College did not have just cause under the collective bargaining agreement to discharge Grievant from his employment as a teacher with the College. The grievance is sustained.

REMEDY

The Grievant will be reinstated to a fulltime teaching position with the College in the EMS program within fifteen days of the date of this decision, without backpay or benefits but will suffer no loss of seniority or accrued benefits.

Dated at Madison, Wisconsin this 10th day of September, 2001.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

PAH/rb

