

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LABOR ASSOCIATION OF WISCONSIN, INC.
FOR AND ON BEHALF OF ITS AFFILIATE LOCAL THE
RUSK COUNTY PROFESSIONAL EMPLOYEES ASSOCIATION**

and

RUSK COUNTY, WISCONSIN

Case 101
No. 62070
MA-12142

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Labor Association of Wisconsin, Inc., which is referred to below as the Association.

Ms. Mindy K. Dale, Weld, Riley Prens & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Rusk County, Wisconsin, which is referred to below as the County.

ARBITRATION AWARD

The County and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve an arbitration filed on behalf of Todd Ludvik, who is referred to below as the Grievant. Hearing on the matter was conducted on April 16, 2003, in Ladysmith, Wisconsin. No transcript was prepared of the hearing, and the parties filed briefs and a waiver of a reply brief by July 7, 2003.

ISSUES

The parties stipulated the following issues for decision:

Did the County have just cause to suspend the Grievant for two days without pay?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE VI - DISCIPLINARY PROCEDURE

Section 6.01: The parties recognize the authority of the Employer to initiate disciplinary action against employees, provided such disciplinary action is for just cause.

Section 6.02: The Employer recognizes the principle of progressive discipline when applicable to the nature of the misconduct giving rise to the disciplinary action.

BACKGROUND

The grievance, filed on November 15, 2002 (references to dates are to 2002, unless otherwise noted), asserts that “The Disciplinary Action taken on November 15, 2002 was issued without just cause” in violation of Article VI. The disciplinary action is set forth in a memo dated November 15 from Gary Rivers, the Director of the County’s Department of Health & Human Services (RCHHS), to the Grievant. The memo reads thus:

This document is intended as notice of unsatisfactory work performance and subsequent disciplinary action.

Your work performance has been determined to be unsatisfactory for the following reasons:

- Failure to ensure safety of a child:
 - On 11/12/02 you received a call from the Sheriff’s Department investigating a child sexual assault. Contrary to Department Policy and procedure you did not have a direct contact with the child and the child’s guardian(s) for the purpose of ensuring safety of the child.

The unsatisfactory work performance identified above constitute a serious and significant work performance deficiency. Due to the seriousness of the deficiency related to the safety of a child, the following disciplinary action is being taken: a 2 day unpaid suspension effective 11/19/02. Your scheduled date to return to work is 11/20/2. Upon your return to work the following corrective action is required:

- Follow all Department policies and procedures to ensure the safety of a child.

Should you fail to meet 100% compliance with the required corrective action as it applies to following Department Policies and procedures regarding ensuring the safety of a child, you will be suspended without pay pending a termination hearing by the Personnel Committee.

Also upon your return from unpaid suspension, you will be required to review all case assignments (intakes and ongoing cases) with your supervisor, to ensure all Department policies and procedures are being followed.

The Grievant signed this memo on November 15, adding the notation "I completely disagree with this entire action." Rivers denied the grievance in a memo to the Grievant dated December 16. This memo also noted Rivers' conclusion that "the alleged relationship issues between you and your supervisor" had no bearing on the validity of the discipline.

The discipline concerns the events of November 12 and 13. The Grievant called in sick on both days, but was on-call for the evening hours of November 12 and the early morning hours of November 13. During the evening hours of November 12, the parents of a thirteen year old girl phoned the Sheriff's Department to report that they had learned the girl had sexual intercourse with an eighteen year old man on or about October 22. Because the man continued to try to contact the girl, the parents decided to bring the matter to the attention of the Sheriff's Department, bringing the girl into the Sheriff's Department so that she could be interviewed. The Sheriff's Department assigned Deputy Sheriff Travis M. Mayer to conduct the investigatory interview regarding a potential sexual assault.

Mayer summarized the events of the evening in a memo that reads thus:

On November 13 (sic), 2002 while working for the Rusk County Sheriff's Department I was assigned to investigate a sexual assault of a child 13 YOA.

I had dispatch page the on call DHHS worker. I was contacted by (the Grievant). I told him that I had a sexual assault of a child case and that the parents were bringing the child in for an interview. I told him that the victim was X . . . 13 YOA and the offender was Y . . . 18 YOA. I told him that Corporal Zielke had investigate a case after the father had called about Y . . . not leaving his daughter alone. I told him that Y . . . had agreed not have contact with X I then told him tonight the mother had talked with X . . . and X . . . had admitted that on or near Oct 22, 2002 she had sex with Y . . . I told him that this happened at Josie Creek Campground in a vehicle.

(The Grievant) then told me that he was not going to come in because the parents were keeping the child safe. He said that I needed to reaffirm this with X . . . and the parents that there was to be no contact. He said that he would then start his process from my report in the morning.

This was the end of our conversation.

Mayer completed a video-taped interview with the parents and daughter early in the morning of November 13. The Grievant did not participate in the interview. The Grievant documented the time spent in responding to the pager in the "Comp" section of his time sheet for November 12.

The RCHSS maintains a collaborative agreement with the Sheriff's Department. Broadly speaking, the agreement calls on the two agencies to cooperate during an investigation, with a deputy sheriff assuming responsibility to determine facts relevant to the prosecution of a criminal complaint and a social worker to determine the care needs of a child and the child's family. More specifically, the social worker's assessment, under the collaborative agreement, is to include an initial determination "whether the child is likely to be in need of protective services within the guidelines established in Chapter 48 Wisconsin statutes". The RCHSS maintains internal policies that call on social workers to implement a protective plan where circumstances demand it. The policies define a protective plan as "an immediate, short term, sufficient strategy that provides a child responsible adult supervision and care, compensates for immediate physical or situational threats and accommodates the family situation to allow for the completion of the initial assessment." The RCHSS maintains forms to guide the creation of a protective plan, including obtaining the signatures of parents or caregivers, the social worker and their supervisor.

The background to this point is undisputed. The balance of the background is best set forth as an overview of witness testimony.

Travis Mayer

Mayer first learned of the alleged assault at roughly 10:00 p.m. on November 12. He had no independent recall of the events of that evening beyond the memo set forth above, which he prepared the week after the incident, in response to a request from the Chief Deputy, Gary Hahn. This was the first time in his experience that a social worker did not respond to an interview involving the sexual assault of a child. After conducting the interview, he submitted a general report to Hahn, who supplied the report to RCHSS to comply with the collaborative agreement, which requires contact with RCHSS within twenty-four hours of an allegation of sexual contact involving a minor. Even if the Grievant had reported to the interview, Mayer saw himself as the primary investigator regarding the sexual assault.

Sue Hendricks

Hendricks is the Supervisor for the Child and Family Services Unit (CFS) of the RCHSS. She succeeded Ted East in that position, and had been, in November, the Grievant's immediate supervisor for roughly one and one-half months. Under the office calendar by which social workers learn of on-call assignments, the Grievant was scheduled to be on call for November 12. Other social workers covered for the Grievant's absence during the day on November 12, but his on-call status posed a separate problem. Hendricks testified that late in the work day on November 12 she overheard a phone conversation between the Grievant and his (then) fiancé, Debra, who is referred to below as Ludvik. She understood the gist of the conversation to be that Ludvik should bring the pager home to him. Hendricks told her that if the Grievant was too sick that Ludvik should advise her so that she could make other arrangements. Ludvik declined the offer, and returned the pager to the RCHSS at the start of the workday on November 13. Hendricks did not speak to the Grievant on November 12 or 13.

Early in the workday on November 13, a foster parent phoned Hendricks to advise her that she had phoned RCHSS at roughly 4:00 p.m. on November 12, but did not get a return call until 6:00 p.m. When Hendricks inquired about the timeliness of a response to the pager, the dispatcher asked which page she was referring to. This led to Hendricks' discovery, at roughly 8:30 a.m. on November 13, of the Grievant's response to the page initiated by Mayer. Hahn gave Mayer's general report to Hendricks, and asked her if she realized the Grievant had chosen not to report to the interview. Hendricks then brought the matter to Rivers' attention, and asked Hahn to have Mayer prepare a more detailed description of his conversation with the Grievant.

Hendricks stated that she was familiar with the subject of the assault complaint, and that he had a history of improper conduct toward minors. She felt the matter posed safety and support issues for the family that had sought assistance. Beyond this, she felt that the Grievant had violated internal policies regarding the collaborative interview process and the creation of a protective plan. She did not think she had the authority to discipline the Grievant, but documented her concerns and presented them to Rivers.

Hendricks did not speak directly to the Grievant until November 15. After a CFS morning staffing, she asked the Grievant to report for a meeting with her and Rivers at 1:00 p.m. The Grievant appeared at the meeting with the Association's President, Deb Klund. Rivers conducted the meeting. He had prepared a memorandum outlining all of their concerns with the Grievant, which included the imposition of a three day suspension. Rivers modified the memo as the Grievant responded to their concerns. She played no role in these modifications or in the imposition of the discipline.

She testified that she did not call the Grievant to determine how sick he was. She arranged to cover his absence during the workday on November 12, and would have taken the pager herself if she had known the Grievant was too sick to respond to it. She assigned the creation of a protective plan to another social worker on November 13. She saw no need to

contact the Grievant once alternative arrangements to address the assault had been put in place. She felt that Mayer did a good job to determine the parents' ability and willingness to protect their daughter, but did not feel that this should have been left to Mayer.

She acknowledged that she and the Grievant had "some big problems" in a non-work relationship in the summer of 2001 that prompted East to write a staff-wide memo on propriety in inter-personal working relationships.

Gary Rivers

Rivers stated that Hendricks reported her concerns with the Grievant's response to the alleged assault on November 13. They reviewed her concerns and the reports she had obtained and discussed possible policy infractions. Rivers did some background research then waited for the Grievant to return to work. He did not view it as necessary or worthwhile to contact the Grievant before he felt well enough to return to work.

Rivers and the Grievant worked together on November 14 to unload a truck containing donations to the tornado relief effort. Rivers did not mention the events of November 12 or 13. On November 15, Rivers summoned the Grievant to a meeting, and informed him that it could result in discipline. The Grievant appeared at the meeting with Klund, and Rivers appeared with Hendricks. Rivers stated he probably prepared a memo stating all of his concerns with the Grievant, but asked the Grievant to explain his response to the pager on November 12. The Grievant responded that he was very sick with the flu on November 12 and 13, and asked Mayer to double check on the child's safety during the course of the interview. Rivers detailed his concern that this assessment had to be made by an RCHSS employee, and detailed the questions he thought the Grievant should have addressed in the interview. He did not feel the Grievant meaningfully responded to his concerns regarding the need for a social worker's presence at the interview. He did feel that the Grievant's illness was a mitigating factor, but only in the sense that if the Grievant had not been ill, Rivers would have imposed more stringent discipline. He did alter his memorandum during the course of the meeting, but could not recall how with any specificity. He felt the two day suspension rested on the events of November 12 and 13 standing alone.

Rivers concluded that the Grievant's illness could not obscure that he had accepted the pager, sought payment for having it, and was responsible for responding to it or for alerting Hendricks to his inability to do so. His failure to either appear at an interview concerning the sexual assault of a child or inform RCHSS that he was too ill to do so constituted negligence that warranted the two day suspension. He stated he could "hardly imagine another employee issue" more significant. Regarding the level of the suspension, he stated that "We can tolerate one mistake like this, but we cannot tolerate two."

Debra Ludvik

Ludvik is now the Grievant's wife, and was his fiancé in November. She has worked in CFS since April of 1998. The Grievant was very ill on November 12, and called in sick to the Office Manager and to Hendricks after Ludvik informed him he needed to call twice to be sure that the message had been received. Late in the afternoon of November 12, Sheila Poradish, a Social Worker, came into Ludvik's office and offered to take the pager that evening. Later in the afternoon, Hendricks asked Ludvik what she would do with the pager, and noted that if she did not take it home to the Grievant then Hendricks would have to take it. Ludvik responded "whatever", and then Hendricks told her she needed to take it home to the Grievant. In a subsequent conversation, Poradish again volunteered to take the pager, but they agreed that Hendricks seemed to want the pager to be taken to the Grievant. Ludvik denied that the Grievant told her to bring the pager home. She appeared in Rivers' office on November 14 or 15 to advise him that Poradish had offered to take the pager for the evening of November 12. She stated that Rivers seemed uninterested in the point. She added that she feared her testimony might have an adverse impact on her job.

The Grievant

The Grievant has worked for the RCHSS for roughly eight years, employed as a Juvenile Court Intake/Child Protective Services Worker in November, and currently as a Long Term Support Case Manager. While he served as a Juvenile Court Intake/Child Protective Services Worker, Hendricks was his immediate supervisor.

On November 12, he left a voice mail with the Office Manager and with Hendricks that he was ill and could not report for work. His normal hours of work were 8:00 a.m. through 4:30 p.m., and he was scheduled to be on call from 4:30 p.m. until 8:00 a.m. on November 13. He noted he had a bad case of the flu and spent the two days confined to his bedroom and bathroom. Ludvik came home early in the evening of November 12, and the Grievant was surprised to hear the pager. He phoned the dispatcher, who informed he that he had had two calls. The Grievant responded to each, and neither person complained about the timeliness of his response.

At roughly 11:00 p.m., the Grievant awoke to the pager. The dispatcher informed him of a potential sexual assault involving a child. He called the dispatcher, who connected him to Mayer. Mayer advised him the victim was a thirteen year old girl and the alleged assailant was an eighteen year old man. The Grievant recognized the name of the alleged assailant, since he had supervised him as a delinquent who was being supervised for improper sexual conduct. The Grievant believed that the alleged assailant was the subject of an ongoing investigation involving another deputy. He asked Mayer if the other deputy was involved, and Mayer responded that the parents were bringing the child in to be interviewed. Mayer asked whether the Grievant wanted to take part in the interview. The Grievant responded that he was really sick, and asked if Mayer would do him a favor and talk to the parents. The Grievant specified that he wanted Mayer to

ask the parents if they would protect the child. Mayer said he would. The Grievant thanked Mayer and said that if there were problems, Mayer should call back, adding that he would do the follow-up on November 13.

The Grievant intended to do the follow-up on November 13, thinking that he would feel well enough and could prepare a protective plan within twenty-four hours of the report of the assault. However, he did not feel well enough to report to work until November 14. On November 14, he spoke to two fellow social workers to determine if there was any need for him to follow-up on the alleged assault. Neither had any information on the matter, and there was no documentation in the Grievant's mailbox concerning it. Later on that day he assisted Rivers in unloading a truck with donations for tornado relief. They did not discuss the events of November 12, and Rivers joked with him as they worked.

The following morning after a staffing, the Grievant turned over his time records to Hendricks, who questioned him about November 12. The Grievant consulted Klund and East. East informed him that he did not think the Grievant committed a disciplinable offense.

Klund accompanied him to the meeting with Rivers and Hendricks. Rivers confronted him with a document containing three distinguishable allegations, and imposing a two day suspension. Rivers asked the Grievant to sign the document, but the Grievant refused. He perceived the document to be a final copy, not a draft. He noted one of the allegations concerned his response to a page earlier in the month and the other concerned his response to the initial pages on November 12.

He did not see Mayer's written memo until the arbitration hearing, and thought the memo lacked detail. Specifically, he noted the memo failed to note the Grievant asked him for a favor and directed Mayer to question the parents concerning the child's safety. Beyond this, he noted that he has handled child safety issues in the past over the phone. In such cases he would write a protective plan the following day. He has not been disciplined for this.

After receiving the discipline, the Grievant brought to Rivers' attention two staff responses that he deemed relevant to his grievance. One involved Brenda Taylor, who, while on-call, received a call from a teacher who was concerned about an incident of abuse to a child. Taylor phoned the child's home and discovered that law enforcement officers were present. Taylor documented the incident on the RCHSS computer system, but took no action to prepare a protective plan. The second involved Jeremy Jacobs, who received an intake call concerning sexual contact between a twelve or thirteen year old girl and her older brother. The following day Jacobs raised the issue at a staffing, and was informed to prepare a protective plan immediately. He was not, however, disciplined.

He noted that he has had difficulty dealing with Hendricks in the past, and has filed a complaint against her for making inappropriate comments regarding their relationship on and off work. Their difficulty dealing with each other prompted East to write a staff-wide memo on

working relationships. The Grievant stated the relationship had reached the point that he did not contact Hendricks except “for work and work only.”

Sue Hendricks

On rebuttal, Hendricks testified that the incident regarding Taylor involved physical abuse, not sexual abuse. The violence involved the mother of a child and a live-in relative of the mother, who attacked the mother. Law enforcement handled the incident, the in-law was jailed for the weekend and thus the child’s safety posed no issue.

Gary Rivers

On rebuttal, Rivers stated that he investigated the Taylor incident after the Grievant brought it to his attention. The altercation involved two adults. The child happened to get between the adults during the altercation, and there was no indication either adult intended to hurt the child. Rivers could not recall Ludvik telling him that Poradish would take the pager. He did not feel this affected the decision to discipline, since how the pager got to the Grievant was less significant than what he did with it. He added that he discussed the incident with East, who assured him that the Grievant should have known he had a duty to report for the interview.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES’ POSITIONS

The County's Brief

After a review of the evidence, the County argues that it had just cause to “suspend Grievant for failing to follow department policy and procedure to ensure the safety of a child who had been the victim of a sexual assault.” The County contends that arbitral precedent does not warrant “a mechanical application of the Daugherty framework.” Essentially, the just cause standard demands that the County demonstrate employee misconduct and a reasonable employer response.

The evidence establishes that the Grievant faced a clear and known imperative under governing County policy to be present at the investigation of the sexual assault. The Grievant failed to respond appropriately. He understood the need to participate in the collaborative effort to investigate the charge and the need to prepare a protective plan. By asking Mayer to cover his role in the investigation, the Grievant failed to meet his duty as a professional to assure “that the safety of a child comes first and foremost.”

Nor can the Grievant’s defense of his actions be credited. His self interest in protecting himself must be acknowledged. Beyond this, none of the excuses he offered for his conduct are persuasive. Rivers took the Grievant’s illness into account, but the “illness did not excuse

his failure to ensure the safety of a child.” His claim to have called in, or his assumption that no one else could have covered for him cannot obscure that the responsibility to respond to the call-in was his alone. Having accepted the pager, he was obligated to report to the Sheriff’s Department or to find someone who could. He “chose not to do either.”

Whether or not another employee volunteered to take the pager, it was his responsibility to meaningfully respond to it. Ignoring this, Hendricks’ account of how the pager got to the Grievant is credible. An examination of the Grievant’s finance’s testimony will not explain his conduct. In any event, the fact that the Grievant accepted the responsibility of the pager is the ultimate source of the County’s disciplinary interest.

Nor can the Grievant’s assertion that he thought the sexual assault was part on an on-going case defend his inaction. There was no on-going investigation of the sexual assault, but even if there had been, the Grievant remained obligated to “assist Deputy Mayer with the interview, meet with the parents to complete a protective plan and ensure the safety of the child.” Similarly, his request that Mayer cover for him cannot remove this obligation even though Mayer did a competent investigation without him.

The record will not establish that the County treated the Grievant in less than an even-handed fashion. The “prohibition against disparate treatment requires like treatment under like circumstances” and the Association bears the burden of proving this point. A review of the evidence will not support the assertion that the County has, under like circumstances, treated other employees more favorably than the Grievant. Nor will the evidence support the assertion that East approved of the Grievant’s conduct. Rivers determined that there was no disparate treatment and no supervisory approval of the Grievant’s conduct.

With this as background, there is no support in the evidence or arbitral precedent for finding a two day suspension inappropriate. Section 6.02 “recognizes the principle of progressive discipline”, but “the seriousness of the offense” makes “a two day suspension . . . appropriate.” That Rivers struck two performance issues from the memo he had prepared prior to interviewing the Grievant establishes no more than Rivers’ willingness to listen. Hendricks played no role in the preparation of the disciplinary memo. Nothing in the evidence concerning Hendricks’ and the Grievant’s difficulties in relating to each other can undermine the reasonableness of Rivers’ conclusions. The record demands “that the Arbitrator dismiss the grievance in its entirety.”

The Association's Brief

After a review of the evidence, the Association contends that the County violated Section 6.01 by disciplining the Grievant without just cause. The evidence establishes that the Grievant called in sick on November 12 and 13, that Hendricks was aware of his illness and that Hendricks failed to take any action to verify the severity of the illness before issuing him the pager. Even assuming the Grievant failed to exercise good judgment, that errant conduct “was

due to a physical problem . . . he was too ill to respond to the deputy's request to come to the Sheriff's Department."

Arbitral precedent establishes that this factor should be considered a mitigating factor in assessing the Grievant's conduct. More specifically, the evidence establishes that Hendricks ignored another employee's request to take the pager and thus that Hendricks' conduct contributed to the Grievant's situation. Beyond this, the evidence demonstrates that the County's assertion that the Grievant willfully violated established procedures "is patently false." Rather, the record shows that the Grievant "went out of his way" to confirm with Mayer that the child was safe and not in need of immediate care. Thus, the Grievant acted reasonably, given that he knew "that he was too ill to respond to the Sheriff's Department."

The same cannot be said for Hendricks. She failed to assess the Grievant's illness and failed to release him from on-call duties. The labor agreement permits an employee to take sick leave, and this presumes a release from duties. Thus, the discipline "infringes upon the Grievant's right to use the sick leave benefits of the CBA." Beyond this, the Grievant's testimony establishes at least two other incidents in which departmental employees failed to respond to the abuse of a child with the immediate development of a protective plan. The County failed to demonstrate why it did not discipline these employees after it had chosen to discipline the Grievant.

Even if the evidence indicated a basis to discipline, the County's suspension "was too extreme" and violates Sections 6.01 and 6.02. At most, the evidence shows excusable neglect on the Grievant's part rather than willful misconduct. This demands the assertion of progressive discipline, which calls for "a letter of reprimand for the November 12, 2002 incident." The Association concludes the evidence demands that "the Arbitrator find that the Employer suspended the Grievant . . . without just cause." As the appropriate remedy, the Association requests that "the Arbitrator:

1. Order the Employer to make the Grievant whole for all lost wages and benefits denied the Grievant for the period of November 19 and 20, 2002.
2. Order that any and all reference to the suspension shall be expunged from the Grievant's personnel records.
3. That should the Arbitrator find that the Employer had just cause to discipline the Grievant in the instant case, the Association respectfully asks the Arbitrator to find that the degree of discipline imposed by the Employer was not reasonably related to the Grievant's conduct, and that the discipline be modified to a letter of reprimand."

DISCUSSION

The stipulated issue concerns whether the County had just cause to suspend the Grievant for two days for his conduct on November 12 and 13. In my view, when the parties do not stipulate the standards defining just cause, two elements define it. First, the employer must establish conduct by the Grievant in which it has a disciplinary interest. Second, the employer must establish that the discipline imposed reasonably reflects its interest. This does not state a definitive analysis to be imposed on contracting parties. It states an outline of the elements to be addressed, relying on the parties' arguments to flesh out the outline.

The Association does not seriously question, and the record will not support a serious question regarding the existence of a disciplinary interest in the Grievant's failure to respond in person to the call concerning the sexual abuse of a minor. A professional employee in human services is paid for the exercise of informed discretion. It is not necessary to belabor discussion of the policies maintained by the County to note the significance of the prompt preparation of a protective plan in a case of sexual abuse of a child. That Rivers thought it best that the Grievant view the people whose care needs were to be assessed is reasonable. There is no dispute that a collaborative interview process reduces the number of interviews a child victim must encounter. That the policies permit the exercise of case-by-case discretion in determining when and how to prepare a protective plan accentuates the significance of the discretion exercised by the Grievant on the evening of November 12, and on the morning of November 13. The Grievant's decision not to participate in the interview is insupportable and the existence of a County disciplinary interest established. The County has also established a disciplinary interest in the Grievant's decision not to prepare a protective plan on November 13 or to advise anyone that he was too ill to do so.

The Association asserts a series of mitigating factors to undercut, if not eliminate, this disciplinary interest. The first is that the Grievant was too ill to respond to the call. The Association adds a closely related point that the Grievant responded within the limits of his physical ability to respond. The points have some persuasive force. However, each obscures that the Grievant chose not to advise anyone of his inability to respond. A call to RCHSS supervision at any point during the evening of November 12 could have opened up the possibility of finding a substitute. Viewed more pragmatically from the Grievant's perspective, it would have shifted the responsibility to someone else. To the extent the Grievant's request that Mayer do him a favor is seen as an exercise of discretion, it is flawed. It treats the RCHSS interest in the interview as inconsequential, or indistinguishable from the Sheriff's interest in the criminal ramifications of the incident. In any event, the points cannot obscure the Grievant's fundamentally flawed determination to act ineffectively rather than advise management of the degree of his illness.

The Association makes a series of more forceful arguments regarding Hendricks' conduct. She covered for his sick leave on November 12, but took no effective action to relieve him of pager duties on the evening of November 12 and the morning of November 13.

As a contractual matter, the most significant assertion is that Hendricks effectively denied him the use of contractual sick leave. Two factors undercut this assertion. The first is that there is no evidence that the Grievant was not afforded sick leave for November 12 and 13. To the extent the period of on-call duties is the focus of the point, it ignores that the Grievant claimed compensation for responding to the calls. Nor does this point turn on witness credibility. Even if Hendricks' account of how the pager reached the Grievant is credited over Ludvik's, Hendricks' unwillingness to contact the Grievant remains insupportable. However, crediting Ludvik's account does no credit to the Grievant. He assumed that no one was available to cover for him. This assumption needed no more than a phone call to RCHSS management to be tested. He was not too ill to converse over the phone, as his response to three pages demonstrates. However the pager reached his hands, his discharge of his responsibility for it remains inadequate.

This cannot obscure that Hendricks' unwillingness to contact the Grievant affords no support to the County. The evidence indicates each party to a dysfunctional relationship valued the dysfunction of the relationship over their work responsibilities. This has a bearing on the second element of the just cause analysis, but has no bearing on the existence of a disciplinary interest in the Grievant's conduct of November 12 and 13.

In sum, the County has established a disciplinary interest in the Grievant's failure, on November 12 and 13, to report to an interview regarding an allegation of sexual abuse of a minor. There is no factor to undercut the existence of this interest. The Grievant's illness cannot justify his failure to disclose to RCHSS management that he could not physically respond to the interview. Nor can it justify his failure to prepare a protective plan or to advise RCHSS management of his physical inability to do so on November 13.

The analysis thus turns to the second element of the cause analysis. Section 6.02 bears directly on this point. The most persuasive line of argument advanced by the Association is that the Grievant's conduct warrants a lower level of discipline. Rivers' view is that the suspension is directly related to the severity of the misconduct, and reflects that the County will view one instance as a warning, but cannot tolerate a second. The language of Section 6.02 will accommodate either line of argument, for the principle of progressive discipline is made "applicable to the nature of the misconduct giving rise to the disciplinary action."

Determining the more persuasive line of argument thus becomes a factual issue, and the evidence supports the County's view over the Association's. The misconduct giving rise to the discipline is fundamental, involving the exercise of a professional's discretion in a situation involving sexual abuse of a minor. The misconduct is not restricted to a single act. The Grievant could have chosen throughout the evening of November 12 to advise RCHSS management that he was too ill to respond to the pager. He did not, including the point at which he declined to participate in the interview. To complicate this flawed exercise of judgment, he informed Mayer that he would start the protective plan process, based on Mayer's report, when he reported for work on November 13. Ignoring the impact that may have had on getting Mayer

to “do me a favor,” the Grievant later called in sick, taking no effective action to assure the protective plan process was set in motion. That Mayer’s report would generate a departmental response cannot obscure the Grievant’s failure to assume personal responsibility. Nor do other actions manifest a sense of responsibility for his actions. His time sheets indicate his opinion that the response was appropriate. His signature on the reprimand memo indicates that Rivers’ memo had no impact on his view of the events of November 12 and 13.

The Association urges that there are mitigating factors, but the arguments are stronger logically than factually. The Grievant’s citation to Rivers of the Taylor and Jacobs incidents proves something less than disparate treatment. The facts of each matter are less than clear. Neither, however, affords a substantial basis to question the reasonableness of Rivers’ decision. The Taylor incident did not involve sexual abuse, and the evidence indicates that the assaulting party was jailed. The Jacobs’ incident is unclear. Even if the facts are taken as the Association asserts, the County demanded that Jacobs create a protective plan the day following the incident. This affords at best evidence to undercut the County’s interest in the actions of November 12. However, it affords no defense for the Grievant’s failure to take some meaningful action to report the incident on November 13. Beyond this, the incidents underscore the need to assess the exercise of judgment on a case-by-case basis. The Grievant’s assertion of disparate treatment seeks to insert a general rule where none will fit. In addition, the Grievant’s willingness to question the conduct of fellow employees manifests more zeal to protect himself than solid evidence to question RCHSS management decisions.

The most persuasive arguments for a lesser level of discipline concern the conduct of RCHSS management. Hendricks’ unwillingness to contact the Grievant directly created, for no evident reason, circumstances in which the Grievant was forced to exercise discretion while ill. There is no reason to believe Hendricks could not have found another employee to take the pager. The Association’s arguments on this point are forceful. However, it is ultimately the Grievant’s exercise of discretion that is at issue, and the evidence underlying that discretion is, as noted above, troublesome in its own right. If the Grievant’s conduct indicated a meaningful assumption of responsibility for his conduct there would be reason to believe a lower level of discipline could send the necessary signal. However, there is no evidence that the Grievant acknowledges any responsibility for the incident. This supports Rivers’ conclusion that a higher level of discipline was necessary.

Rivers’ preparation of a disciplinary memo in advance of the imposition of discipline is troubling. The evidence is not, however, sufficiently clear to conclude that he failed to afford the Grievant a meaningful opportunity to tell his side of the story.

In sum, the County has established that the suspension reasonably reflects its disciplinary interest in the Grievant’s conduct. Thus, it has met both elements of just cause, and has complied with the requirements of Section 6.01 and 6.02.

AWARD

The County did have just cause to suspend the Grievant for two days without pay.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 2nd day of September, 2003.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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