

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**HUMAN SERVICE EMPLOYEES OF FOREST, ONEIDA
AND VILAS COUNTIES, LOCAL 79-A, AFSCME, AFL-CIO**

and

**HUMAN SERVICES BOARD OF FOREST,
ONEIDA AND VILAS COUNTIES**

Case 21
No. 67400
MA-13865

(Goetz Grievance)

Appearances:

Mr. Dennis O'Brien, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin, appearing on behalf of Local No. 79-A.

Mr. John Prentice, Attorney, Simandl & Murray S.C., 20975 Swenson Drive, Waukesha, Wisconsin, appearing on behalf of Human Services Board of Oneida, Vilas and Forest Counties.

ARBITRATION AWARD

Human Service Center Local 79-A hereinafter "Union," and Human Services Board of Forest, Oneida and Vilas Counties, hereinafter "Employer", requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing began before the undersigned on January 11, 2008 and was reconvened on February 22, 2008 at Rhinelander, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs by June 23, 2008 at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

Did the Employer have just cause to discharge the Grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE 2 – MANAGEMENT RIGHTS

The Board possesses the sole right to operate the Human Services Organization and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following;

A. To direct all operations of the Organization.

. . .

D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause.

. . .

E. To maintain efficiency of organization operations entrusted to it.

Any dispute with respect to the improper application of said management rights contrary to language contained in this Agreement may be processed through the Grievance and Arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the right of the Board to continue to exercise these management rights.

. . .

ARTICLE 4 – GRIEVANCE PROCEDURE

5. Authority of the Arbitrator: The authority of the Arbitrator shall be limited to the interpretation of the Agreement in the area where the alleged breach occurred and the Arbitrator shall have no authority to modify, add to or delete from the express terms of the Agreement.

BACKGROUND AND FACTS

The Employer operates a residential treatment facility for individuals with drug and alcohol addictions. The facility addresses the health and psychological needs of the clients through group and individual treatment.

The Grievant was a six year employee until his discharge on June 27, 2007. The Grievant was hired by the Employer first as a part-time house staff member position and later he moved to full-time status. The Grievant regularly worked weekends and evenings. The Grievant's supervisor was Peter Bennett, Assistant Director, and had no disciplinary record.¹

On June 4, 2007 the Grievant, Charles Ring and Rodney Williams were working the second shift. At approximately 8:30 p.m., the three employees were in the office area of the Employer's facility waiting for the Narcotics Anonymous meeting to disperse from the meeting room. GB, a meeting attendee and resident at the Employer's facility, left the meeting room, walked into to the lobby area of the facility, and began to suffer from a seizure. When the seizure began, three residents in close proximity to GB assisted him to the floor.

Each of the three employees offered a different account of the events that occurred thereafter. Ultimately, an ambulance and emergency medical technicians arrived at the facility. GB did not want to go to the hospital, but was convinced by an EMT that it was necessary. GB was transported to the hospital.

Consistent with the facility practice of bringing clients together to discuss and debrief after an extraordinary event, the Grievant, Williams and Ring met with the residents in the meeting room immediately following GB's departure. Following the meeting, Ring and Williams went to the basement of the facility to work on a malfunctioning refrigerator. While there, they discussed the Grievant's behavior during the incident and agreed that he did not act appropriately. Williams informed Ring that he was going to report the Grievant's behavior the following day to their supervisor.

On June 5, 2007, Williams returned to the facility and spoke to Bennett. Williams informed Bennett of his concerns. Bennett required Williams to write a statement. When the Grievant arrived for work on the 5th, Bennett obtained his viewpoint of the June 4 incident. Based on Williams' comments and before Bennett spoke to Charles Ring, Bennett placed the Grievant on paid leave. Bennett spoke to Ring later the same day.

Bennett met with the Grievant, his Union Representative Ken Winnicki, and Tamara Feast, Employer AODA Administrator, on June 14, 2007.

¹ Agency Director Ann Cleerman testified that a previous manager had disciplined the Grievant. No evidence was presented to support Cleerman's assertion. Had discipline been imposed, it is reasonable to conclude that it would have been documented, placed in the Grievant's personnel file and placed into evidence in this hearing. Given that no disciplinary records were offered, I conclude that no discipline was imposed.

On June 27, 2007, the Grievant received a letter of termination which read as follows:

. . .

Dear Mr. Goetz:

We have completed our investigation into the events of June 4, 2007 and have concluded that your failure to act in a crisis situation constitutes inexcusable nonfeasance and serious dereliction of duty. Your failure to call 9-1-1, in light of the circumstances that occurred on June 4, 2007, is unconscionable and is contrary to your training and duty. Consequently, your employment at Koinonia is terminated, effective immediately.

Please be advised that you are to have no further contact with Koinonia or its staff on Koinonia premises. If you have left any personal effects at Koinonia, please contact Patrick Bennett, AODA Services Administrator.

Very truly yours,

THE HUMAN SERVICE CENTER

Ann Cleereman, Executive Director

The three employees offered the following testimony at hearing:

Rodney J. Williams

Williams is a one-year employee of the Employer working part-time in a House Staff position. Williams has known the Grievant for four to five years.

Williams was working on June 4, 2007 when GB had a seizure in the facility lobby. Williams testified that he became aware of something occurring in the lobby. He walked to the doorway, and observed three clients helping another client, GB, to the ground.

Williams observed Ring in the lobby area for 10-15 seconds. Ring got up from GB, headed back to office and said to "call 911". Williams testified he was going to make the call, but heard the Grievant say "I'm not making the call" or "I'm not going to, you do it". According to Williams, he was so shocked by the Grievant's response that he "froze" and did not call 911. After Ring telephoned 911, Ring went back to tend to GB. Williams left the office area and went to the lobby. Williams testified he and a client dispersed the crowd.

After GB left facility in an ambulance, Williams, Ring and the Grievant assembled the clients to allow them to discuss the incident. Williams recalled that the Grievant had upset the

clients at the meeting by immediately saying "This is what %*\$#ing happens when you go out and keep using". Williams viewed the Grievant's comment to the clients as very inappropriate.

Williams testified that he reported the Grievant to management because of his behavior in the foyer and at the meeting.

Charles Ring

Ring is a ten-year employee of the Employer having first been a client, followed and then a part-time employee followed by full-time employee status. Ring was working on June 4, 2007 at the time of the incident.

Ring testified he was standing at the window and someone came to the doorway and said someone was having a seizure. Ring went out to the lobby and observed three individuals assisting GB to the floor. Ring knelt down by GB, then got up and walked to the office area where he called out for someone to "call 911". Ring testified he did not address the Grievant directly, but intended the comment for him, because the Grievant was closest to the telephone. Ring heard the Grievant respond, "you do it". Ring made the telephone call and returned to the lobby area. Williams was in the lobby when Ring returned.

Grievant

The Grievant testified that he, Ring and Williams were waiting in the office for the close of the NA meeting. The Grievant was at the left desk situated furthest from the doorway between the office and the lobby. The Grievant stated Ring and Williams went out to greet former clients. Ring then returned and said that someone had been involved in an incident in the lobby. The Grievant got up from the desk and went toward Ring to the doorway. Ring then asked the Grievant if he had called 911. The Grievant told Ring he had not, questioned whether anyone in the lobby had called, and questioned whether it was medically necessary to call. Ring responded that it was medically necessary and Ring proceeded to make the call. The Grievant was in the doorway at the time Ring made the telephone call.

After Ring made the telephone call, he returned to the lobby. Ring, Williams and residents were attending to GB and the crowd was dispersing. The Grievant proceeded to locate four Oneida County jail residents, complete their paperwork and send them back to the jail. The Grievant did not assist because he observed Ring and Williams attending to GB's needs.

Additional facts, as relevant, are contained in the DISCUSSION section below.

POSITIONS OF THE PARTIES

Union

The Union maintains that there was no action or inaction by the Grievant that warranted discipline, let alone discharge, and therefore the Employer's decision to terminate lacked just cause in violation of the collective bargaining agreement. Not only was the Board's investigation deficient, but it was executed in such a manner so as to justify management's actions at the expense of an exemplary employee.

The Grievant appears to have been terminated for declining to call 911. The Grievant did not decline to call; he only misunderstood the instruction. William and Ring offered testimony at this hearing, the unemployment compensation hearing and written versions – all of which are different versions and the employer never attempted to explain the incongruities between Ring and Williams' stories.

The incident occurred in less than three or four minutes in the vestibule of the facility. There is no evidence of any adverse affect on either the individual or the interest of the facility as a result of what is characterized as a "delay" caused by the alleged inaction of the Grievant.

The investigation was flawed. The incident occurred early evening on June 4, 2007. Two of the Grievant's co-workers complained to each other about the Grievant's behavior, but at no time that evening did they speak to the Grievant. Co-worker Rodney Williams returned to the facility the next day to report his concerns to supervision. The Grievant was then called in to talk with Assistant Director Peter Bennett who asked him questions and requested a written report of the prior evening's events. Bennett never informed the Grievant of any specific charges made against him by his coworkers nor did he ever ask the Grievant why he would act so irresponsibly after so many years of good service.

While there is no question that Bennett conducted the flawed investigation, it was Cleerman who made the decision to discharge. The fact that Cleerman, the decision-maker, never spoke to any of the witnesses or reviewed any of the evidence establishes a clear violation of due process.

Not only was the investigation flawed, but it was biased. Williams instigated the investigation that led to the Grievant's termination. Williams froze during the event and failed to call 911 when asked. The hypocrisy of Williams's actions cannot be overlooked nor can the facility's failure to similarly discipline Williams.

The Board failed to recognize the concept of progressive discipline. The Grievant is an eight-year employee with no prior disciplinary infractions. Termination is an excessive form of punishment in this instance.

Union in Reply

The Employer's assertion that the Grievant had a greater responsibility to act than his accuser is simply not true. All employees were on an equal plane in terms of their job responsibilities on June 4. All were required to have the same training and all held the title, "House Staff". If the Grievant's behavior was grounds for discipline, then Williams was similarly due discipline.

The Grievant consistently acknowledged that his level of involvement did not match his co-worker Ring's, but that he observed the situation, concluded that there was ample attention being given to the client, and assisted in crowd control. The Grievant did not sit by idly while Ring and Williams attended to GB, rather he took the initiative to complete the paperwork for the jail prisoners.

Ring and Williams do not offer the same version of events. The inconsistencies are crucial to a determination of blame. Had the Employer conducted a proper and effective investigation, it would have exposed these inconsistencies and explored them in detail.

Finally, it appears the Grievant had some philosophical differences with several of his coworkers concerning the most appropriate method of dealing with clients who suffer from addictions. Williams and Schanes testified that they had reservations regarding the Grievant. Bennett and Schanes testified that clients complained about the Grievant. There is no way to evaluate these claims and they should be dismissed.

A tragic injustice was committed against the Grievant. The Union requests that the grievance is sustained and the Grievant made whole.

Employer

The Grievant failed to fulfill his obligations to management and was terminated. He not only placed the safety of a client in jeopardy, but violated the trust relationship that is essential at the facility between staff members and clients. Given the potential for future harm, and the actual harm imposed by the Grievant, termination was warranted.

House Staff member Ring provides the most plausible version of the event. Ring has no motive to lie and had a positive relationship with the Grievant as evidenced by their social interactions. Ring testified that the Grievant refused to call 911. Williams testified to essentially the same version of events although he recalled the Grievant's response as "I'm not making the call, you do it".

Ring was the only staff member to physically attend to the client and yelled out "call 911". Williams, a probationary employee with limited experience and distracted by the Grievant's statement, knew enough to go to the lobby area, check on GB and encourage the crowd to disperse.

In contrast, the Grievant did nothing to help. He failed to get up from the desk, exit the office area or help with the clients. It wasn't until Ring and Williams returned to the office that he got up. The Grievant admits he did not call 911. He also admits that he simply "observed" the events from the doorway to the office. He justified his inaction because "there were a lot of people around the guy". There is no justification for the Grievant's inaction.

The Grievant violated the trust of the clients at the facility. His actions, or lack thereof, communicated to the clients that he did not care about their well-being. Not only did he refuse to assist the stricken client during a medical emergency, he failed to assist the frightened clients and meeting attendants cope with the traumatic event.

Management's investigation was complete and fair. The Grievant's co-workers brought the issue to management's attention. The Grievant was timely informed of the incident, wrote a statement and was interviewed at a later date.

Management's decision to terminate the Grievant was appropriate. The Grievant was an experienced, well-trained individual who should have assisted his co-workers. He failed to set an example for the probationary employee he was charged with training and undermined the faith and confidence of the residents and clients at the facility.

Employer Reply Brief

The Union is introducing collateral issues as a means to divert attention away from the seriousness of the Grievant's misconduct. There was no "hidden bias" against the Grievant.

The Union challenges the credibility of Williams' and Rings' testimony. It points to the discrepancies and concludes that their testimony must be disregarded. Williams' and Ring's testimony are substantially similar regarding the most important details and those details serve as the basis for the Grievant's discharge. Both Williams and Ring recall that the Grievant said "You do it" in response to Ring's request to call 911.

The investigation was proper and adequate. The Grievant was informed of the complaint on June 5. That was just one day after the events. Bennett obtained statements from two employees and several residents which stated that the Grievant failed to call 911. Bennett concluded that the Grievant's statement was less credible and imposed the discipline.

The Grievant failed to do his job and put the life of a resident in jeopardy. This was a serious breach of his duty to his employer and served as grounds for discharge. The Grievant did not follow the emergency procedures as established by the Employer.

As to the Union's comparison of Williams and the Grievant, it must fail because the Williams was a probationary employee, in training, and away from the phone.

In response to the Union's claim that the discipline is too severe, the Employer disagrees. The Grievant's conduct is not limited to just refusing to call 911, but includes failing to assist in an emergency situation and his behavior at the house meeting. The Grievant lacked judgment, compassion and a recognition of the consequences and therefore cannot be trusted.

The Grievant does not deserve reinstatement. In the event that it is ordered, the Employer points out that back pay would impose a horrific financial hardship on the financially challenged Employer that provides critical service to its residents and community. The Employer requests the Arbitrator deny the grievance and uphold the termination.

DISCUSSION

This case revolves around what the Grievant said, did and failed to do on June 4. The Employer argues the Grievant's failure to assist during the June 4 incident, given the nature and severity of the situation, the omission justified his termination. I will analyze this case based on a gross negligence standard. I do so simply because gross negligence is customarily understood to be grounds for termination, in and of itself. Applying a simple negligence standard, or analyzing the case in terms of rules violations, would require the Employer to demonstrate that it had used progressive discipline, which it clearly did not.

Gross negligence is generally defined as an intentional or willful act, in flagrant or reckless disregard of the consequences to persons or property. *Discipline and Discharge*, p. 143. The factors to consider include:

1. whether the misconduct by the employee is habitual, the employee is "accident prone", or whether the employee is likely to repeat the alleged act or omission;
2. the attitude of the employee;
3. the actual injury or damage sustained to persons or property;
4. the potential injury or damage that could have resulted from the negligent actor or omission; and
5. the effect of the alleged negligence on co-workers or customers of the company.

Id. At 146-147.

The Grievant was terminated for his "failure to act in a crisis situation" and for his failure "to call 9-1-1, in light of the circumstances". The Union disputes the conclusions that the Grievant failed to act and failed to call 911. I will start with the 911 call.

Failure to Call 911

On June 4 a client of the Employer had a seizure in the lobby area of the facility. The Grievant, Williams and Ring were working in the office area, waiting for a Narcotics Anonymous meeting to end. The Grievant was at the left back desk, Williams was at the right desk and Ring was standing between the doorway to the lobby and the lobby window. Someone from the lobby area approached the doorway/window area and requested assistance in the lobby. Ring was the only employee who reacted immediately. He exited the office area and went to attend to the situation. Williams moved from the right desk to the doorway and the Grievant stood up at the left desk.

After approximately one to two minutes, Ring returned to the office. Before he reached Williams in the doorway, Ring called out, "call 911". Ring testified that when he said "call 911", his comment was meant for the Grievant because he was closest to a telephone. This seems unlikely, given that Ring could see Williams in the doorway area, but had no idea where the Grievant was located. Moreover, Ring's understanding is not controlling. It is the Grievant's conduct which is in dispute, and thus it matters more what the Grievant thought was going on. Ring did not specifically address the Grievant – he was one of two co-workers in the office and Williams was closer to Ring when the request was made. I cannot find on these facts that the Ring directed his statement to call 911 at the Grievant, nor that the Grievant must have understood that the request was directed to him.

The Grievant's statement taken the day after the incident and his testimony at hearing establish that he believed he heard Ring ask whether anyone had called 911. The Grievant admitted he heard Ring speaking when he entered the office. Further, he heard some reference to 911. The question is whether the record supports the Employer's conclusion that he refused to call 911.

Both Ring and Williams' statements prepared on June 7 establish that when Ring yelled out to call 911, the Grievant was in the office. Beyond this, there are few similarities in their statements other than they both recall the Grievant's response to Ring's statement to call 911.

Williams entered the office area in advance of Ring, with the intent to make the call. Williams' statement following the incident indicated that the Grievant said "I am not getting involved in this and not calling 911. You do it," and he testified the Grievant responded that he was "not making the call". Similarly, Ring's statement indicates what he heard was limited inasmuch as he stated, "I'm not sure of all that Boyd said, but I did hear, I'm not, you do it." Ring testified that he heard the Grievant say, "you do it" in response to his request to call 911. Both Ring and Williams agree that the Grievant said, "you do it". Such a recollection by both Ring and Williams could be based on the seriousness of the Grievant's comment, but it could also be the result of Ring and Williams discussing the incident less than two hours after it occurred, both reacting to what they viewed as the Grievant's inappropriate behavior, and essentially reaching an agreement as to what the Grievant said.

The Grievant asserts he did not hear nor was he asked to call 911.² According to the Grievant he heard Ring say something about 911 and he responded in the negative believing that Ring had asked if anyone had already called 911. The Grievant's statement, prepared a day after the incident and without specific knowledge of the Employer's concerns, affirms that he heard Ring make a reference to 911, but provides a differing view of the exchange. The Grievant's statement indicates he asked Ring if calling an ambulance was medically necessary.³ Taking into consideration that Ring and Williams discussed and essentially agreed on June 4 as to what they perceived the Grievant had done wrong and Ring's inability to recall whether he heard the Grievant ask if it was medically necessary to make the 911 call, I am not convinced that the Grievant actually heard Ring's request with sufficient specificity so as to know that Ring wanted the Grievant to call 911.

One factor influencing my conclusion is that it is difficult to fathom what possible reason the Grievant would have had to tell Ring that he would not make the 911 call. The record establishes that contacting outside medical assistance is a judgment call that House Staff members must make. While the Employer has offered evidence in the form of emergency response policies which state that calling for assistance is an expectation, there was testimony offered that on at least two occasions in the last few years a client has suffered a seizure and medical assistance was not called. Therefore, the Grievant would not have been concerned about calling 911 prematurely nor would he believe that it was an expectation to call 911 when a seizure occurs.

Disparate Treatment

Even if I find that the Grievant heard, understood and refrained from calling 911, he was not the only House Staff member to do so. The fact that the Employer choose to discipline the Grievant and not Williams is problematic since they held the same position, were both proximately positioned to make the 911 call, and both failed to make the call.

Williams heard Ring's directive to call 911 and did not make the call. Williams was standing in the doorway and was easily able to make the 911 call. He explained that he "froze" and was so shocked by the Grievant's response that he could not make the call. Yet, his statement of June 7 indicates that after the few seconds, he proceeded to say "what the *&#@!" and exit the lobby area. It appears that he "unfroze" rather quickly, yet still did not attempt to make the 911 call.

² The Grievant offered evidence of a hearing impairment in the form of a document from his audiologist dated August 7, 2007.

³ The Union has not argued that the medical situation with GB did not warrant outside medical attention. While it is true that there have been some instances in the past where clients have had seizures and emergency personnel were not contacted, that is not the case in this instance. As such, I will not address the policies and procedures that dictate how employees of the Employer are to react and respond to medical emergencies other than to point out that contacting medical personnel is the first directive.

The Employer goes to great lengths to distinguish Williams' behavior from the Grievant's so as to justify the Grievant's discipline. The Employer points out that Williams was a probationary employee, that the Grievant was supposed to be training Williams, and that the Grievant, by the very nature of his tenure and experience, was better trained for emergency situations than Williams. I am not persuaded by any of these propositions and find that the Grievant was subjected to disparate treatment.

It is true that Williams was a probationary employee, but he was not being trained by either Ring or the Grievant. The Grievant and Ring were mentoring Williams and it is beyond a stretch to assert that Ring and the Grievant were "in charge" of Williams. Neither Ring nor the Grievant had any supervisory authority over Williams and any directions they gave him were recommendations, not directives. Moreover, at the time of the incident, Williams had completed five months of his six month probationary period. This was not his first day on the job, and he was not being asked to perform some technical or complex task. Rather, he was asked to respond in an emergency situation and call 911 which is a task society teaches elementary school children to perform. No one was being asked to decide whether it was medically necessary or appropriate to call 911. This is a case where one employee called out to the other two employees for someone to call 911, and neither employee responded, each citing a different reason to mitigate their responsibility. Whatever the reasons for their failure, it had little to do with a lack of training.

Failure to Assist

The Employer's termination letter cites "failure to act in a crisis situation". The Employer further states that it was fearful of the harm that the Grievant would inflict in the future given his lack of action in this instance.

After Ring made the 911 call, he returned to the lobby area and was attending to GB. Two of the three clients/individuals that were helping GB moved away. Williams was clearing the lobby area of clients and individuals that had attended the meeting. Ring met the ambulance at the facility door, obtained GB's file, and escorted the medical personnel and GB out of the facility to the ambulance.

The Grievant remained in the doorway between the office and the lobby for the entirety of the incident excluding the time period in which he completed the paperwork for the Huber prisoners. Records obtained from the Oneida County Sheriff's Department document the timeframe of events. The 911 call was received by the Department at 2030 hours by both the ambulance and the first responders from the Fire Department. The ambulance was enroute to the facility at 2031, arrived at 2033 and departed at 2046. The First Responders were enroute at 2030, arrived at 2034 and departed at 2044. Thus, the entire incident spanned between 14 and 16 minutes, two prior to the 911 call, three minutes between when the 911 call was made and the arrival of the First Responders, and 11 minutes while the medical personnel were at the facility and departed with GB.

During the first two minutes when the incident was being identified, the Grievant did not leave the office area. During the three minute interval between when the 911 call was made and the arrival of the ambulance, the Grievant stood in the doorway between the office area and the lobby. Neither the Employer nor the Grievant offered the paperwork for the Huber prisoners which would indicate when the Grievant signed the prisoners out of the facility, but the Grievant testified that it was a few minutes between when the four Huber prisoners departed for the jail and when the ambulance arrived. Given this and the Grievant's testimony that he remained in the doorway between the office area and the lobby "observing" until after GB left the facility, there is a period of approximately 10 minutes of time when the stood in the doorway.

The Employer's conclusion that the Grievant failed to do "anything" during the incident is not supported by the evidence. Rather, the evidence establishes that during the time period in which Williams and Ring were responding to the client seizure, the Grievant was completing paperwork, albeit a very limited amount, in order to release the Huber prisoners back to the Oneida County Jail.

I find it significant that neither the Grievant, Williams or Ring testified that the Grievant ever offered to assist either Ring or Williams or that he ever inquired as to GB's status during the course of the incident. Given that the Huber prisoner paperwork may have taken at most two minutes, this leaves the Grievant standing and observing for at least 12 minutes during a medical emergency.

The Employer must prove that the Grievant's actions or inaction in this case, amounted to gross negligence. 12 minutes of inaction in these circumstances is obviously unacceptable. However, that is not the standard. The standard is gross negligence and the record will not support a finding of gross negligence. The Grievant has no record of similar behavior nor any disciplinary action. It is difficult to establish his attitude at this time, although he clearly believes he was not guilty of any wrong-doing. No actual harm occurred as a result of the Grievant's behavior essentially because his co-worker Ring acted in a highly professional and competent manner, especially in light of the fact that his two co-workers reactions and behavior were sub-par.

The greatest harm that occurred as a result of the Grievant's inaction was the negative impact it had on his co-workers, the clients and ultimately his reputation. Clearly, the clients were disturbed. While I do not accept Schane's statement and testimony as evidence of what the Grievant did nor did not do on June 4, she credibly communicated the feelings of the clients in response to the Grievant standing in the doorway while Ring and Williams responded to the incident.

In retrospect, and likely at the urging of other clients who explained to him what occurred during the incident, GB submitted a letter to the facility which criticized the Grievant. And, in a highly irregular manner, the Grievant's co-workers informed management in a letter

that they did not want him to return to active employment with the Employer. There is no question that the Grievant's inaction negatively affected the Employer.

Viewed in its entirety, the Grievant failed to satisfactorily assist during the incident, but that failure falls short of meeting the criteria established for finding an employee guilty of gross negligence.

Investigation

The Union challenges the quality of the investigation. Without going on at undue length, while there may be questions about Williams' motives, Shanes' motives, and other aspects of the investigation, on balance, I find it to have been sufficient to preserve the Grievant's interest in due process.

Conclusion

Ultimately, I am presented with a scenario in which a probationary part-time employee with a 10 year loyal relationship to client GB filed a report against the Grievant. Williams testified that he did not approve of the Grievant's communication style. Williams' motive for reporting the Grievant is suspect.

The Employer maintains that the Grievant's behavior was so egregious it justified termination and makes two charges against the Grievant. As to the first charge, that the Grievant refused to call 911, I do not find that he heard Ring tell him to call 911. Ultimately, whether the Grievant called 911 or not is not controlling since even if I accept the Employer's conclusion that the Grievant heard and refused to make the call, Williams, a similarly situated employee who heard Ring call out for someone to telephone 911, did not do so and was not disciplined.

As to the charge that the Grievant failed "to act in a crisis situation," the record supports a finding that the Grievant was indifferent. During the medical incident, the Grievant did not assist, did not attempt to assist, and did not inquire as to GB's condition. While there was no specific act or omission that can be identified as having caused harm, the Grievant's showing of indifference is culpable and discipline was warranted. The question then becomes whether the level of discipline imposed was appropriate.

The Employer based the termination on the Grievant's refusal to call 911 and his lack of involvement or willingness to help during in the medical emergency. The record bears out only one of the charged offenses. The Grievant was an six year employee without any discipline in his record. Termination is the most serious level of discipline that can be imposed on an employee. The Employer's decision to terminate was excessive.

Remedy

The Employer has argued that an award of back pay to this Grievant is inappropriate given the dire financial circumstances of the facility. Unfortunately, there is no limit to the number of public or private employers at this time that are financially plagued. But, an Employer's violation of a collective bargaining agreement is not inconsequential and there is no balancing test between the Employers ability to pay and the award of a remedy. Paramount to labor peace is compliance by both sides to a negotiated collective bargaining agreement. When one side has violated the agreement and has caused this level of harm to an employee, no basis in law or reason supports an award that directs anything less than a make whole remedy.

AWARD

1. No, the Employer did not have just cause to discharge the Grievant.
2. The Employer had just cause to issue a three day unpaid suspension for his failure to act in a crisis situation.
3. The appropriate remedy for the violation found in item one above is as follows: The Employer shall immediately expunge all references to Goetz's termination from his personnel files and it shall make him whole without interest for all money and benefits, less three days suspension, including overtime, that he otherwise would have earned but for his termination, less any monies he would not have received but for his termination.

Dated at Rhinelander, Wisconsin, this 17th day of September, 2008.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

