

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PULASKI SCHOOL DISTRICT

and

PULASKI EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

Case 39
No. 68893
MA-14395

Appearances:

Robert Burns, Davis & Kuelthau, S.C., 318 South Washington Street, Green Bay, Wisconsin, 54301, appearing on behalf of the Pulaski School District.

Joanne Huston, Staff Attorney, Wisconsin Education Association Council, 33 Nob Hill Road, Post Office Box 8003, Madison, Wisconsin, 53708-8003, appearing on behalf of the Pulaski Educational Support Personnel Association.

ARBITRATION AWARD

The Pulaski School District (“District”) and the Pulaski Educational Support Personnel Association (“Association”) are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising thereunder. On May 11, 2009, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning the discharge of the Grievant, a member of the bargaining unit represented by the Association. Following concurrence by the District, the Commission provided a panel of five WERC-employed arbitrators from which the parties could select an arbitrator to hear and decide the grievance. The parties selected the undersigned. A hearing was held on September 24, 2009, and November 24, 2009, in Pulaski, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A stenographic transcript of the proceeding was made. Each party submitted initial and reply post-hearing briefs, the last of which was received on April 16, 2010, whereupon the record was closed.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

ISSUE

The parties stipulated that the following is a statement of the issue to be heard:

Did the District have just cause to terminate the Grievant? If not, what is the appropriate remedy?

REVELANT PROVISION

The collective bargaining agreement between the District and the Association contains the following provision that is relevant in this matter:

ARTICLE 12 - DISCIPLINARY PROCEDURE

12.01. Employees shall be disciplined for just cause. The District shall follow the following progression of disciplinary action, except when serious action giving rise to the disciplinary action warrants a stronger penalty.

1. Oral reprimands with a statement placed in the employee's personnel file;
2. Written reprimands;
3. Suspension for up to five (5) days depending upon the offense; or
4. Dismissal.

...

BACKGROUND

During the course of her employment with the District, the Grievant held a series of aide positions. She began, in December of 2002, as a substitute educational aid. In that position, she filled-in in District classrooms as an aide, most notably in a six- or eight-week assignment in the cognitive disabilities room at Glenbrook Elementary School.

In May of 2006, the Grievant was hired by the District on a permanent basis, as a special education aide at the Pulaski High School. In that position, she worked one-on-one with an autistic student. In an evaluation of the Grievant's performance that was completed by the Pulaski High School principal in the spring of 2007, the Grievant was said to need "a bit of direction at times", but she otherwise received positive feedback. The evaluation anticipated that, with more experience, the Grievant would become "highly proficient"; it stated that she was "well prepared" to deal with challenging students "effectively", interacted "well" with students, conducted herself in a "quite appropriate" manner around staff, was "very accommodating" to parents; it noted that there were "no concerns" about her confidentiality; and it observed that she was "very good" at following directions, "very proficient" at operating equipment, and never late for work. At the end of the 2006-2007 school year, the

Grievant's position at the high school was eliminated, and the Grievant was laid-off pursuant to the terms of the collective bargaining agreement between the Association and the District.

Subsequently, the Grievant was able to bump into a position as a part-time clerical aide at the District's middle school. In that position, which the Grievant held from September of 2007 through October of 2007, the Grievant worked with lunch detention and the District honor level system.

In October of 2007, the Grievant accepted a recall into another position, as she was entitled to do under the terms of the collective bargaining agreement. She moved into a part-time position as an aide in the early childhood special education classroom at Glenbrook Elementary School. This classroom is dedicated to pre-kindergarten special education students. Tracy Teske ("Teske") was the teacher in the classroom.

Although an educational aide works directly with and takes day-to-day directives from the teacher to whose classroom the aide is assigned, aides are not supervised by classroom teachers. In other words, although a teacher has the ability to give directives to an aide, that teacher does not have the authority to discipline the aide for not following the directives. When the Grievant worked in Teske's classroom, Lisa Misco ("Misco") directly supervised early childhood programs in the District and, therefore, was the Grievant's direct supervisor.¹

In November of 2007, only about two weeks into the Grievant's assignment as an aide in Teske's classroom, Teske approached Misco and indicated to her that things were not going well with the Grievant. Teske reported to Misco that she thought the Grievant was having a hard time developing rapport with the children. Specifically, Teske indicated that, although she was directed to do so, the Grievant was not getting down on the students' level, which was important with very small children such as those in Teske's room who can feel intimidated by having adults stand over them. Teske also expressed a safety concern relating to the Grievant. There were two children in Teske's classroom that had a tendency to run away in the hallways during transition times. While Teske tended to one of those children, she needed the Grievant to attend to the other, but the Grievant would not respond quickly and would let the child under her supervision run away.

In response to hearing these concerns, Misco asked Teske if she had met with the Grievant to outline her expectations for the classroom, and Teske indicated that she had done so. Misco directed Teske to have another meeting with the Grievant and to review her concerns with the Grievant. Over the course of time, Teske met with the Grievant three times to discuss her concerns, indicating that she wanted the Grievant's performance in these areas to change.

¹ When the Grievant had been an aide at the high school in her previous position, Misco was an assistant to the director of student services and, therefore, did not supervise the Grievant and, in fact, had only informal contact with her.

During this time, Misco also stopped in Teske's classroom periodically and informally observed the Grievant approximately three times, each time for between five and fifteen minutes. On one occasion, when Misco entered the room, she observed the Grievant standing behind the children who were in a circle activity. Misco perceived that, when the Grievant noted Misco's presence in the room, the Grievant then bent down and got on the floor with the children.

At the end of December of 2007, Teske scheduled a formal meeting with Misco to discuss the Grievant. During that meeting, Teske indicated to Misco that her concerns regarding the Grievant continued. Teske had observed that the only time the Grievant's performance would improve was when the Grievant was being observed directly by Misco. Misco and Teske discussed the next steps that should take place with respect to the Grievant and determined that they would meet, together, with the Grievant to discuss the ongoing issues. That meeting never occurred, however, because, after working in Teske's classroom for only seven weeks, the Grievant accepted a recall into a full-time special education aide position at Glenbrook Elementary School that started in January of 2008.

The full-time position was in the cognitive disabilities classroom, which has kindergarten- through fifth-grade-aged students. Misco described the cognitive disabilities classroom as follows:

The students in our cognitive disabilities classroom are the neediest children in the district. They have – they have usually a great deal of therapies involved in their IEPs², those adaptive skills that I talked about are things we're working on in school, and we want to make sure that they're making progress academically. So it's quite a comprehensive room. So the things that we talked about, the toileting, the feeding, the using alternative communication, those are all daily tasks within that classroom.

An aide would assist students in the cognitive disabilities room with whatever they needed to be working on in a particular setting. Kelli King-Herman ("King-Herman"), the teacher in the cognitive disabilities classroom, described the role of the special education aide in her room as "critical":

They provide almost all of the same things that I do to the children. Usually I provide the new instruction and they reinforce activities. They do toileting and feeding and watching the general population so that they're successful there.

² An "IEP" is an Individual Education Plan. Every special education student has an IEP in place that encompasses the educational objectives and related services that are required for that student to have the best education in the safest and least restrictive environment. It is the role of a special education teacher to oversee the implementation of an IEP. It is the role of a special education aide to follow the teacher's directives to implement the IEP. It is not the role of an aide to interpret or alter an IEP.

Mary Connolly (“Connolly”) is the principal at Glenbrook Elementary. As an aide in the cognitive disabilities classroom, the Grievant would be supervised primarily by Connolly, as the school principal, but also by Misco.³ Just before the Grievant began in the cognitive disabilities classroom in January of 2008, Misco approached Connolly about the Grievant. Misco indicated to Connolly that the Grievant would likely be accepting the position in King-Herman’s classroom and that Misco had concerns about that, because the Grievant had experienced problems in a similar position in Teske’s room. Misco told Connolly that the Grievant would not get down on the children’s level and that she would not take direction from Teske. Misco and Connolly decided that they would meet with the Grievant to review with her the job description for the aide position in the cognitive disabilities classroom and to make sure she understood the requirements of the job.

It was not Connolly’s standard practice to hold the kind of meeting Misco and she had with the Grievant. Indeed, Connolly had never held such a meeting before. Once they had gone over the job description, Connolly and Misco asked the Grievant what she thought, and the Grievant indicated that she was capable of performing all the responsibilities of the job, that she wanted more hours, and that she wanted to take the position. The Grievant did not provide, at the meeting, any reason to Misco and Connolly to believe that she could not do the job. Connolly never explained to the Grievant what her concerns were and why she had decided to have the meeting. Although Connolly had isolated certain areas she was concerned about regarding the Grievant’s performance, she did not highlight those areas for the Grievant. At hearing in this matter, Connolly indicated that she did not believe it would have been appropriate to share those concerns with the Grievant, because the information had not been relayed to Connolly directly by Teske and because Connolly had not been the Grievant’s supervisor at that time when the concerns arose. The Grievant testified at hearing that she understood that the purpose of her meeting with Connolly was to have any questions answered and to make sure she understood what was expected of her. The Grievant had “no inkling” that the meeting with Connolly and Misco was prompted by concerns regarding her performance in Teske’s room.

Before the Grievant started in King-Herman’s classroom, Teske had a brief exchange with King-Herman regarding the Grievant. In reaction to learning that King-Herman would be working with the Grievant, Teske said to King-Herman, “I’m sorry”. When the Grievant then started working in the cognitive disabilities classroom, King-Herman met with the Grievant and the two other instructional aides who already had been working in the classroom to discuss the guidelines and expectations. King-Herman had not taken this approach before.

Sometime after the Grievant began in the cognitive disabilities classroom, King-Herman developed concerns regarding the Grievant’s performance. Initially King-Herman became

³ When the Grievant was in Teske’s classroom, Misco was her direct, sole supervisor. When the Grievant was in King-Herman’s classroom, Misco was the Grievant’s co-supervisor, along with Connolly. It is not clear why Connolly did not supervise the Grievant when she worked in Teske’s classroom, which was also at Glenbrook Elementary School.

concerned with smaller matters, such as the Grievant's apparent tendency to behave defensively, roll her eyes, or huff when given a directive. King-Herman also observed that the Grievant would only start doing a task she was supposed to be undertaking once the Grievant noted that she was being observed by King-Herman. Then, around March of 2008, an event occurred that King-Herman described at hearing as more significant. During a school program in the gym, King-Herman observed the Grievant placing her hand over the mouth of a student who was vocalizing. King-Herman made eye contact with the Grievant, said "no", and shook her head. The Grievant put her hand down. Later, King-Herman discussed the incident with the Grievant, stating to her that it is never acceptable to put your hand over a child's mouth. The Grievant responded, "I didn't, I didn't". King-Herman explained at hearing that she did not know how to deal with the Grievant's denial, because King-Herman believed the Grievant clearly had put her hand over the child's mouth. King-Herman decided to have a discussion with Connolly regarding this incident and the other little things that had occurred involving the Grievant. At hearing, King-Herman described her discussion with Connolly as an "information sharing" in which she explained what was happening to Connolly and indicated that things were not going well. King-Herman also had a discussion with Misco regarding the school program incident.

On March 11, 2008, the Grievant requested a meeting with Connolly. Connolly believed that the Grievant had requested this meeting because the Grievant had seen Connolly a day or so before meeting with King-Herman, and the Grievant suspected, Connolly believed, that they had been talking about her. This belief was reinforced for Connolly by the fact that the Grievant brought a union representative with her to the meeting. In the meeting, the Grievant articulated concerns about King-Herman, primarily indicating that she felt King-Herman was disrespectful toward her. Connolly suggested that perhaps meetings involving King-Herman, the Grievant, and the other aides in the classroom would assist with communication in the classroom. The next day, Connolly had a follow-up meeting with King-Herman, sharing with her what the Grievant had stated. King-Herman indicated to Connolly in response that the Grievant was not an accurate reporter, that the Grievant was disrespectful with her comments and body language, and that she did not trust the Grievant to be alone with students who could not self-report.

Apparently throughout the spring semester of 2008, the teaching and administrative staff at Glenbrook continued to have issues with the Grievant. During this period of time, King-Herman kept notes that documented various incidents involving the Grievant. These notes refer to the school program incident, the Grievant's failure to prevent a student from running away, two occasions where the Grievant seemingly eavesdropped on conversations between King-Herman and other teachers instead of tending to students; "defensive" reactions on the Grievant's part, the statement of an agitated student that he was afraid of the Grievant, the Grievant's inappropriate use of her cell phone, and two instances in which the Grievant and another aide were talking with each other and being inattentive to students. The notes also reference instances in which other teachers had complained to King-Herman about the Grievant. The notes also document the fact that King-Herman met with Connolly regarding these various issues again on April 24, 2008.

During this period of time, Connolly also informally observed the Grievant in her day-to-day interactions, and Connolly noted conduct that she felt was consistent with what had been reported to her: the Grievant on her cell phone in the hallway rather than inside the classroom, the Grievant walking in front of or behind students in the hallway rather than with them, and the Grievant eavesdropping on a conversation Connolly was having with another teacher. On the occasion when the Grievant appeared to be eavesdropping, Connolly addressed the Grievant directly, saying, “this conversation does not involve you”.

Connolly also, independently, took a number of steps with regard to the Grievant during this spring semester. She reviewed the Grievant’s personnel file. She had a conversation regarding the Grievant’s performance with another teacher in whose classroom the Grievant was sometimes present. Further, Connolly contacted Misco regarding the issues that had been raised. Connolly and Misco discussed whether it was appropriate to put the Grievant on a “plan of improvement”. They did not, however, put the Grievant on a plan of improvement during the spring 2008 semester.

Evaluation time came at the end of the 2008 school year. As the Grievant’s co-supervisor, Misco took a role, along with Connolly, in preparing the Grievant’s evaluation form. Connolly indicated to Misco that she wanted to articulate, on the Grievant’s evaluation, some of the concerns that had arisen throughout the semester regarding the Grievant’s performance. At that point, Misco asked Teske to fill out an evaluation form with a summary of Teske’s concerns from the time the Grievant was in Teske’s classroom. It was not uncommon for Misco to solicit feedback from a teacher as part of an aide’s evaluation process. Misco intended to use the evaluation form completed by Teske to make the point that some of the concerns that came up in the spring of 2008 related to the Grievant’s work in King-Herman’s classroom echoed sentiments that had been articulated the semester before by Teske.

Teske completed the evaluation form relating to the Grievant on May 27, 2008. Of the sixteen areas that were deemed applicable to the Grievant’s performance, Teske rated the Grievant’s performance as “basic” in three areas and “unsatisfactory” in thirteen areas. Further, the evaluation form completed by Teske contained the following narrative:

[The Grievant] came to work, however was not always punctual. When she was at work, there were instances where she would have non-work related conversations on her cell phone. She also fidgeted with her cell phone when students were present. When teacher requested her to perform job duties with students, [the Grievant] would roll her eyes, sigh, or stare at the teacher. At times, she would stand and not interact with the students as requested. When I addressed my concerns in a meeting, [the Grievant] did not have a physical reason as to why she was not interacting. I requested this to change. The same day of the meeting, [the Grievant] continued to not follow job duties request: interacting/playing with students on the floor, watching students while teacher discussed issues with a team member or spoke to a parent on the phone. [The

Grievant] would come by the team members and listen in on conversations. I re-directed her to be by the students. She had to be addressed again in a meeting to perform her job duties especially watching students in transition from the room. A student has run away from her two times and she did not immediately run after him. This is a safety issue that was a concern from a teacher standpoint. She has said things out loud about the student in a negative way. "He can't do it." "He won't come by me." "What is wrong with you?" All of these comments show a great disrespect for the students in my classroom. Unfortunately, after 3 meetings to communicate my concerns, ultimately her behavior did not change. Based on my opinion and gut instinct, [the Grievant] truly did not want to work in the position, but rather collect a paycheck for doing the bare minimum of work. She left for another position with more hours.

The Grievant also completed a self-evaluation in the spring of 2008. The Grievant rated herself as "proficient" in every category except "technology skills, overall", for which she gave herself a rating of "basic". The Grievant's assessment refers to some "rough going" in King-Herman's room, but also says that the Grievant felt that they resolved it and moved on for the better. The Grievant testified at hearing that, by "rough going", she was referring in part to King-Herman's interactions, saying "she was not always nice".

The official year-end evaluation of the Grievant's performance was completed by Connolly in May and presented to the Grievant, at a meeting attended by the Grievant, Connolly, and Misco, on June 9. Of the twenty-one categories deemed applicable, the Grievant received five "proficient" rankings, twelve "basic" rankings, and four "unsatisfactory" rankings. The unsatisfactory rankings were in the following areas: "time management skills", "confidentiality", "follows policies and procedures", and "ability to follow direction and cooperate". The comments by Connolly attached to the evaluation identified and discussed three areas of concern, relating to the Grievant's inability to follow directions and cooperate, to the Grievant's interactions with students, coworkers, staff members, and administration, and to the Grievant's work ethic. At hearing, Connolly summarized these concerns as follows:

The first one was my concern that [the Grievant] did not display consistent ability to follow directions and cooperate with staff; that she disregarded specific instructions relating to how a student is to complete a skill practice; that I had directed her to respect conversations between staff members or staff members and me that did not involve her; that when she was given tasks with students, she at times became defensive or questioned the teachers' directions. Other than those, some of her interactions with core co-workers, staff members; looking for her to have better rapport with the student and better rapport with the rest of the staff. She did display a defensive attitude when teachers followed up with her on how a task should be done. I also addressed with her the direction on the work and she should not leave an area to take personal phone calls or leave a student to go listen in on conversations.

The evaluation presented to the Grievant concluded with the following paragraph:

Based on the information that I have collected since [the Grievant] began working as a special education aide in our [cognitive disabilities] program, this position may not be best match for her skills and abilities. Therefore, I am placing [the Grievant] on a plan of improvement so that she can specifically work on the skills needed to perform her assigned duties at a proficient level.

Connolly, Misco, and the Grievant met and reviewed the “plan of improvement” on June 10, 2008. The plan of improvement corresponded with the areas of concern and objectives that had been outlined in the Grievant’s year-end evaluation. It included the following four goals:

- Goal 1: [The Grievant] will follow the directions given by the teaching staff and cooperate with them to complete any assigned tasks.
- Goal 2: [The Grievant] will improve her work ethic by following the directions she is given, completing assigned tasks in a timely manner, and using any free time to help clean and organize learning area (or help with other tasks that may arise).
- Goal 3: [The Grievant] will improve her working relationship with students, coworkers, and school staff members.
- Goal 4: [The Grievant] will participate in professional development to continue to enhance her technology skills and her ability to work with and support students and staff.

To the right of the “objective” column, in which the steps necessary to achieve these goals were set forth in greater detail, the plan of improvement form includes a column with the following heading: “timeline to meet goal”. For every objective identified on the plan, a corresponding date of October 31, 2008, was set forth in the timeline column.

At hearing, Connolly recalled that the Grievant did not talk to her during the meeting in which they reviewed the plan of improvement. At one point during the meeting, the Grievant began to cry. On June 12, 2008, the Grievant submitted a written response to the plan of improvement. Connolly testified that, although she received and read this response and respected the Grievant’s right to make such a submission, it did not change her thinking regarding the objectives that had been set out in the Grievant’s plan of improvement. Connolly acknowledged at hearing that she did not follow up with the Grievant regarding any of the explanations the Grievant provided in her written response. For example, the Grievant’s response indicated that she believed that the criticism alleging a failure to follow directions related to a situation with a student and a math problem. Connolly testified at hearing that did

not give that response any credence because the situation that Connolly was thinking of did not involve math. She also did not talk with the Grievant to clarify that point.

The plan of improvement could not actually be implemented until school was back in session the next fall. After school started, Connolly observed the Grievant, informally, around the school. These observations occurred as Connolly made her way around the building in her normal course of business. She did not make an effort to cross paths with the Grievant more than she would have had a plan of improvement not been in place, and she made no other observations related to the plan of improvement.

In October, the Grievant sent an e-mail message to Connolly asking her if they needed to meet about the plan of improvement and asking her if they should do so before the October 31 deadline. Connolly responded that they should meet, and Connolly and the Grievant met on October 14. Connolly testified at hearing that her assessment of the Grievant at the mid-October meeting was that she had seen improvement in the Grievant's job performance and she commended the Grievant on that and encouraged her to keep it up. Connolly took notes at the meeting, which read as follows:

October 14, 2008
Meeting w/ [the Grievant]

-Communication meetings w/ Kelli

(2 so far this year) meet again on Thursday 10/16

-[The Grievant] & [Pautz] have been working to establish a routine w/ [Student A]. [Student A] is spending most of her day in the K classroom

[The Grievant's] Comments:

-feels more comfortable, more confident

-feels like she is doing what is being asked by [King-Herman] & other teachers

-can do things w/ [Student D] that the other aides don't feel comfortable with. [the Grievant] can do the lifting.

-Everyone gets along; talking & listening w/ each other; the team meetings are good.

-Sometimes [Student L] works well & other times he doesn't want to work.

Q: Are aides suppose to read the students' IEP's?

*[Connolly] will check w/ [Misco] & get back to [the Grievant]

[The Grievant] would like to do more for [Student D].

Q: What more could we do?

Q: Do you have any expectations for me as principal?
No.

Loves the interaction w/ the kids. Loves to be busy.

Q: Breaks? Are we supposed to get breaks?
Yes – AM 10 min. / PM 10 min.

*Mary – check on this.

The October meeting also was attended by union representative Mary Witthuhn (“Witthuhn”). Witthuhn testified at hearing that she did not participate in the meeting, but was only there to take notes of the conversation between Connolly and the Grievant. She further indicated that she attempted to document, as closely as possible, what was said at the meeting, placing in quotation marks those things that she was transcribing verbatim. The District did not challenge the accuracy of Whthuhn’s notes, which read as follows:

Thursday, Oct 14th 2:30 pm

[Connolly] & [the Grievant]

[Connolly] – sitting down for a follow-up per [the Grievant’s] request
[The Grievant] – thought [illegible] more interaction
Per [Grievant] – [King-Herman] said things are fine

[Connolly] – interaction has improved w/ staff & students
Put into a situation of not [the Grievant’s] choice
Lot to learn
Demanding job: never the same

[The Grievant] – things change constantly
“fly by the seat of our pants”
Constant motion

[Connolly] – communication meetings are helping

[The Grievant] – more open comm. this year
Comm.. mtgs occur once per week
Working through [Student A’s] routine
-some inclusion

[Connolly] – have not heard one thing about confidentiality
Seems to be going better – improvement

[The Grievant] – thought confidentiality was in the public
Apologized for leaving room and involving
Herself in conversations.

[Connolly]: “[Grievant,] you have a lot of great skills”
Grow as professional
“Congratulate & compliment you on improvement”
Lot of growth – better job this year
Training: talked about opportunities

[Connolly]: How do you feel things are going?

[The Grievant]: More comfortable & confident
Small kids are challenging
It’s the day to day stuff
Exhausted at end of day.

[Connolly]: Things are going better

[The Grievant]: I do everything [King-Herman] asks.

[Connolly]: You want to be appreciated for what you do.

[The Grievant]: Says she does things with [Student D] that others say they can’t do. Two people are normally needed.

[The Grievant]: Sometimes [Student D] can’t get all the attention he needs because of high demands in room.
Would love to learn more about signing with [Student N] and ? ([Student L] or [Student C])

[Connolly]: New year, new kids

[The Grievant]: Everyone in the room seems to be getting along and can talk to each other.
Comm. mtgs are helping
We all can learn new things on how to communicate and held our children.

[The Grievant]: CPE Training – Can they read the IEP's??

Will it be better for the kids for us to know what is in those?

“I wish there was more we could do for [Student D]. Seems to be confined to the room.

[Connolly]: “Are you feeling I support you?”

Any expectations of me to help support you?

First professional mtg since beginning of school year.

[The Grievant]: “Not specifically”

In-services designed more to our room.

[Connolly]: Overall, things are going well.

Come & talk to me anytime.

Interested in helping you gain skills and staff growing as professionals.

[The Grievant]: Reason so upset. Thought could loose [*sic*] job by date on plan.

Why no communication, when school started?

[Connolly]: As talked about at end of last yr this is a Plan of Improvement

“I’m not kicking you out.”

[The Grievant]: This year is better.

King-Herman was hard to work with last year.

Came in with positive attitude this year.

[Connolly]: Keep working at it.

Neediest kids in the district

Physically & emotionally demanding

[The Grievant]: Love being busy

Can I do something different to make it better for the kids?

[Connolly]: Will write up a follow-up for [the Grievant] to sign for agreement

[The Grievant]: Was my response to plan of improvement in my file?

[Connolly]: Yes – in pers. file and she rec'd a copy

[The Grievant]: Should we let it go as is that we don't get breaks?

[Connolly] – Quoted contract on breaks. 2 – 10 minute

Side Note:

[The Grievant]: Doesn't want to complain

New perspective to get refreshed – [the Grievant] quoted.

[Connolly] – Anything else want to discuss?

[The Grievant] – No.

[The Grievant] – If I wouldn't have emailed, would you have followed up on my email?

[Connolly] – Probably not – completely overwhelmed. Sorry for distress this has caused you

Not intent.

Witthuhn testified at hearing that her assessment from witnessing the October, 2008 meeting was that things were going well for the Grievant. She understood the meeting to have been “very positive”. Witthuhn did not recall any specific statement during the meeting as to whether the plan of improvement had ended or was being continued or modified. When asked whether she understood, based on her observation of the meeting, the plan to be completed at that time, Witthuhn stated the following:

...I have no idea what was in the plan. So I couldn't say whether or not [the Grievant] completed everything, but based on the feeling in that meeting, she was doing what was asked of her. I can only, in my opinion, think she was completing what was asked of her in the plan.

Connolly indicated at hearing that she understood that the goals and expectations set forth in the plan of improvement were still in place after the October 14 meeting. It was Connolly's expectation that the Grievant would continue to satisfy those goals and expectations on an indefinite basis, because they were linked directly with the responsibilities of her employment position. Connolly testified, “I did not intend for [the Grievant] to believe that this was some cutoff date, that I didn't have any expectation for her in her role as in special ed after October 31st”. Although Connolly does not recall if she explained it to the Grievant when the plan of improvement was presented, Connolly testified that she put the October 31 date in the plan for herself, as “a time more so for myself to follow-up on what was being done”.

The Grievant testified that, when she read the plan of improvement, she understood October 31 to be a date by which some decision would be made as to her employment status: “I was under the impression that this was the deadline and if those goals weren't met, I was done”. The Grievant described her perception of the October 14 meeting with Connolly as follows:

Mary and I talked. We had – she asked, you know, me questions. I asked her questions. The way I understood it she – you know, she thought I followed through. She thought I was doing much better. Kelli was happy. She hadn't heard any problems or concerns or anything from anybody else on the staff that I was aware of or she was aware of. So my understanding was that this was no longer in existence. I mean, it was in existence in that it was in my file, but it wasn't in existence that a new timeline was set.

The Grievant acknowledged at hearing that there was still an expectation that she would meet the objectives set forth in her job description, but she believed after her meeting with Connolly that she had successfully completed the improvement plan. The Grievant further testified that Connolly had told her, around the time of their meeting in October of 2008, that she had been really busy and it hadn't even occurred to her to speak with the Grievant about the plan of improvement.

The plan of improvement form also contains, next to the timeline column, a column for "progress checks". No information was ever filled-in on this column of the Grievant's plan of improvement. Connolly explained at hearing that she never completed any progress checks because the document was signed in June and there was no school in the summer. Connolly further stated that, although she did not document any progress checks, she viewed the mid-October meeting with the Grievant to be such a check. Aside from the October meeting, Connolly did not meet with the Grievant at any other time regarding the plan of improvement.

In the fall of 2008, the Grievant had continued to be assigned to King-Herman's cognitive disabilities classroom. King-Herman testified at hearing that, at the beginning of the 2008-2009 school year, pretty much through December, her working relationship with the Grievant was improved. King-Herman did not have any discussions with the Grievant regarding her performance in the early part of the fall. Shortly after the 2008-2009 winter break, however, King-Herman again developed concerns regarding the Grievant's performance. Some of her first concerns related to complaints about the Grievant from other instructional aides. Among other things, the aides were telling King-Herman that the Grievant wasn't carrying her weight. King-Herman says she believed the aides when they told her this, because she had seen examples of such behavior from the Grievant before. King-Herman had observed that it wasn't an automatic thing for the Grievant to jump in and help. After the aides had come to King-Herman three times complaining about the Grievant, King-Herman offered to step in and assist with the matter by assigning specific duties to each individual, but the aides declined her offer. King-Herman reported to that the aides were frustrated with the Grievant.

At the beginning of the 2008-2009 school year, the Grievant had been assigned to provide one-on-one assistance to Student A, a kindergarten-aged student in King-Herman's cognitive disabilities classroom with cerebral palsy. The Grievant's job as the aide assigned to assist Student A was to assist Student A through her daily schedule. There is an effort in the District to integrate special education students, particularly in early grades, into the general student population as often as possible, depending on their abilities and levels of functioning. Under this "inclusion" approach, Student A spent time not only in King-Herman's special education classroom, but also in Sarah Pautz's ("Pautz") regular education kindergarten classroom at Glenbrook. In Pautz's classroom, the Grievant would guide Student A through the activities taking place there so she could maximize her success in that regular education setting. The arrangement between King-Herman and Pautz, with regard to the Grievant, was that King-Herman would give the Grievant the general directives that related to Student A and

Pautz would give the Grievant directives that specifically related to Student A's activities in Pautz's classroom.

At some point toward the beginning of the Grievant's assignment with Student A, in the fall of 2008, King-Herman indicated to Pautz that she had concerns regarding the Grievant of which Pautz should aware. King-Herman indicated to Pautz that there were safety concerns regarding whether the Grievant was properly monitoring children and that there were concerns regarding the Grievant's ability to receive directives in a positive manner.

Children with cerebral palsy such as Student A have abnormal muscle tone, which affects balance and posture. They can suffer from increased fatigue, because they have to work very hard to control and coordinate body movements. Because of this, Student A's IEP requires "an adaptive sitting device" at school, which would assist her in maintaining her balance while in a sitting position. As is common, Student A's IEP did not specify what adaptive sitting devices should be used. In the fall of 2008, Student A's physical therapists, who worked with her during her school day in her school surroundings, arrived at the conclusion that a foam wedge needed to be placed under Student A's feet, as an adaptive sitting device, when she was seated at a table in Pautz's classroom. This was an event that occurred relatively infrequently throughout the week. At hearing, Misco described the significance of the foam wedge for Student A:

In this particular setting, it would – it is for core stabilization. The student, the student needing physical therapy, she had poor strength and then along with that poor endurance. So when the student is sitting in a chair where the feet don't touch the ground, she's spending a lot of her energy trying to focus on keeping her posture straight, and so that's one thing, she would fatigue more quickly. The other is that when you're trying to stabilize yourself, you're not able to focus on the task at hand in front of you. So putting that block under her feet helps her to stabilize herself and then focus on the academic task given to her.

Daily progress notes maintained by Student A's physical therapists indicate, in November of 2008, that Pautz, the Grievant, and another aide named Mary had been instructed regarding the use of the foam wedge. Also, in February of 2009, the physical therapy notes indicate that the "staff" was cued to use the foam wedge for Student A in Pautz's classroom.

The foam wedge was located on a shelf in the center of Pautz's kindergarten classroom, so it was easily accessible from any angle. When Student A was in Pautz's classroom with the Grievant, it was the Grievant's sole responsibility to assist Student A, including the times when Student A was sitting at the table and needed to have the foam wedge placed under her feet. Pautz's attention was focused on providing instruction to the students. Pautz and the Grievant never spoke about the use of the foam wedge for Student A.

Sometime around conferences, which were in late February of 2009, Pautz approached King-Herman with some concerns about the Grievant's performance in her classroom. Among other things, Pautz told King-Herman that the Grievant was not using the foam wedge with Student A. Pautz indicated to King-Herman that it had not been off the shelf in her classroom for two months. In response to this criticism and others raised to King-Herman regarding the Grievant's performance, King-Herman put together the following bullet point list that addressed "changes" with Student A and Student H, another individual student to whom the Grievant was assigned:

- Instead of leaving when [Student A] is gone, stay in room to help with [Student H]
- Beginning of day – direct him so that he does not wander
- Each day, try to have both [Student A] and [Student H] find someone to play a game with or do a puzzle with. Help them to start a conversation with a friend – maybe asking someone if they want to play or look at a book together. You will have to prompt them and stay engaged with the kids once they've started.
- Have [Student A] use the foam block when she's sitting at a table.
- Keep in mind that our purpose and goal is to help our students interact appropriately with their peers and their tasks. You will need to stay actively involved with the students and their activities.

King-Herman reviewed this list with the Grievant.

Shortly thereafter, in early March, Pautz again indicated to King-Herman that the foam wedge was not being used. On Tuesday, March 10, King-Herman came into Pautz's room when the Grievant and Student A were in there and, referencing the foam wedge, King-Herman said to the Grievant, "you need to use this". The Grievant indicated that she was using the foam wedge, but that it wasn't used very often because Student A was not at the table very often. King-Herman testified at hearing that she did not believe the Grievant when she said this. She drew the conclusion that the Grievant was not being honest based on her belief that the Grievant had not been truthful with her before involving, for example, the situation when she denied having put her hand over the student's mouth at the school program in the gym. The next day, on March 11, King-Herman walked past Pautz's classroom to check on whether the foam wedge was being used. King-Herman observed that Student A was at the table but the foam wedge was not under her feet. King-Herman walked into the room, pulled the wedge off the bookshelf, and put it under Student A's feet. When this occurred, the Grievant stated to King-Herman, "I was just about to do that". At hearing, the Grievant testified that, when King-Herman came into Pautz's room on that day and found the wedge still on its shelf,

Student A was not yet in a learning position at the table. It was boot weather and the start of the school day, and the Grievant was on the floor next to Student A still finagling to get Student A's shoes on over her foot braces.

Also within this same two day period, Pautz indicated to King-Herman that the Grievant had raised with Pautz a question regarding a new toilet training technique King-Herman had implemented for Student A. Student A had not successfully used the bathroom yet, and King-Herman decided to attempt to entice her to do so by secluding Student A in the bathroom for a day or two, having her take her instruction in that room. Pautz told King-Herman, with regard to the Grievant and the toilet training program, "she was criticizing what you were doing". At hearing, the Grievant explained her conversation with Pautz as follows:

I don't remember exactly how I approached her. What I do remember from that incident as they had decided to seclude [Student A] in the bathroom for a full day, maybe two, to try to entice her to use the toilet because she still hadn't successfully done that. And what I took out of it was more not a questioning of what - what the programming part was, but as - I guess when I went to another adult, it wasn't a question of what she was doing. It was a question of is this really okay to do from a school setting, and that's coming from a mom more than it is than where I was employed. I mean, I guess I just didn't think they could do that. I just wanted to kind of just run it past another adult as, you know, is that okay? Is that normal? May be I should have went to [King-Herman], but in this instance I didn't. I asked [Pautz].

King-Herman again went to Connolly about the Grievant. King-Herman raised several issues with Connolly, including the complaints of other aides, the Grievant's criticism of her toilet training plan, instances in which the Grievant would be in the hall rather than in the classroom tending to children, and about the Grievant's failure to use the foam wedge. In response, Connolly immediately talked to Pautz about whether the Grievant was using the wedge. Pautz told Connolly that the wedge was not being used and that the Grievant had lied when she said that she had been placing under Student A's feet. Pautz also indicated to Connolly that the Grievant had a "short fuse" with the special needs students, that she had stated, "nobody tells me what to do", that the Grievant wasn't doing what she was supposed to do, that the Grievant would not move around the room but only sat at a table, that the Grievant did not multi-task, and that the Grievant had been questioning Student A's instruction.

At the end of the school day on March 12, Connolly met with Misco to convey what had been reported to her about the Grievant's failure to use the foam wedge. Misco and Connolly consulted Student A's IEP and established that the foam wedge was supposed to be used. Misco indicated to Connolly that she would speak with Mel Lightner ("Lightner"), the District superintendent, regarding the matter. Misco explained the story to Lightner, at which point Lightner told Misco to place the Grievant on administrative leave while the situation was being investigated. Lightner testified at hearing that he instructed Misco to place the Grievant

on leave at this point because he wanted to be able to conduct an unfettered investigation into the matter. On the evening of March 12, Misco contacted the Grievant at home and told her that there was a concern they were going to be investigating and that she would be on administrative leave during the investigation. The Grievant asked Misco what situation was being investigated, and Misco responded, "I can't tell you". Misco instructed the Grievant not to talk to anyone in the District and that she was not allowed to enter any of the District's buildings.

On March 13, at Lightner's direction, Misco and Connolly interviewed King-Herman and Pautz regarding the matter. They asked King-Herman specifically about the subject of the foam wedge. King-Herman stated during the interview that she had given the Grievant multiple directives to place the foam wedge under Student A's feet, that she had gone in on one occasion and placed it under Student A's feet herself when she observed that it was not being used, and that she was frustrated that the wedge was not being used. King-Herman also shared her concerns with Misco and Connolly regarding such things as the toilet training issue, confidentiality, and the Grievant's unwillingness to follow directives when not being directly observed. Misco and Connolly also interviewed Pautz, who shared largely similar concerns. Pautz indicated to Misco and Connolly that the foam wedge was almost never being used.

Misco and Connolly met with Lightner following those interviews and reported to him the information they had gathered. Lightner wanted to assess the situation personally. Thus, on that same day, Misco, Connolly, and Lightner visited Pautz's classroom. Lightner spoke with Pautz and concluded, based on his observations, that the location where the foam wedge was kept in the classroom was very visible.

On March 16, Misco, Connolly and Lightner again met regarding the Grievant. At that meeting, they reviewed the Grievant's personnel file, Student A's IEP, the plan of improvement that had been implemented for the Grievant at the beginning of that school year, the notes from the interviews of King-Herman and Pautz that Misco and Connolly had done, and Misco and Connolly generally shared with Lightner what they had learned in the course of the investigation. Lightner testified that he determined, particularly after reviewing the plan of improvement, that the Grievant had a problem following directives. He testified that this tendency was a very big concern.

On March 18, the Grievant was asked to attend a meeting regarding the situation. Prior to the day of the meeting, the Grievant had not been told anything about the subject of the investigation. Just before the meeting began, the Grievant had a conversation with Suzanne Dishaw Britz ("Britz"), the UniServ director for the Association, in which Britz explained her understanding of the issue. Britz attended this meeting with the Grievant, as did two other local union representatives. Lightner, Misco, and Connolly were also present at the meeting. In response to Lightner's questions, the Grievant acknowledged being aware of the need to use a foam wedge with Student A. The Grievant was asked by Lightner how often she had used the foam block with Student A. The Grievant's first response to that question was that she had

used the foam block fifty percent of the time. Then the Grievant indicated that she believed she remembered using it ninety percent of the time. Lightner noted not only the discrepancy between the Grievant's own reports of how often she had been using the wedge, but also the discrepancy between the Grievant's claims and the assertions by Pautz and King-Herman that the Grievant had not been using the wedge at all. Lightner believed the accounts by the teachers, because they were consistent with one another. Misco and Connolly drew the same conclusion.

The meeting lasted about fifteen or twenty minutes. At the conclusion of the meeting, Lightner indicated to Britz that the Grievant could either resign or be discharged. On March 20, 2009, the Grievant's employment with the District was terminated, with the following letter:

Dear [Grievant],

On March 12, 2009 you were placed on administrative leave pending further investigation concerning the matter discussed with you on March 18, 2009. Based upon the district's review we have concluded that you have persistently disregarded serious work directives regarding care and safety of students and were not forthright with administration when questioned about your performance. More specifically, you were directed and reminded on multiple occasions to place a foam pad under the feet of a disabled child while that child was sitting at a table in the kindergarten room. You disregarded the directive and reminders and failed to perform your assigned duty. This was after an evaluation and performance plan had been given you in which the district had told you that you had problems following directions. Despite the district's reminders, you have failed to be responsible in carrying out your duties. This irresponsibility not only as the potential to delay the physical development of the student in this matter but could also cause the district huge liability.

When reviewed in the context of past performance issues which have been addressed with you formally and informally since your employment in the district, I have concluded that termination of your employment is warranted at this time. Your employment is hereby terminated effective March 20, 2009. Information regarding benefits or other administrative matters will be sent under separate cover.

DISCUSSION

The just cause provision that applies in this case mandates that the District is to follow a progressive system when disciplining covered employees, moving from oral reprimand, to written reprimand, to suspension, to discharge. The sole exception to this requirement applies where "serious action" giving rise to a discipline justifies a stronger penalty. Though the

District would argue that the Grievant received indications during the course of her employment with the District that her performance was not satisfactory, there is no contention here that the Grievant was ever the subject of any disciplinary action such that her discharge should be viewed as part of a progressive sequence. Thus, as the District points out, the central question in this case is whether the conduct that led to the Grievant's discharge constituted "serious action" warranting her immediate discharge, absent prior discipline.

The conduct that led to the Grievant's discharge is set forth in the letter provided to the Grievant at the time of her discharge. That letter states that the Grievant was discharged because she failed to place the foam wedge under Student A's feet after having been reminded to do so on multiple occasions, because she was not forthright with District administrators when questioned about that issue, and because the District believed discharge was necessary when those actions were considered "in the context" of the Grievant's past performance issues. It is these three bases that the District has argued, in the present proceeding, justified its decision to discharge the Grievant. In his testimony at hearing, Lighter described the issues that led to the Grievant's discharge as follows:

...And here an educational special ed aide is asked to make a modification, and it's a very simple task to take a foam block off of a shelf and place it under the disabled child's feet. That task, that directive was deliberately ignored. It's basic insubordination, and that's what I came to believe. And then I believed compounding that insubordination, she lied in the interview. The trust with [the Grievant] to be an employee in this district was eviscerated at that point, and that's why I terminated her employment.

Thus, the first issue to be examined in a just cause analysis is the Grievant's failure to use the foam wedge with Student A. At the outset, it should be noted that there is little doubt that the Grievant did not use the foam wedge on a consistent basis as she should have. While the Grievant asserted at hearing that she does not believe that she failed to use the wedge for an entire two months as asserted by Pautz, the Grievant implicitly acknowledged in her testimony at hearing and in her March 18 meeting with the District that there were times when she did not use it. Thus, the question here is not whether the Grievant failed to use the wedge, but rather how serious her undisputed failure to do so really was.

The District contends that the Grievant's failure to use the foam wedge was serious in part because she had so many reminders to do so. Throughout this proceeding, the District has referred to the "numerous", "multiple" reminders the Grievant had with regard to this issue. In fact, she received the following reminders: the Grievant was instructed on the use of the foam wedge for the first time by Student A's physical therapists in November of 2008; most likely, she was among the "staff" instructed by the physical therapist regarding its use again in February of 2009; in late February of 2009, King-Herman reviewed a list of "changes" with the Grievant related to Student A and another student, which included a reminder to have Student A use the foam wedge when sitting at the table; on March 10, 2009, King-Herman said

to the Grievant, referring to the wedge, “you need to use this”; and on March 11, 2009, King-Herman placed the wedge under Student A’s feet herself in the Grievant’s presence, and the Grievant acknowledged an awareness of the need to use the wedge by saying, “I was just about to do that”.

Though the Grievant certainly received, as the District points out, more than one reminder to use the foam wedge, I do not believe that the number or type of reminders the Grievant received justified her immediate termination as the District has claimed. It is clear that the Grievant understood from the physical therapists, as did everyone, that the wedge needed to be used when Student A was at the table in Pautz’s room. After the physical therapists put the practice into place, Pautz never said a word to the Grievant about her perceived failure to use the wedge, even though Pautz alleges that this conduct persisted for two months. After Pautz raised concerns with King-Herman, King-Herman reminded the Grievant in late February to use the wedge, but apparently did not mention to the Grievant that it was understood that she had not been using it. Further, it cannot fairly be concluded that the Grievant did not heed the reminders that came from King-Herman on March 10 and 11. First, they occurred two days before the Grievant was put on leave, so she had little opportunity to respond. Second, the Grievant’s un rebutted testimony was that, when King-Herman came into the room on March 11, Student A was at the table but the Grievant was still on the floor, trying to put Student A’s shoes on over her foot braces. This explanation lends credibility to the Grievant’s statement to King-Herman that she was “just about to do that”.

Moreover, the record shows that the issue of the foam wedge never was addressed with the Grievant by one of her supervisors. Indeed, neither Connolly nor Misco even knew about the Grievant’s failure to use the wedge until a day before she was put on administrative leave. The logical gap between the District’s claim in this case that the failure to use the foam wedge was a very serious offense and the established fact that no one reported such a failure to the Grievant’s supervisors under mid-March of 2009 is difficult to reconcile. In any case, the result was that the Grievant was never told by anyone that her failure to use the foam wedge could result in her discipline or discharge. This is not to say that the Grievant did not have reason to know that she was obligated to follow directives from the teachers, including those relating to the implementation of Student A’s IEP. But it is one thing for an employee to know that she has to do her job, and it is another thing altogether to understand that the failure to perform a single, isolated job duty can result in immediate termination.

The District also asserts that the Grievant’s failure to use the foam wedge necessitated the Grievant’s immediate discharge because of the resulting potential harm to Student A and federal and state liability for the District. Because of these potential consequences, the District contends that the failure to implement an IEP is distinctly different and more serious than the mere violation of a work rule. The alleged seriousness of the offense, however, is not born out by the record. Pautz’s testimony was that, before she brought her concerns about the foam wedge to King-Herman’s attention, Pautz had observed, for two straight months, that the Grievant was not using it. This evidence is significant because, if the failure to use the wedge

was as gravely serious as the District claims, it is difficult to believe that a teacher in the District would stand by and watch such a violation occur for that period of time before even mentioning it. Whether Pautz was attentive to that issue apparently did not matter, however, to Superintendent Lightner, when carrying out an investigation into this matter:

- Q: Who all was obligated to provide a foam pad for this child?
A: [The Grievant.]
Q: And if [the Grievant] failed to do that, was anyone else obligated to step in and do it?
A: I think someone was obligated to report that and [Pautz] did that to [King-Herman].
Q: And how long after she first noticed it did she report that?
A: I'm not sure.
Q: How long did they say the foam pad had not been used?
A: A couple of months, I think [Pautz] said.
Q: Okay. Did [Pautz] report it at the first time she noticed it wasn't used?
A: I'm not sure.
Q: Did you ask.
A: No.
Q: Did you care?
A: I don't know.

King-Herman also, apparently, did not perceive the foam wedge issue to be so serious. Indeed, contrary to the District's suggestion, the Grievant's failure to use the foam wedge was not the main thing that prompted King-Herman to have the conversation in March of 2009 with Connolly that ultimately led to the Grievant's discharge. At several points in her testimony at hearing, King-Herman described the concerns that led her to go to Connolly. She stated that she believed that her "first concern" was the Grievant's criticism of King-Herman's toileting plan. Although King-Herman acknowledged that her reaction to such criticism was "just a personal thing", she stated that "[i]t was perhaps the thing that caused me to say we need to step in and take action". King-Herman also described her motivation to talk to Connolly as follows:

Well, again things were accumulating and it was getting to that point where I needed to talk with [Connolly] again. And I was implementing a new toileting program with Student A and she had been criticizing it to another teacher, to Ms. Pautz, and the issue with the block and issues with other instructional aides, and so I talked to [Connolly] about those. ...

She also stated:

There was one that I was very concerned about. It was one of several concerns. It was – the one I was most concerned about with [the Grievant] was not

actually watching the children when she was supposed to be but out in the hall and when she saw me, she went back in the room. I was concerned about the criticizing of the toileting plan because again there's the trust and confidence that you have with people you work with. The foam block was one of them.

Further, in notes made by King-Herman in March of 2009, she wrote the following:

Within these two days – I don't remember if it was Tuesday [, March 10,] or Wednesday [, March 11] – [Pautz] shared with me that [the Grievant] was criticizing a new toilet training technique that I was trying with [Student A]. I felt that it was not her place to criticize a plan that I had worked out with her parents and not her place to be talking about it to another teacher. I told [Connolly] that I was upset about this and told her that she really needed to talk to [Pautz] about the things that were going on in her room with [the Grievant].

[Connolly] and [Misco] asked me questions the following day. Thursday night, [Connolly] called and said that [the Grievant] was on administrative leave and wouldn't be back until after an investigation. On Friday, [Connolly], [Misco] and [Lightner] came to ask me questions about the foam block. They didn't ask about any of the other issues – which I found surprising. Some of the other things that I had mentioned with my meeting with [Connolly] and [Misco] were that the other [instructional aides] had let me know that [the Grievant] was slacking and giving them directions instead of doing things herself. After the third time that they mentioned something, I asked if they wanted me to step in and assign specific duties to her so that they didn't have to deal with it. They said 'no, that they would just deal with it.' I also told [Connolly] and [Misco] about finding [the Grievant] outside of the classroom watching a student who was having a meltdown. The teacher and aide were handling it and [the Grievant] was just standing there watching it – not in the classroom with the two students she was supposed to be assisting. When I walked out of my room and she saw me, she quickly turned and went back into [Pautz's] room.

What these statements reveal is that King-Herman was motivated to go to Connolly because of a number of issues. The non-use of the foam wedge was one of them, but it ranked perhaps third or fourth in King-Herman's mind after her concerns about Grievant's tendency to not watch children in the halls, the Grievant's perceived criticism of King-Herman's toileting plan, and the issues with the instructional aides. The fact that King-Herman found the District's narrow focus on the foam wedge issue to be "surprising" suggests that even she did not view the failure to use the device as the paramount, serious matter the District now says it was.

The District's decision to discharge the Grievant was based also on the perception on the part of District representatives that the Grievant lied in the meeting of March 18. It is clear that the Grievant first stated during that meeting that she had used the foam wedge fifty percent

of the time. Then she asserted that she had used it ninety percent of the time. While an employer certainly has a legitimate expectation that employees will be honest in investigatory meetings, given the circumstances that were involved here I do not interpret the Grievant's admittedly conflicting statements at the meeting as a lie that warranted her immediate discharge. The Grievant was understandably nerve-wracked when she walked into the meeting with Superintendent Lightner, her supervisors Misco and Connolly, and three union representatives. The Grievant had never been disciplined before and, therefore, had never been involved in such a disciplinary meeting. After being placed on leave and kept in the dark for six days, the Grievant had learned why she was being investigated just a few minutes before the meeting. At hearing she described her state of mind leading up to that point as:

...pretty confused, pretty worried. I assumed that a meeting like this didn't happen unless something was wrong, and I was scared. I'll admit I was scared.

The Grievant credibly suggested that it was difficult to make a reliable estimate as to the percentage of times the wedge had been used:

I mean, I believe it's in the testimony that I did say those words. I was very nervous. I was upset. I responded – I didn't know anything about this investigation until I walked in that day. So I didn't have time to sit and think well, I think I use it all the time. And I think that's where I got myself in that 50 to 90 thing because I wanted to be forthright, and honest and when all of a sudden somebody starts asking you about something you did throughout your day and you did a zillion things throughout your day, it's hard to remember exactly. So my initial response was, "Yeah, I used it. I know I used it." I'm sure I came across as not sure and it was – you know, still to this day I can't say for sure I used it 100 percent of the time. I know I wanted to use it 100 percent of the time. I would never purposely deny that child, you know using it.

The Grievant also asserted that it was difficult to reliably estimate how often she had used the wedge because it was "so random in its use". The District contends, in response, that the use of the wedge could not have been random, because the Grievant was supposed to use it every single time Student A was at the table. The Grievant's reference to randomness, however, seems to be more related, legitimately, to the fact that Student A spent relatively little time at the table where the wedge was supposed to be used. Moreover, unlike statistics related to diapering, feeding, and medication in the cognitive disabilities classroom, the use of the foam wedge was never documented in any way. At hearing, ironically, one of the District's witnesses provided testimony that illustrates how difficult it can be to estimate the number of times even an allegedly significant event has occurred. When asked to indicate how many times the Grievant had allowed a student in the early childhood special education room to run away from her, purportedly creating a safety issue, Teske replied:

I don't feel comfortable because I don't know that number in my head. I can't tell you. It was on a daily basis in the two hours and forty-five minutes that the students were at school, so I – I don't feel comfortable saying exact numbers.

In her disciplinary meeting of March 18, the Grievant would not have been in the position Teske was in at hearing to decline the request to provide a number. On top of the basic difficulty of making an estimate, it is fair to also attribute the Grievant's widely fluctuating response to a natural compulsion to defend her self during an undoubtedly tense meeting for which she was not well prepared. Considering all these factors, I find that the District has not met its burden to show that the Grievant told a lie at the meeting of March 18 that provided just cause for her discharge.

The District's third basis for the Grievant's discharge is the "context" referred to by Lightner in the Grievant's discharge letter: the conduct the District has described in this proceeding as the Grievant's routine failure to follow directives and perform her job duties. This alleged basis relates to all the other stuff the Grievant purportedly did wrong, aside from her failure to use the foam wedge with Student A.

As with the failure to use the foam wedge, the real question is whether the Grievant had adequate notice that she was not performing adequately in these areas and that her failures could lead to her discharge. A number of concerns related to the Grievant's performance were, of course, raised in the plan of improvement in June of 2008, and the District is not wrong to assert that the plan should have been an indication to the Grievant that her performance was unsatisfactory. Nevertheless, the conclusion to be drawn from the record is that the plan did not provide just cause, or even the suggested "context", for the Grievant's later discharge. The date set forth in the plan of improvement, by which the Grievant was obligated to meet its objectives, was October 31, 2008. Although Connolly asserted at hearing that this date was merely put into the plan for her own benefit and not as any cutoff date for the plan, that assertion is difficult to credit. It is odd to believe that Connolly would use a column with the heading "timeline to meet goal" to record a tickler for herself next to every single objective set forth for the Grievant to meet. Without any indication to the contrary, the Grievant fairly understood that date to be one by which she would either complete the plan of improvement, get fired for having failed to do so, or be told that the plan of improvement would continue in some fashion. Connolly apparently never expressly stated to the Grievant that any of those three outcomes had occurred. The implication that can be fairly drawn, however, from Connolly's handling of the plan of improvement in the fall of 2008 and her interactions with the Grievant was that the Grievant had successfully satisfied its objectives. First, Connolly apparently didn't seem very worried about the plan in the fall of 2008. As the Grievant recalled in her testimony and Witthuhn's notes indicate, Connolly stated to the Grievant that a meeting about the plan might not have occurred had the Grievant not asked for one, because Connolly had been so busy. Then, after the meeting of October 14, no further meetings were scheduled or held. Further, according to notes taken by Witthuhn, the accuracy of which have not been challenged by the District, Connolly conveyed many positive messages to the

Grievant with regard to the subjects that were raised in the plan of improvement: that the Grievant's interactions had improved, that communication meetings were helping, that she had not heard negative feedback about confidentiality and that there was improvement in that area, that there had been a lot of growth and that the Grievant had done a better job this year, that overall things were better and going well, that Connolly was interested in helping the Grievant gain skills. When the Grievant indicated to Connolly that she thought could lose her job by the date of plan, Connolly responded, "I'm not kicking you out". The notes also attribute to Connolly a statement to the Grievant congratulating and complimenting her on her improvement.

The District argues that it is inappropriate to conclude that the Grievant satisfied the plan of improvement because its objectives were taken from the Grievant's position description and, therefore, should be viewed as ongoing. I disagree. Obviously the District had a right to require the Grievant to do her job throughout the course of her employment. The question, however, is how long the plan of improvement served as notice to the Grievant that there were performance deficiencies. For the reasons discussed, the plan of improvement only served that purpose through October of 2008.

Outside the limited confines of the plan of improvement, there simply was not enough communication with the Grievant regarding her other performance issues to justify using them as a basis for her discharge. Indeed, a review of the record in this case reveals that, while there were many people talking about perceived problems with Grievant's performance from the beginning of her time in Teske's classroom in November of 2007 until her discharge in March of 2009, very few people took the opportunity on very few occasions to actually talk with the Grievant. On a basic level, the Grievant's supervisors rarely addressed the Grievant's performance issues with her, despite many opportunities to do so. Although Teske talked to Misco and Misco apparently thought the Grievant's issues in Teske's classroom were serious enough to warrant observing the Grievant, Misco never talked to the Grievant. Although Connolly and Misco were motivated by the Grievant's experience in Teske's room to review with the Grievant the job description for the aide position in King-Herman's room, neither supervisor told the Grievant why they were really meeting with her. Although King-Herman discussed the incident at the school program with both Connolly and Misco, neither of them discussed the matter with the Grievant. Although Connolly was hearing about concerns from other teachers about the Grievant through the spring of 2008, Connolly never communicated those to the Grievant. Although Connolly personally observed the Grievant doing multiple things wrong during that semester, Connolly did not point them out to the Grievant, with the single exception of the occasion when Connolly said to the Grievant, "this conversation does not concern you". In the spring of 2008, the Grievant met with Connolly in Connolly's office. Although Connolly had seen things leading up to that meeting that were consistent with other concerns she had heard about concerning the Grievant, Connolly apparently raised none of those in that meeting. Instead, Connolly merely reported back to King-Herman that she had met with the Grievant, to which King-Herman responded that the Grievant was not being honest. At the end of the 2007-2008 school year, although Misco and Connolly solicited and

apparently considered an evaluation regarding the Grievant from Teske, they never told her they had done so; the Grievant never knew that form existed until after she had been discharged. In the 2008-2009 school year, Connolly never told the Grievant about the complaints from the other aides relating to the Grievant not pulling her weight. Finally, neither Misco nor Connolly knew about the foam wedge until a day before the Grievant was placed on leave, and neither of them, therefore, discussed that issue with the Grievant.

Thus, prior to her discharge, the Grievant had been told only twice that she had done something wrong by a supervisor. Once was at evaluation time when the Grievant was placed on the plan of improvement. The other was when Connolly told the Grievant to stop eavesdropping. Aside from the plan of improvement, which the Grievant reasonably associated with the potential for discipline, the Grievant never was disciplined or told that she could be facing discipline because of her performance. Indeed, Misco testified that she did not speak to the Grievant directly about the situation in Teske's room, because she did not want the Grievant to perceive that she was being reprimanded. Connolly stated that she did not convey complaints from other teachers to the Grievant, but rather simply chose to observe the Grievant, because she was not looking to reprimand the Grievant. The conclusion to be drawn is that District representatives were avoiding discipline, presumably because they thought it was not the appropriate response to the issues concerning the Grievant.

It is established that the Grievant was supposed to take directives from classroom teachers. My observation that the Grievant's supervisors did not directly address her alleged failures in the classroom is not intended to ignore this division of labor in the District. It is apparent that it would have been impractical for Misco and Connolly to give day-to-day, classroom-specific directives to the Grievant. Nevertheless, it is clear on the record that the enforcement of directives is the responsibility of supervisors, not the teachers. Thus, the fact that the Grievant was not approached by a supervisor who had disciplinary power was significant from a notice standpoint. The Grievant had very little opportunity to understand that she was committing discipline-worthy offenses.

Moreover, even the teachers with whom the Grievant was communicating directly on a daily basis were giving her very limited feedback, particularly in proportion to the number of complaints they apparently had about her. Although Teske told the Grievant about her concerns, she did not tell the Grievant that they were serious enough that she had discussed them with Misco three times. The Grievant never saw the notes that were maintained by King-Herman. The Grievant's un rebutted testimony is that, when she tried to discuss the hand-over-the-mouth incident with King-Herman, King-Herman did not want to talk with the Grievant. King-Herman also did not tell the Grievant that she perceived that issues were reemerging in the spring of 2009. King-Herman also did not discuss with the Grievant the complaints of the aides or her offense related to the criticism of the toileting plan – she just went to Connolly. Further, over the course of two months, Pautz never mentioned to the Grievant her observation that the Grievant had not been using the foam wedge. Nor did Pautz apparently mention to the Grievant her observations that the Grievant had a short fuse, didn't multi-task, wouldn't move around the room, and wasn't doing what she was supposed to do.

Although the Grievant never knew about these concerns, they were being passed around among District administrators and teachers and undoubtedly were coloring their perception of the Grievant on a consistent basis from early 2008 until her discharge. In anticipation of the Grievant transferring to the cognitive disabilities room, Misco told Connolly that she had concerns with the Grievant's performance. Although Connolly suggests that such concerns were no longer on her mind after the meeting in January of 2008 in which Connolly and Misco reviewed the job description with the Grievant, the record suggests otherwise. The Teske complaints were resurrected with the evaluation form that was solicited from Teske in May of 2008 and presumably used when the Grievant's evaluation form was completed. Teske also indicated directly to King-Herman, before the Grievant started in her classroom, that she was "sorry" that King-Herman had to work with the Grievant. And King-Herman told Pautz, toward the beginning of the Grievant's time in Pautz's classroom with Student A, that there were concerns about the Grievant's ability to accept directives, as well as safety concerns. Although the Grievant certainly knew that Teske and King-Herman were not happy with some aspects of her performance, she could not have known the extent to which their attitudes were building against her to the point where everyone had reason to expect the Grievant to do poorly.

It is clear that the Grievant had performance problems. There is no reason to believe that the teachers and administrators at the District were fabricating her reported shortcomings. This award, however, is not an evaluation of the Grievant's performance. It is a just cause analysis. The fundamental problem with not providing the Grievant sufficient notice regarding her performance problems, either through more pointed, consistent communications or through the use of the progressive discipline system allowed for in the collective bargaining agreement, is that she was denied an adequate opportunity to understand that she needed to improve, how to improve, and the consequences for failing to do so.

Given these factors, the District has not met its burden to show that it has just cause for the Grievant's termination. Thus, it is my

AWARD

That the grievance is sustained.

REMEDY

The District is directed to reinstate the Grievant and to make her whole for losses in pay, benefits, and seniority. The District is entitled to offset the back-pay with unemployment compensation benefits or interim earnings, if any. The District is free to issue a verbal warning relative to the Grievant's failure to use the foam wedge.

JURISDICTION

I will retain jurisdiction for a period of sixty (60) days from the date of this award to address any dispute as to remedy.

Dated at Madison, Wisconsin, this 9th day of September, 2010.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator