

Ramsey, County of

TIME REQUIRED TO RENDER AWARD: 42 DAYS

IN THE MATTER OF THE ARBITRATION BETWEEN

closed

THE AMERICAN FEDERATION)	MINNESOTA BUREAU OF
OF STATE, COUNTY AND)	MEDIATION SERVICES
MUNICIPAL EMPLOYEES,)	CASE NO. 06-PA-371
COUNCIL 5,)	
)	
)	
Union,)	
)	
and)	
)	
THE COUNTY OF RAMSEY,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

For the Employer:

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On September 19, 2006, in Shoreview, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Ameal Bowman. Post-hearing briefs were received by the Arbitrator on October 6, 2006.

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FACTS

The County of Ramsey (the "Employer") includes in its boundaries the City of St. Paul, Minnesota, and many of its suburbs. The Employer's Human Services Department operates the Lake Owasso Residence (the "Facility"), where developmentally disabled adults live and receive care.

The Union is the collective bargaining representative of many of the non-supervisory employees of the Employer who work at the Facility, including those who work in the Residential Counselor's classification. The primary function of Residential Counselors is to supervise and care for residents.

The grievant was hired by the Employer on April 28, 1998, to work at the Facility as a Residential Counselor, and he was so employed until August 24, 2005, when he was discharged. On August 23, 2005, Louis M. Speggen, Administrator of the Facility, and William Stich, its Program Director, issued the following notice of discharge to the grievant:

In accordance with the provisions of the Ramsey County Personnel Act, you are discharged from your position as Residential Counselor in the Department of Human Services, Lake Owasso Residence for the following reasons:

CHARGE: Physical abuse of a resident.

SPECIFICATIONS: On 7/23/05 around 8:25 p.m. in House #4 you entered the time-out room, struck a resident on each side of the head and possibly elbowed the resident in the stomach. The discharge is effective on 8/24/05. . . .

The Facility provides living quarters and care to sixty-four individuals with differing levels of mental disability. They live in eight houses, eight residents per house, each of which has rooms where the residents sleep and a common area

where they interact with each other and with staff. The common area includes kitchen and dining equipment.

The allegation that the grievant physically abused a resident was made by a co-worker, Mira Gallagher, who is also a Residential Counselor. She has been employed at the Facility since June 2, 2002. Although Gallagher is classified as a "float," she has consistently worked a full schedule of eighty hours per two-week pay period since she was hired. She testified that in each two-week pay period, she worked forty hours in House 4 and forty hours in other houses. About two or three times a week, when she was working in House 4, she had a common shift with the grievant, as she did on Saturday, July 23, 2005, during the shift that began at 2:00 p.m. and ended at 10:30 p.m. Because it was a Saturday shift, there was no supervisor on duty in House 4, nor was there a Registered Nurse working.

Hereafter, as I refer to the resident who, by Gallagher's allegations, was physically abused by the grievant, I use the fictitious name, "John Smith" or "Smith," to preserve his anonymity. In July of 2005, Smith was forty-one years in chronological age, and, according to Stich, he had mild mental retardation, had some physical disabilities, functioned as a four to six year old, but had "many good receptive and expressive communication skills."

An understanding of this dispute requires some description of the "time-out" room in House 4 and of Smith's treatment plan, as updated in May of 2005. Excerpts from that treatment plan, set out below, describe the time-out room and provide relevant

information about Smith's behavioral traits and the prescribed methods of treatment when he exhibits those traits:

A. Summary of Methodology and Definitions: Room Time Out will be used to contain the risk of injury and destructiveness presented by [Smith's] Physical Aggression Toward Others [ATO] and Property Destruction [PD]. Room Time Out was chosen as a Consequence for ATO and PD because it will prevent [him] from receiving social reinforcement for these behaviors and because the emergency use of manual restraint has not reduced the frequency of these behaviors. ~~The Release Criteria will~~ be 5 minutes verbal and physical calm or maximum 30 minutes. To ensure safety, this Time-Out procedure may also require the use of brief manual restraint and/or physical escort. Manual restraint will be used as a consequence for and to prevent further SIB. The preferred restraints will be 2-Arm Standing Restraint or 2-Arm Sitting Restraint. If [Smith] drops to the floor staff will restrain upper extremities by grasping [his] wrist/arm. If necessary, his lower body may be restrained as taught in Two or Three Person Restraint Lying Down. Release Criteria for Manual Restraint for SIB will be 2 minutes duration of restraint.

1. Physical Aggression Toward Others (ATO): Any attempted or actual hitting, slapping, striking with open or closed hand; scratching, kicking, pushing; forcefully grabbing another's clothing, hair or body parts; or throwing any object toward another person. (This definition includes grabbing because grabbing may be a precursor to aggression.) Physical Aggression will be recorded in episodes, e.g., one episode results in one Time-Out procedure.

2. Property Destruction (PD): Pounding on or with any object, attempting to kick, tip, rip, or bite any object in a way the object was not intended to be treated, or throwing any object not meant to be thrown. Property Destruction will be recorded in episodes; e.g., one episode results in one Time-Out.

3. Description of Time Out Room: The Time Out room is an 8' by 8' room with padded floor, walls and door. It is a well lit, ventilated room with no sharp edges. An Observation window allows continuous observation of the room's interior. The door to the room cannot be locked. It must be manually held closed, or given ongoing manual contact an electronic latching system can be used.

4. Release Criteria: A release criteria of 5 minutes of verbal and physical calm behavior was chosen because a

data review indicates that [Smith] typically needs more than three minutes to calm himself. [He] may be talking softly to himself in positive tones with positive content (e.g., quiet reminders to self) and meet the criteria of "verbally calm." He may be slowly pacing or otherwise moving in the Time-Out Room and meet the criteria of "physically calm." . . .

8. Self-Injurious Behavior (SIB): Attempted or actual: scratching, picking at, pulling at skin or touching any skin areas that are receiving prescribed medical treatment for tissue damage. SIB may also include hitting body parts to stationary objects (e.g., head banging, pounding on wall, etc.).

B. Description of Controlled Procedure Methodology:

Staff Responses to ATO and PD:

When [Smith] is observed engaging in Aggression or Severe Property Destruction, staff will tell him, "[John], don't hurt _____ (name specific person) Time-out" or "[John], don't destroy _____ (name specific property item) Time-out." If [he] resists the escort and a carry is necessary, staff will use the "Sedan Chair" or the "Caterpillar Carry" and will document its use. Staff will refrain from conversing with [Smith] as they physically escort him to a Time-Out Room. All physical escorts will use the least restriction technique as taught by LOR's Crisis Intervention Training. The preferred technique is a One or Two person escort using a One or Two-Armed Standing Restraint. If [Smith] does not resist the escort, two staff may perform the escort using a Team Standing Control Technique.

Staff will put [Smith] in the Time-Out Room, close the door, and provide constant observation through the observation window. Staff will document [his] behavior in the Time-Out Room at least every 5 minutes. [Smith] will remain in the Time-Out Room until he has exhibited 5 minutes of verbal and physical calm behavior, or until 30 minutes have passed. When the above Release Criteria is met, staff will open the door and using a single "Soft" verbal prompt will invite him to rejoin household activities. If he chooses to stay in the Time-Out Room with the open door staff will return in another 5 minutes to use another single Soft Prompt to rejoin household activities. [He] will be reinforced as per programs when he does rejoin peers.

If [Smith] does not exhibit 5 minutes of verbal and physical calm, after 30 minutes of Time-Out, regardless of [his] behavior, staff will open the door and offer release and also offer him a drink of water and access to the bathroom. Each time [Smith] engages in ATO or PD

staff will implement this Time-Out program and will document its implementation on a Time-Out Recording sheet. . . .

The following additional description of the time-out room in House 4 is based upon my viewing of the room during the hearing, at the request of the parties. The description given in Smith's treatment plan appears to be accurate -- that the room's dimensions are eight feet by eight feet and that it is entirely padded, not only on all walls, but on the floor. The room has no furnishings, so that an occupant must stand, sit on the floor or lie on the floor.

There is one door to the room, and the door has a window that I estimate to be about nine inches wide and fifteen inches from top to bottom. The window provides a means for staff to observe a resident who is in the time-out room. In all houses of the Facility, it is an accepted practice to cover the entire window with a cardboard panel that has a small hole cut into its center, measuring about 5/8ths of an inch by 5/8ths of an inch. Staff then can look into the room through the hole in the cardboard covering. This method of observation is used so that a resident placed in the time-out room will not be distracted from the effort to calm him by seeing one of the staff looking through the window.

Only three people were present at the time of the alleged physical abuse of Smith -- Gallagher, the grievant and Smith. Gallagher and the grievant testified. Though Smith did not testify, Ralph P. Zalazar, Assistant Program Director and Assistant Supervisor, testified about a conversation he had with Smith on Sunday, July 24, 2005, during which, as Zalazar

testified, Smith gave an account of what had occurred the night before at the time of the alleged abuse.

I summarize Gallagher's testimony as follows. She escorted Smith to the time-out room on three occasions on the night of July 23, 2005, and she made required entries documenting those incidents in Smith's Time Out Recording Sheet. The first time-out began at 8:00 p.m. after Smith hit her and was destructive of unspecified property. She escorted Smith to the time-out room, where her documentation showed that at 8:02 p.m. he was "sitting on floor calm." At 8:05 p.m., he was "hitting the door yelling." At 8:07 p.m., he was "calm on the floor." At 8:10 p.m., she wrote, "released/calm," and "calm but refused to come out," and "calm/sitting in time out room."

Gallagher testified that, when Smith finally came out of the time-out room, he started walking toward her and hit her. She escorted him back to the time-out room for the second time that evening. Her entries in his Time Out Recording Sheet show that it began at 8:20 p.m., that at 8:22 p.m., he was "sitting on floor" and that at 8:25 p.m., he was "calm/released." Again, he refused to come out upon his release, and Gallagher left him in the room calm and sitting on the floor with the door open.

Gallagher testified that she then left the immediate area of the time-out room and went toward the common area to attend to another resident. While she was doing so, she heard Smith screaming and went back to the time-out room, where she found the door closed. She testified that she looked through the 5/8ths inch cut-out in the cardboard covering on the window and

saw the grievant standing over Smith as Smith sat on the floor in one of the far corners of the room. The grievant was holding both of Smith's hands with his left hand, and he hit Smith with his right hand on the side of the head. The grievant then changed hands, taking both of Smith's hands in his right hand, and he hit Smith on the side of the head with his left hand.

~~Gallagher testified that she opened the door and "everything stopped,"~~ that the grievant walked out of the time-out room, and that she helped Smith up and escorted him out of the room toward the common area. As she did so, he was still "crying and screaming."

Gallagher testified that, about ten minutes later, the grievant asked her if she would give Smith his medications, that she agreed to do so, and that, as the grievant was walking away, Smith picked up a stool and threw it toward the grievant. The stool did not strike the grievant. Then Smith tried to hit her, and she placed him in the time-out room for the third time that evening. Her entries in Smith's Time Out Recording Sheet show that she escorted him there at 8:30 p.m., that at 8:32 p.m., he was "sitting on floor," and that at 8:35 p.m., he was "calm/released." The record for this time-out does not indicate that Smith refused to come out of the room when he was released to do so.

Gallagher testified that she did not enter any notation in Smith's record about her observation of the grievant's treatment of Smith because Smith is not a member of the group she is assigned to and the practice is that staff members are

not to make notations in the record of a particular resident unless the staff member is assigned to that resident.

Gallagher testified that about five minutes after the alleged abuse she took Smith to the patio area just outside of House 4 to calm him and that she saw Khaled Saad, a Behavior Analyst assigned to House 5 on the House 5 patio. She testified that she told Saad about the incident and that Smith was present as she did so. Gallagher also testified that at the end of each shift, it is the practice that Residential Counselors from the ending shift report to the Residential Counselors on the next shift and that she did not include in her report her observation of the grievant's alleged abuse of Smith. She testified, however, that she was upset because she knew she had to report what she had seen and she would have to continue working with the grievant. She testified that she thought the report had to be made within twenty-four hours.

The next morning, she called Zalazar and told him about the incident. Zalazar testified that, as Assistant Program Director, he oversees the entire Facility on weekends when Stich is off duty. I summarize his testimony as follows. On Sunday morning, sometime after 8:00 a.m., Gallagher told him she had seen the grievant hit Smith the night before. Zalazar could not remember whether she telephoned him or told him in person. After she talked to him about the alleged abuse the previous evening, he went to House 4. He spoke to Smith and, later in the day, to the grievant. He wanted to avoid being suggestive when he spoke with Smith because he is aware that residents

are open to suggestion. When he walked into House 4, the residents were very active. Smith said he wanted to go outside for a walk, and, because the Residential Counselors were busy, Zalazar said he would walk with Smith. When outside, Smith said he wanted to talk to Zalazar.

Zalazar wrote an account of the discussions he had that ~~Sunday with Gallagher, with the grievant and with Smith.~~ He included a description of those discussions in a report he made to Stich about his investigation of the incident. Zalazar testified that the accounts given in his investigation report of his discussions with Gallagher, the grievant and Smith are accurate.

In the investigation report, Zalazar states that Gallagher told him that Smith also told her that the grievant hit him in the stomach. The report's account of Gallagher's description of the incident is substantially the same as the description she gave in her testimony, summarized above.

Below, I set out the part of Zalazar's report that describes his discussion with Smith:

I arrived in House 4 shortly before lunchtime on Sunday, July 24, 2005. Mr. [Smith] was asking to go for a short walk with staff and as his morning staff were busy, I offered to walk with [him]. [He] accepted my offer and we started walking around the path. Our discussion began with [Smith] asking many questions regarding staffing for the afternoon which allowed me time to make sure that [he] was comfortable with me before asking questions that could evoke a lot of emotion. I did not ask a question regarding the incident when [he] brought it up himself declaring, "I want to talk about what happened last night." I acknowledge[d] that I heard there was an incident involving him and that I had questions about it and then asked [him] to tell me what happened.

He said that Ameal (he had difficulty saying his name, stuttering and repeating it 5 times) had hit him in the stomach and held his wrists very tightly" when in the time out room. I asked [him] if he had been hit anywhere else and he acknowledged that he had also been hit in the head. I asked him to show me where he was hit and he rubbed the upper left side of his head saying "here" and then he started to lift his shirt and pointed to his stomach and said "and here." I asked him whether he was hit anywhere else and he replied "I don't know." When I asked him a leading question "Did you get hit twice on the head?" He replied yes and then reaffirmed that he had his wrists held very tightly. I then asked [him] to point out on me what parts of the body were used to hit him in the stomach but he only responded by pointing to his own stomach. He followed up by saying he was scared and felt like throwing up after the incident. I asked him if he felt that a foot or a knee or elbow were used to hit him in the stomach and he replied "his elbow."

At that time I informed [Smith] that I was going to ask Mr. Bowman to stay home for the evening shift and that he would not have to be scared today. He responded in a positive manner and started to repeat the information I shared with him. . . .

I summarize the grievant's testimony as follows. He received certification as a Nursing Assistant after completing a course at St. Paul Technical College, and he has also completed training as a Medical Assistant. He has worked in the Human Services field since 1992. He has never been disciplined. He testified that when he parked in the Facility's parking lot on Sunday, July 24, 2005, Zalazar approached him and said that he wanted to discuss a complaint made about an incident between the grievant and Smith the previous evening. He was surprised because there had been no incident. He talked to Zalazar that Sunday and to Stich on Monday. Later, he discussed the allegations with a Ramsey County Deputy Sheriff and an investigator from the Minnesota Department of Human Services.

Before me, the grievant gave the following testimony about the allegations of abuse. He and Gallagher and Daniel

Auiya worked in House 4 during the 2:00 p.m. to 10:30 p.m. shift on Saturday, July 23, 2005. In dividing tasks for the shift, they agreed that he would be responsible for administering medications ("passing meds," as he put it), that Auiya would be the cook and that Gallagher would be responsible for "tokens" -- awards, usually food snacks, given to residents as reinforcement for positive behavior.

The grievant testified that, at about 8:00 p.m., he was passing meds among the residents when he noticed Gallagher with Smith. She was picking up towels to take them to the washer, and Smith was coming out of the bathroom. Smith picked up a telephone and threw it. The grievant opened the door to the time-out room for Gallagher as she escorted Smith there, and he went back to passing meds. About five to ten minutes later, the grievant heard the door to the time-out room opening and closing as Gallagher was trying to put Smith in the room again. The grievant saw Gallagher trying to close the door and keep Smith in the room, but Smith was trying to get out. The grievant said to Gallagher, "let me go in and talk to him." The grievant testified that he wanted to get the time-out over with so he could give Smith his medications. Residents are not given medications while in the time-out room.

The grievant testified that Gallagher opened the door to the time-out room, and he saw Smith standing in the room with his hands in the air and yelling. The grievant went inside the room with Smith and closed the door. Gallagher remained outside the room. Smith backed up and sat on the floor, but then he

"scooted" forward, kicking and screaming and trying to push the grievant out the door. The grievant redirected Smith, using a two-armed restraint. As he was trying to grasp Smith's hands, Smith was resisting. The grievant moved in close to Smith so that Smith could not hit him, and he grabbed both of Smith's wrists at the same time. Smith was sitting on the floor still kicking. ~~The grievant placed one hand on the wall as he~~ maintained his grip on Smith's wrists. Smith calmed down in a few seconds. The grievant testified that all of the action he described took place very quickly, in less than a minute. He testified that he did not slap Smith.

The grievant testified that he then moved toward the door, probably by backing out and that either he or Gallagher opened the door. He left the room, and went back to passing meds. About three to five minutes later, he saw Smith out of the time-out room, throwing a stool toward the counter in the common area. He did not know if Smith was throwing it at him. Gallagher then put Smith back in the time-out room for throwing the stool. The grievant went to the laundry room to clean towels. Later, Smith came to him and asked for his medications, and the grievant gave them to him. He had no other unusual contact with Smith that night. Gallagher said nothing to him about her allegations of physical abuse, nor, to his knowledge, to Auiya. He testified that all of his actions toward Smith that evening were proper, that it is permissible when a resident resists placement in the time-out room to enter the room and back the resident into its interior so that the door can be

closed and that grasping the wrists of a resident who is striking out is permitted restraint. He denied striking Smith.

In Zalazar's investigation report of his discussion with the grievant on Sunday, July 24, 2005, Zalazar states:

I met [the grievant] in the parking lot and escorted him to the Program Supervisor's Office. I informed [him] that we were suspending him with pay pending investigation regarding potential physical abuse to [Smith], a vulnerable adult in House 4. I informed him that I had two complaints regarding this incident from [Smith] and [Gallagher]. . . . I asked [the grievant] to please allow me a chance to hear his view of the incident and also offered him the opportunity to put his response in writing to include in the investigation. . . .

[The grievant] went on to say that he had saved [Smith's] afternoon medications for last because he was exhibiting property destruction, was being loud and verbally abusive. After [his] 2nd time-out he was sitting in the corner of the time-out room choosing to sit on the floor with the door open and the light on. [The grievant] went into the room to administer medications. At that point [Smith] became aggressive without getting up from the floor. [The grievant] said that he usually reminds residents that he is stronger than them and that they should quit being physically aggressive. He reported that while standing in front of him he was able to hold [Smith's] wrists while he sat on the floor and successfully kept him from flailing and aggressing. (It appeared that the position he was demonstrating would have put [Smith's] hands on his stomach area. He explained that he also was preventing him from kicking which I suspect took some use of [the grievant's] leg or legs to accomplish this.) He acknowledged that [Gallagher] entered the area and then he stood up from his chair in the office and said he was real angry. . . .

On July 26, 2005, the Ramsey County Department of Human Services notified the Ramsey County Sheriff's Department of the allegations of abuse made against the grievant. A Deputy Sheriff investigated the matter, and, eventually, the City Attorney for Shoreview charged the grievant with fifth degree assault. That charge was disposed of by a plea agreement on

June 13, 2006. The grievant pleaded guilty to disorderly conduct, a misdemeanor. On July 7, 2006, he was fined \$100 or, in the alternative, required to do twenty hours of community service. The sentencing directed him to complete a crisis intervention class, and it stated that he "[m]ay not hold position of authority of [Smith]." Further, the sentencing ~~directed that the charge be vacated and dismissed "after 1-yr probation period."~~

On August 8, 2005, the Deputy Sheriff who investigated the incident interviewed the grievant, and on August 10, 2005, he interviewed Gallagher. Their accounts of the incident, as given in the Deputy's investigation report, are roughly consistent with the accounts they gave at the hearing before me.

The Division of Licensing of the Department of Human Services of the State of Minnesota also investigated the allegations of physical abuse made against the grievant. On January 11, 2006, Scott Brody, the Investigator for the Department of Human Services, issued a report in which he found that "there was a preponderance of the evidence that [the grievant] hit [Smith] in the head and in the stomach." He found the grievant's version of the incident less credible primarily because he had given inconsistent explanations -- telling Zalazar on July 24, 2005, that he went into the time-out room to give Smith his medications, but later stating that he went into the time-out room to help Gallagher as Smith was resisting her effort to place him there. Brody's report concluded that the grievant's actions toward Smith constituted maltreatment of

Smith, but not "recurring maltreatment" or "serious maltreatment," as those terms are defined by statute, and that, accordingly, the grievant was not disqualified from providing future "direct contact services" to vulnerable adults.

DECISION

With respect to the central issue of fact -- whether, as the Employer alleges, the grievant struck Smith on the evening of July 23, 2005 -- I find, for several reasons, that the account given by Gallagher is credible and that the account given by the grievant is not. First, the statements made by the grievant have been inconsistent. He told Zalazar on July 24, 2005, that he went into the time-out room to give Smith his medications, but, since then, he has explained that he entered the room to assist Gallagher with Smith. Second, Gallagher's account of the incident has been consistent. Third, Gallagher's account is consistent with the one that Smith gave to Zalazar on July 24, 2005. Zalazar's report of Smith's statements is hearsay evidence -- here, a written report made by a testifying witness, Zalazar, sworn by him to be an accurate summary of the statements made by someone who does not testify.

In the interest of expediting the arbitration process, arbitrators often relax the rules of evidence, including the rule that would exclude hearsay evidence. I receive and use hearsay evidence, provided that the evidence meets standards that are similar to those used by the courts to receive evidence under exceptions to the hearsay rule. First, the testimony of the in-hearing witness who reports the out-of-hearing statement

must be credible. Here, Zalazar's testimony was direct, consistent and without apparent motive for falsification when he testified that his written description of Smith's statements to him was an accurate summary of what Smith said.

Second, the statements of the out-of-hearing witness -- in this case, Smith's statements to Zalazar on July 24, 2005 -- ~~as reported by the in-hearing witness must appear to be credible~~ intrinsically, i.e., they must be made without apparent motive for falsification and they must be consistent with other non-hearsay evidence. The evidence shows that Smith has limited ability to function intellectually, but that he can communicate coherently. Zalazar's report about Smith's spontaneity when reporting the grievant's alleged conduct indicates that Smith was telling Zalazar about an actual occurrence and not something that he imagined or intentionally fabricated. Smith's statements, as reported by Zalazar, are consistent with Gallagher's account of what occurred.

The grievant testified that he thought Gallagher was motivated to accuse him falsely because she was a part-time worker who wanted to work full-time by gaining his hours if he were discharged. The evidence does not show any apparent motive for her to lie about the grievant's conduct. Indeed, she testified without contradiction that she has been working a full eighty hours per two-week pay period since she was hired in 2002.

The Union argues that Zalazar's investigation denied the grievant due process because Zalazar did not offer him Union representation before their discussion on July 24, 2005. Most

cases that have considered the right to representation during a disciplinary investigation do not invalidate the investigation or otherwise limit its use unless the employee has requested representation and the request has been denied. See Elkouri and Elkouri, How Arbitration Works, 1268 (Sixth Ed.). I follow that line of authority in the present case, in which the grievant did ~~not request representation at the time of Zalazar's discussion~~ with him on July 24, 2005.

The final issue presented is whether discharge of the grievant is the appropriate discipline. The Union makes the following arguments that, even if I find that the grievant acted as Gallagher described, he should not have been discharged. The grievant had no record of prior similar misconduct, nor, indeed, of any misconduct during his many years of employment as a Human Services employee. Brody, the investigator for the Minnesota Department of Human Services, concluded that the grievant's actions toward Smith did not constitute "recurring maltreatment" or "serious maltreatment," as those terms are defined by statute, and that, accordingly, the grievant should not be disqualified from providing future "direct contact services" to vulnerable adults.

The Employer argues that progressive discipline should not be required in a case such as this because its use would give employees charged with the care of vulnerable adults "one free hit." The Employer cites Section 483.420(a)(5) of the Federal Medicaid Standards, which requires that licensed facilities show that "no patterns, isolated incidents, unexplained

functional regression, or other evidence of physical, verbal, sexual or psychological abuse or punishment posing a serious and immediate threat to individuals are present, are likely to occur, or have occurred without corrective action."

The Employer also notes that, even though the fifth degree assault charge against the grievant was plea bargained to ~~disorderly conduct, the Court's disposition required that the~~ grievant not hold a position of authority over Smith. Though the Employer concedes that the grievant, if reinstated, could be assigned to a house where Smith is not present, the Employer argues that an emergency could arise that would require the grievant to work in the house where Smith is a resident.

For the following reasons, the award directs the Employer to reinstate the grievant without loss of seniority, but without back pay. I recognize the Employer's concern that it should not be required to employ an employee who has been found to have maltreated a resident. The grievant's actions, however, were considered by the Minnesota Department of Human Services not to be serious enough to disqualify him from doing in the future the same kind of human-services work that he has done for many years. I infer from this determination by the Department of Human Services that it finds no substantial risk that the grievant would repeat the kind of misconduct that led to the discharge. Indeed, the grievant's record, which shows no previous similar incident, supports that conclusion.

As the Union points out and the Employer concedes, the Employer is not restricted by the parties' labor agreement from

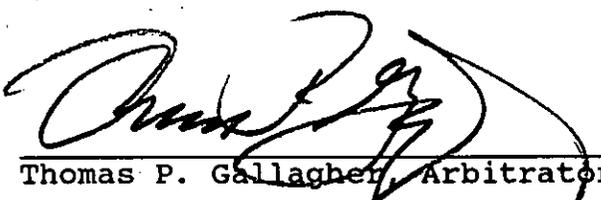
reassigning the grievant to work in a house where Smith does not reside. If an emergency occurs that makes temporary assignment of a Residential Counselor to the house in which Smith is then residing, the Employer should be able to avoid assigning the grievant to that house -- by assigning a Residential Counselor other than the grievant to Smith's house and, if necessary, assigning the grievant to fill in for that other Residential Counselor.

The award does not provide the grievant with lost pay because the grievant's misconduct was the primary cause of the loss.

AWARD

The grievance is sustained. The Employer shall reinstate the grievant, without loss of seniority, but without back pay.

November 17, 2006


Thomas P. Gallagher, Arbitrator