IN THE MATTER OF ARBITRATION BETWEEN

DEPARTMENT OF HUMAN SERVICES	)	
STATE OPERATED FORENSIC SERVICES	)	
STATE OF MINNESOTA "Employer"	)	
St. Paul, MN	)	BMS No. 08-PA-1394
	)	AFSCME 08M-16-404-14127
AND	)	State of MN 08-189
	)	Richard Delestre, Grievant
AMERICAN FEDERATION OF STATE COUNTY	)	
AND MUNICIPAL EMPLOYEES	)	
AFSCME Council No. 5 "Union"	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: October 20, 2008; Regional Treatment Center, St. Paul, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: October 20, 2008

APPEARANCES

FOR THE EMPLOYER:

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Minnesota Management & Budget
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St. Paul, MN 55155

FOR THE UNION:

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AFSCME Council No. 5
300 Hardman Avenue
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BACKGROUND

Richard Delestre (the "Grievant") was employed by the Minnesota Security Hospital (the "Hospital" or "Employer") at St. Peter for some 18 years at the time of his discharge on January 8, 2008. The Notice of Termination over signature of Security Hospital Unit Director Matt Schroeder states, in relevant part,:

> This memo is your written notice that you are being terminated from your employment as a Security Counselor Lead.
>
> Article 16, Section 5.F., in the AFSCME Council 6 Union Contract covering your employment requires that an employee being discharged from a permanent position in a job classification, be notified in writing of the reason for the discharge.
>
> This termination has occurred as a result of your failure to maintain professional behavior with patients and staff and your failure to maintain therapeutic conduct with patients.
>
> You have the right to a "Loudermill" hearing to present information related to this issue, while in paid status, regarding the suspension prior to being discharge. This Loudermill hearing has been scheduled with the program director Rita Olson, at 2:00 p.m. on Wednesday, January 9, 2008 in the Administrative Conference Room. You may bring representation to this meeting.
>
> This discharge notice ends your employment at Minnesota Security Hospital, effective immediately.

The Grievant promptly grieved his termination on January 17, 2008. The parties were unable to resolve the matter through the contractual grievance procedure and the Union appealed the case to the State Bureau of Mediation for arbitration. The BMS supplied a list of arbitrators in June 2008 from which the parties selected John J. Flagler.

The case was heard at the St. Peter Treatment Center on Wednesday, October 10, 2008 at which witnesses were heard and documentary evidence received. The parties submitted oral summations and written briefs at that time.

FACTS

No material facts remain in dispute. The Grievant's employment record shows positive performance evaluations and no disciplinary actions for the first 16 years he worked at the hospital. Indeed his performance review for the period 2/05-7/06 entered into the record by the Employer cites his first job related criticism:

> Met or exceeded expectations except in area of documentation and exhibit (sic) appropriate work habits…Rich has exhibited unprofessional and inappropriate behavior within the work setting…Overall performance of Responsibilities Meets Expectations.

The above reference to the Grievant's "unprofessional and inappropriate behavior" is not further detailed in the evaluation cited but probably covers his refusal to comply with a doctor's directive to release a dangerous patient into a less restricted setting. The Grievant defended his actions on the grounds that the man was a murderer and should have been observed and evaluated by the doctor before release, rather than by merely phoning in the order.

It appears that the incident prompted some pressure from certain medical staff to fire the Grievant, with the result that he was issued a written reprimand on February 14, 2005.

About a year and a half later the Grievant received a warning memo from the same supervisor regarding his attempts to get a co-worker with whom he had been feuding removed from his shift. No disciplinary sanction was issued.

The next disciplinary a action, a one day suspension, was issued to the Grievant by then Group Supervisor Matt Schroeder on March 1, 2007. The accompanying notice stated:

> This memo is notice of a one day Suspension to be served on Tuesday, March 6, 2007 for spending excessive time away from your assigned work area and unprofessional conduct.
>
> Future unauthorized absences from your assigned work area and/or unprofessional conduct will result in further discipline up to and including termination.

As so often happens in the use of the vague and non-specific term "unprofessional conduct," no detailed description of any particular misconduct is mentioned in the notice. Of particular interest is a "letter of expectations" issued to the Grievant by G.S. Schroeder in connection with the suspension and the corrective counseling sessions he provided him.

The letter of expectations issued on March 20, 2007 states, in relevant part,:

You are receiving a letter of expectation which is offered as a constructive means to clarify expectations and improve your performance…the expectations I have for you…are outlined below. This letter should not be considered…as discipline…Should you fail to meet the expectations outlined below you may be subject to discipline.

My expectations for you are as follows:

Professional Conduct:

> You must consistently demonstrate effective leadership skills and conscientious work behavior in order to maximize organizational efficiency while providing a role model of professionalism for peers, visitors and patients.
>
> Your personal/professional conduct and interpersonal interactions always reflect strict compliance with the division and facility policies regarding employee conduct, professional relationships and boundaries.

-All interactions with others are observed as professional and in compliance with MSH Procedure A204, Employee conduct/Boundaries/Boundary Violations, and SPRTC Policy #70400, Standards of Conduct: Employee/Patient Interactions.

You must complete and/or assure completion of assigned, routine work tasks.

Your communication skills (both written and verbal) are effective and meet all facility policies and expectations.

-You must meet documentation requirements per unit policy.

Leaving Assigned Work Area:
You shall not leave your assigned work area without a legitimate work related reason and if there is a reason you must inform your fellow staff of the destination and return time.

-SOD/UD approval needed for all off unit union business conducted
-SOD/UD approval and escort required when going to Unit 800 for any reason other than ICS if you are assigned A or B team responsibilities for that shift.

Time Management
Telephone calls of a personal nature should not exceed five minutes in duration; these calls should not occur more than two times during any one shift. Calls to inform family of overtime and make arrangements related to work are allowed.

Follow all expectations contained in staff breaks procedure, A214.

You can expect the following from me:

Regular follow up meetings to review expectations, problems and progress.

Continued support in meeting the goals contained in this letter of expectations and all Security Counselor Lead expectations.

Feedback as necessary.

I am confident that you will accept this letter as an effort to improve your performance.

Schroeder testified that a series of counseling sessions with the Grievant followed from May 2 through September 25, 2007. Schroeder noted his general satisfaction with the Grievant's corrective response in the following observations:

EMPLOYEE RESPONSE
Rich continues to follow the guidelines of his expectation letter. Upon speaking to Rich and encouraging him to continue the good work Rich stated: "I'm doing what I've always done." Discounting the work being done is any different then in the past. Rich was encouraged to continue to follow the letter as outlined.

FUTURE ACTION EXPECTED
Continue to follow the letter of expectations and implement desired outcomes. Rich was encouraged and it was pointed out that he has made progress with the expectations suffered in the letter. Most notably to this writer is that Rich is no longer leaving the unit without reason. Rich is no longer sending or receiving numerous calls each shift. Rich continues to work on the expectations with success to date.
7/19/07

EMPLOYEE RESPONSE
Rich continued to follow the guidelines of his expectation letter. Rich continues to feel that he has always acted according to expectations, discounting the positive reinforcement given. Rich was reminded that there were problems and the letter outlined what needed to change and this writer felt that the changes were happening. This writer further encouraged Rich to follow the guidelines as written and don't discredit himself as he was doing better than before the letter.

FUTURE ACTION EXPECTED
Continue to follow the letter of expectations and implement desired outcomes. Rich has made progress with the areas outlined in the letter of expectations. At times Rich discounts and discredits the progress he has made by stating that he always has worked the same and nothing has changed, however, this writer observes change and Rich is continuing to following the expectations outlined in the letter given March 20, 2007. The expectations letter will continue for the entire 12 months.
9/25/07

The foregoing summary of the Grievant's disciplinary record brings the fact statement to the incidents for which the discharge decision was made. The credible testimony of several eyewitnesses proved consistent and outweighed certain denials by the Grievant.

The record establishes that on November 27, 2007 the Grievant was assigned to Unit 900, the YAAP Unit, where he immediately proceeded to make rude, insulting, and obscene remarks to members of the YAAP staff including:

- Upon entering the guard station he said, "What the fuck are you doing with a glass fish tank in here? If they get in here there'll be weapons all over."

- While leaving a group session, he remarked, within the hearing of staff and patients about a TV and play station on a stand," "What the fuck, how many more weapons can you give these people?"

- Security Counselor Amy Bruning testified that after the Grievant left the YAAP Unit that same day he left a personal message on her cell phone that said: "Your unit is fucking ridiculous. The patients run your unit. It is best not to talk about work because it gets me fired up and pissed."

In addition to these rude and disruptive remarks, the Grievant engaged in certain arrogant and disruptive behaviors. These included:

- Bumping into a patient who argued about moving back from the yellow line Dr. Wanner had ordered him to stand behind. As demonstrated by an eyewitness, the physical contact was not violent but, nonetheless, it was contrary to prescribed practice in the YAAP Unit.

- Shoving a TV unit on a cart forcefully to the side as he preceded Dr. Wanner's group into a meeting room.

- Sighing and rolling his eyes in a disdainful manner while Dr. Wanner's was attempting to get a group activity underway.

It is important to note the context of intergroup animosity between staff members of Units 800 and 900 (YAAP). Several witnesses described the ill-feelings which sparked critical and often insulting comments usually directed at YAAP staff by members of 800 Unit staff.

These intergroup tensions grow out of the differences between the two unites in regard to type of patient form of therapy, and even program results. Most notably, the ages of YAAP patients is aptly described by its title – Young Adolescent and Adult Program – whose ages top out at 25. By contrast no upper age limits apply to patients in Unit 800.

The therapeutic protocol in YAAP was introduced in the Hospital only about two years ago, and emphasizes intensive 1:1 therapy, together with minimum physical restraints – rather, relying on "talking patients down" from heightened emotions and aggressive acting out of anger/frustrations. On Unit 800, however, limitations are more rigorous and physical restraint of potentially destructive behavior may be relied on as necessary in the discretion of staff.

It appears that certain of the Unit 800 staff, including the Grievant, have not accepted the therapeutic philosophy of YAAP and have expressed contempt and ridicule towards those who conduct the program.

Following reports of the Grievant's misconduct received by Unit Directors Kevin Eichler and Matt Schroeder, an administrative investigation was conducted by H.R. department personnel. Six security counselors and two staff psychologists who had personal information concerning the November 28, 2007 incidents were interviewed, as was the Grievant, accompanied by a union representative.

Top line administrators of the Hospital together with Human Resources personnel reviewed the resulting Investigative Report and determined that the findings supported a decision to terminate the Grievant's employment for just cause, citing:

Rules of Conduct and MHS Protocols #73355
Harassment of Employees (General)

> General Harassment, when referred in this policy, applies to behavior by an employee towards another employee which unreasonably interferes with the employee's work performance or which creates an intimidating, hostile or offensive work environment.

Sexual Harassment, as described in Campus-Wide Policy, #73350, Harassment of Employees – Discriminatory & Sexual, addresses unwelcome sexual advances, requests, or behavior between employees which interfere with an individual's employment or create an intimidating, hostile, or offensive employment environment.

Policy 9616 Incident Reports

Incident: An occurrence or event which may adversely affect the safety or well-being of individuals, or the operation of the MSOCS site.

MSH #73350 – Workplace Relations – 6/14/07 – SPRTC's Mission, Vision and Values Statement affirms our commitment to treat all persons with courtesy and professional respect…Staff will treat all persons with courtesy, dignity and respect. Staff are responsible for establishing and maintaining healthy working relationships with co-workers…Staff will treat all individuals with the same level of respect…Staff are accountable for their behavior.

MSH Protocol A204 – Employee Conduct/Boundaries/Boundary Violations – 7/16/07 - …Professional Behavior: Employee behavior in maintaining acceptable work conduct and as outlined in position descriptions, policies, procedures, work rules and other sources…Personal/Social Behavior: Employee verbal and non-verbal behavior and/or conversation that is personal, social and/or intimate in nature. …also includes behavior or conversation which crosses the appropriate professional behavior guidelines.

THE ISSUE

Did the Employer have just cause to discharge the Grievant?

If not, what remedy, if any, applies?

POSITION OF THE HOSPITAL

The evidence and testimony clearly demonstrates that the State had just cause to terminate the Grievant's employment.

The Grievant committed misconduct when he came over to work on the YAAP unit on November 27, 2007. From the moment he arrived on the YAAP unit that day, his behavior was unprofessional and non-therapeutic: he flicked the aquarium in the security counselors' station, commenting, "What a bunch of fucking idiots work here!" and shoulder-bumped a patient. His co-worker, Terry McDonough testified that he saw him do this.

YAAP security counselor Sherry Tousley and Amy Bruning described how the Grievant made loud derogatory remarks about the program and its treatment approach used as they were walking into work, prior to the November 27 incident.

After the Grievant shoulder-bumped the patient, he walked into the group therapy room and, in front of patients, sarcastically drew their attention to a portable television he stated to be a safety threat. He spoke at this time in a contemptuous and sarcastic manner.

Next, instead of respectfully assisting Dr. Wanner with her group therapy, he continued to behave badly by signing and rolling his eyes throughout the brief session. Dr. Wanner actually ended the session because of his distractions. Later, as he left the unit, his parting words to a YAAP security counselor were: "Your psychologist is fucking stupid and doesn't know how to do her job."

Such behavior violated several security hospital policies and protocols about treating patients and co-workers with dignity and respect. The evidence shows that he knew the workplace rules. He earlier had received memorandum warning that the consequences of non-compliance with these expectations could result in discipline up to and including discharge.

This is a work environment that is very dangerous and very difficult. These policies are about keeping people safe and promoting the therapeutic mission of the hospital.

Staff have to watch one anothers' backs at all times. It was not easy for many of these employees to testify. This hospital is a small place, and it was tough for them to come here and talk about the Grievant. These witnesses have a lot to lose – they depend on maintaining good working relationships with their coworkers. It was a risk for them to testify here today against such a senior co-worker. They deserve having co-workers whom they can rely upon and trust.

The employer needs – and has the right to expect – that hospital employees, particularly 18 year employees who are lead workers, will not:

- Walk into a unit and refer to colleagues as "fucking idiots,"
- Bump into patients who are already agitated and acting out,
- Proclaim that objects out on the unit floor are safety violations or potential weapons in front of patients, and
- Disrupt group therapy sessions with flagrant contempt of the therapists.

The YAAP program is the last best hope for many of these adolescent patients. This could be – quite literally – the end of the line for them.

The Grievant's termination should be considered in the context of his overall employment. As an 18 year employee and a lead worker, he knew better. He had a continuing record of progressive discipline, coaching, and counseling for almost two years preceding this last straw on the YAAP unit. He was explicitly warned of the consequences of the disrespectful behavior just several months prior to his covering on the YAAP unit. His behavior did not change.

Accordingly, the State respectfully requests that this grievance be denied.

POSITION OF THE UNION

The Grievant is an eighteen year employee with a generally good work record. During his career he was promoted from a Security Counselor to a Security Counselor Lead. The Employer assigned him to provide training to new employees. He built a career working at St. Peter Security Hospital and he loves his job. It's a tough job and not everyone can do that work well but he found it rewarding and after 18 years is now just a few years short of his retirement.

On November 27, 2007, the Grievant was assigned to a new unit, one he had never worked on before and was unfamiliar with their specialized practices. There is no dispute over the fact the Grievant misbehaved during the short period of time he was there. The Employer has failed to prove that he was guilty of the type of misconduct that adds up to just cause for discharge or even to serious penalty. The Grievant had never worked on YAAP unit before and he was there for an hour or less. No one in the unit introduced themselves to the Grievant and he did not know who was in charge. Ms. Bruning testified that staff from other units did not like to work on the YAAP unit. The Grievant literally lost the roll of the die and got the assignment.

Testimony states that the patients became upset the minute the Grievant walked into the unit. Dr. Wanner was there and was working directly with the Grievant but she never said anything to him about his behavior being inappropriate. It was her responsibility to do so. The position purpose (tab 12) states that Dr. Wanner was responsible to provide leadership and clinical direction to other program delivery staff. She was also responsible to resolve interpersonal difficulties but she took no corrective action.

It is understandable that the patients were upset because the Grievant was there. These patients are mentally ill and dangerous. He may have had to use restraints on some of them in the past to protect himself, his co-workers or other patients. One of these patients killed his grandmother because she restricted his use of pornography on the internet. The Employee mistakenly blames the Grievant and holds him responsible for the Unit 900's behaviors.

Dr. Carlson testified that the staff on the YAAP unit were given specialized training. The Grievant was not given that training, however. The Grievant is charged with bumping into a client with his shoulder. Dr. Carlson, however, did not believe this accusation warranted a written report. Unit Directors Kevin Eichler and Matt Schroeder testified that there was tension between Unit 800 and 900 – enough tension that they had to send a warning to all staff, not just the Grievant. Eichler testified that all staff, including coverage staff, were given training to work on that unit but yet he felt the need to develop a mere one page guideline specifically for coverage staff on Unit 900. Schroeder testified that the program delivery and philosophies are very different between the two units and are in fact quite opposite. Everyone working on YAAP the day in question failed to address his behavior or the potential danger from patients who were making threats to injure the Grievant.

He had worked under one kind of philosophy for 17-1/2 years and then spent less than one hour working on a unit with a totally opposite philosophy and is discharged. The Union asks that the discharge be vacated and the Grievant returned to work and be made whole.

DISCUSSION AND OPINION

The threshold problem in this case arises from the statement of the grounds for the discharge of the Grievant as set forth in the January 8, 2008 Notice of Termination. That Notice cites the grounds for the discharge decision as "your failure to maintain professional behavior with patients and staff and your failure to maintain therapeutic conduct with patients."

The terms "professional behavior" and "therapeutic conduct" are not otherwise defined and, standing alone, convey no specificity or particularity as to what commissions and/or omissions by the Grievant constitute just cause to terminate his employment. I remain aware that this kind of vague, even opaque terminology often derives from artful compromises in drafting governing legislation.

Other times such impenetrable prose issues from administrative committees that, in an excess of caution, draft standards of conduct so broad and general as to leave no misconduct however rare, uncovered. The unintended consequences that flow from lack of precision and clarity in drafting codes of employee conduct include:

- Possible ignorance among those subject to such standards as to exactly what behaviors are prohibited as well as the consequences for various kinds of misconduct.

- Depriving the accused of the specific commissions or omissions of which they are charged, thereby impairing their ability to defend against disciplinary action.

- In the absence of clear standards of conduct, enforcement of a consistent, fair, progressive, and corrective disciplinary policy becomes difficult, if not impossible.

- Without specificity and particularity in stating the rules of conduct consequences for violations of standards, and positive expectations of job performance, arbitrators of disciplinary grievances must bring a high level of subjectivity into determining whether or not an employer has shown just cause for the disciplinary action grieved.

No civilized jurisdictions in the Western world permit judicial review of matters which are not stated with adequate specificity or particularity. Under criminal law lack of clarity in the charges are grounds for dismissal as being "unconstitutionally vague." In civil cases, suits are routinely denied for "failure to state a justiciable cause."

Turning to the issue at hand, while the charges against this Grievant of "failure to maintain professional behavior with patients and staff" and "failure to maintain therapeutic conduct with patients," lack specificity, the language of the SPRTC Policy Bulletin 7335 spells out the behavior expectations of employees. From this source the meaning of the generic terms "professional behavior" and thergsentic conduct, as used in the termination notice must be inferred.

In relevant part, 73350 states conduct guidelines towards co-workers in unmistakable terms as related to the behavior of the Grievant on the lag in question, as follows:

- Staff will treat all persons with courtesy, dignity and respect.

- Are responsible for a healthy working relationship with co-workers.

Finding: The Grievant violated this expectation loudly declaring to members of YAAP staff as he entered the guard station words to the effect, "What the fuck are you doing with a glass fish tank in here? If they get in here, there'll be weapons all over." At one fell swoop, the Grievant insulted YAAP staff's judgment as to safety conditions, used obscenity in a mixed-gender work setting (a violation of federal, state and the Hospital's Sexual Harassment codes), and sought to damage working relationships with YAAP staff members by rude and arrogant behavior.

MHS Protocol 73355 states in part relevant to the facts of the instant case:

> This facility…at all attempt to provide a workplace environment free from employee general harassment.

Finding: The term general harassment distinguishes conduct, other than sexual harassment, which "unreasonably interferes with an employee's ability to perform their work, by creating a hostile, intimidating or offensive working environment."

The Grievant continued to use obscene language during his short one hour on the YAAP assignment including his remark regarding the TV unit and play station that he forcefully shoved asides earlier. "What the fuck, how many more weapons can you give these people?" This was said within the hearing of both staff and patients.

Still later, his personal message left on Amy Bruning's cell phone further tended to both undermine working relationships and create a hostile and intimidating work environment by the offensive statement, "Your unit is fucking ridiculous. The patients run your unit. It is best not to talk about work because it gets me fired up and pissed off." At least two women on Unit 900 testified that they felt intimidated by the Grievant's language and behavior.

Further remarks that were inimical to good working relationships included the Grievant's response to Ms. Bruning when she asked him if anything was wrong as they passed each other in a doorway. He replied "Your psychologist is fucking stupid. She talked to a patient at the half door and obviously does not know how to enforce the rules or do her job."

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None of the above cited protocols which the evidence shows that the Grievant violated specify what penalty applies. It follows that arbitral consideration must then be given to the factors considered by the Employer representatives who made the discharge decision. Consideration must also be given to what factors which should also have been weighed by the Employer which were not.

The testimony of Unit Director Kevin Eichler and YAAP Clinical Director Dr. Heidi Carlson, were both based on reports from on-duty staff rather than personal observation. This fact takes on special importance because Eichler reported to Director Matt Schroeder of Unit 800 at the time that the Grievant had to be replaced because "he was causing a ruckus" on Unit 900. Eichler obviously had reached this conclusion from second and third hand reports passed on by Dr. Carlson.

Review of the staff interviews contradict the conclusion that any of the offensive comments or behaviors by the Grievant's cited in these findings of fact actually caused the ruckus. Rather the interview statements make clear that the so-called ruckus, i.e., the tensions and resentments some patients exhibited toward the Grievant began as soon as he appeared in the guard station which was before he stepped into the ward. Obviously, the patients were not agitated by anything he said in the guard station but rather by his mere presence.

The animosity of certain patients towards the Grievant obviously came from their experiences with him when they were earlier patients on Unit 800. Consider Bruning's statement that:

> …patients were pacing and yelling. Ricky P. was saying, "I'm going to kick his ass and why is he here?" in reference to (the Grievant), who was in the office…Ricky responded that "(the Grievant) had been on 800 and was really bad."

Security Counselor Billy McCabe stated:

> He thought the unit was "hot"…the kids were very, extremely upset and stating "that mother fucker slammed me."…the patients became agitated when they [first] saw (the Grievant) behind the glass [in the guard station before entering the ward].

Security Counselor Steve Smisek also state that the patients' upset began immediately when the Grievant appeared in the guard station:

> They were in the office for shift change and on the unit a couple of patients were becoming agitated. [the Grievant] was by the half door and Ricky started to be more agitated…commented if he was going to stay…he (Ricky) was going to "go off." Another patient was saying similar things…He did not know what the history was between the two.

Security Counselor Sherry Tousley:

> Patients don't like [the Grievant] and were asking "why is that fucker here?" She tried to calm Mark down…Ricky commented "Why is that fucker laughing, tell him to get his ass out of here or I will kick his ass too."

The importance of the finding that none of the protocol violations by the Grievant "caused the ruckus" – which was the essence of the report to Unit Director Schroeder – lies in the extent to which the turmoil on the YAAP Unit factored into the discharge decision. Clearly, the Employer emphasized that the severity of the Grievant's misconduct was increased by the supposed threat to patients and staff, e.g., "This is a work environment that is very dangerous and very difficult. These policies…are about keeping people safe…" (Emphasis in the Hospital's written brief.

This observation prompts the following conclusion:

1. While the Grievant's protocol violations were serious, they did not rise to the severity of actually causing the turmoil on the YAAP Unit.

2. Given the importance of safety on Unit 800, the Employer had a substantial responsibility to:

- Screen out personnel who had not been adequately trained in and acculturated to the therapeutic modalities practiced on the UYAAP Unit. The minimal efforts to promulgate and enforce guidelines for Unit 800 personnel who, like the Grievant, were sporadically assigned this non-traditional duty, provided patiently inadequate.

- Prepare YAAP personnel to interpose promptly and effectively when several of them observed rising levels of agitation among patients and heard threats of violence against the Grievant before he even entered into the floor of Unit 800. No adequate safety procedures or training was provided to Unit 800 personnel to immediately direct the Grievant to leave Unit 900 when it became obvious that his very presence was escalating the threat level.

These considerations certainly do not exculpate the Grievant's rude and offensive language and demeanor towards YAAP personnel but the Employer's inadequate programmatic response to the animosity against Unit 800 staff does serve to mitigate against the discharge penalty. Arbitrators routinely mitigate penalties where employer representatives fail to adequately train employees in proper behaviors – particularly where safety issues are present.

There remains to be weighed into the penalty consideration, however, one final patient treatment violation by the Grievant which carried the potential for a serious outbreak of violence on the unit. That misconduct involved the physical contact with the patient who was on restriction and who defiantly remained standing on the yellow boundary line after Dr. Wanner had instructed him to move back.

The Grievant, contrary to the therapeutic guidelines on avoiding unnecessary contact with YAAP patients, moved his shoulder into the patient forcing him to move back from the yellow line. The inference suggested by this action was that he vented his impatience with the way staff handled non-compliance on the YAAP Unit by arrogantly demonstrating how such defiance was promptly dealt with on Unit 800.

The Grievant's denial that he had used any forceful contact with "Nate" is unconvincing. Neither can he rely on the excuse that, in regard to such contact, he had not been warned against such tactics. In point of obvious fact, it was precisely the prohibition against the use of force on Unit 900 that galled the Grievant and other Unit 800 staff. This violation stands as far the most serious breach of rules, guidelines and protocols because it put patients, other staff, and himself at significant risk. The evidence shows that patients like Ricky, Nate, and others mentioned in the testimony had been removed from the therapeutic modalities of Unit 800 and were now in the far less restrictive and indeed, benign culture of the YAAP. The threat of a return to the often forceful restricting measures they left behind could only have caused alarm and hostility.

The differences between treatment methods on Units 800 and 900 described by several witnesses are sharply contrasting. The crux of these differences were cited as "On 900 counselors' intervene early and do a lot of negotiating, of talking agitated patient down." "On 800, if you do something wrong they do a take down." "Our rules not black and white. We talk more to our patients. We are more lenient."

As this evidence unfolded it became cumulative to the effect that the agitation among YAAP patients erupted not only because the Grievant appeared at Unit 900 guard station, but was common when other 800 staff came on the scene. Prominently mentioned besides the Grievant were 800 staff Tish and Kennedy. This tension and antipathy by patients on YAAP to temporarily assigned security counselors from Unit 800 clearly called for substantially greater and more effective measures by the Employer to train and to acculurate Unit 800 personnel than was provided. Certainly the single page guideline issued by management was palpably inadequate to deal with such a seniority problem.

Summary and Mitigation

The evidence soundly establishes that the Grievant made several obscene and disparaging remarks to YAAP staff, showed contempt for the program's philosophy and therapeutic methods, and made impermissible physical contact with a patient while on duty.

He also sought to undermine the YAAP on earlier occasions by belittling remarks within the hearing of Unit 800 staff and insulting comments about its clinical staff to security counselors.

As serious as these several misconducts are, however, a degree of mitigation applies due to the fact that certain underlying conditions inimical to inter unit relationships were well known to the Employer and went inadequately addressed. The new approach featured in YAAP obviously provokes the fear and threats which change usually brings to other established work groups. It stands as a cardinal rule of management that change is disruptive and must be carefully managed.

The mitigating effects of inadequate training for and orientation to the changed work culture of YAP on other unit staffs, however, is not as important as the following two factors:

Apparently no person was on the scene at the time of the Grievant's misconduct who was authorized or willing to direct him to promptly cease and desist from his disruptive behavior. The hearing record does not detail the chain of command on Unit 800 at the time but I find it surprising that, at a minimum, no on-duty clinician or lead person did not stop the Grievant's provocative verbal abuse on the spot – particularly in view of what several security counselors testified was virtually a prelude to riot. Hospital management must share some responsibility for the unfortunate events by failing to delegate clear authority to an on-site employee to deal with such provocative misconduct.

By far the most significant mitigating factor, moreover, is the 16 plus years of productive service rendered by the Grievant before his first and only significant disciplinary episodes which led to a written reprimand, a one-day suspension, and a Letter of Expectations issued. The suspension was for spending excessive time away form his work station and attempting to get a co-worker with whom he had a poor relationship transferred out of Unit 900.

These considerations apply to the Grievant's long unblemished service:

1. Arbitrators routinely credit years of good service as warranting mitigation value in assessing the severity of the penalty where guilt of charges is established. The rationale for such mitigation arises from questioning whether the proven misconduct was "out of character" for a grievant and therefore an aberration subject to appropriate remedial disciplinary action.

2. The Grievant's prior disciplinary incidents do, indeed, strongly suggest that he has the ability to respond favorably to coaching and counseling. In particular regard, Unit Director Schroeder's hearing testimony and his written summary of the Grievant's responses to his Letter of Expectation were most enlightening.

Schroeder concluded in his evaluation of compliance with expectations memo of 5/2/07:

> Has responded well to the letter…not receiving phone calls from outside sources…no complaints from staff…take an active role in training new staff…7/19/07…continues to follow guidelines…upon speaking to and encouraging him to continue the good work Rich stated: "I'm doing what I've always done." Discounting the work being done is any different than in the past…has made progress with expectations outlined in letter…9/25/07…continues to follow guidelines. Rich continues to feel that he has always acted according to expectations, discounting the positive reinforcement given…continues to make progress in areas outlines.

3. For all but about one hour of the 18 years of service, the Grievant, according to his performance evaluations, had only two relatively minor misconducts. The principle of proportionality must be weighed in determining whether the termination of such a senior employee's employment is the appropriate penalty for those improprieties committed in such a brief period relative to the Grievant's long period of meritorious service.

DECISION

In spite of the elements of mitigation warranted in this case, the Grievant's misconduct was obviously willful and antagonistic. His disruptive language and demeanor, his action in making impermissible contact with a patient and his contempt for the YAAP staff shown by his sarcasm while Dr. Wanner was engaged in therapeutic measures – all these violations of applicable protocols constitute serious offenses.

While falling short of just cause for termination, these serious offenses warrant appropriately serious penalty. That penalty must suffice as grave warning to any and all other staff who are temporarily assigned to the YAAP Unit that they must fully comply with those protocols that demand respectful cooperation with staff and patients on Unit 900.

Based on the foregoing findings and conclusions:

The Grievant shall be immediately reinstated to the position of Security Counselor.

He shall be demoted from the Lead Counselor job.

He shall receive no backpay, benefits or seniority accumulation for the period of his separation from employment on January 8, 2008 until the date of his return to work.

He shall participate in whatever coaching, counseling and/or training as the Employer deems necessary towards remedying his attitude and conduct relative to the protocols he violated.

_____11/18/2008_____ _____

Date John J. Flagler, Arbitrator