

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration)
between)
) **Case No. AAA 75 390 393 06**
WASHINGTON FEDERATION OF)
STATE EMPLOYEES, on behalf of)
Andrew Sandoval,)
Grievant,)
) **DECISION AND AWARD**
and)
) **Sandra Smith Gangle, Arbitrator**
DEPARTMENT OF SOCIAL AND)
HEALTH SERVICES,)
Employer)
)
)
_____)

Hearing Conducted: May 23, 2007

Representing the Grievant: Gregory M. Rhodes, Attorney at Law
Younglove Lyman & Coker, P.L.L.C.
1800 Cooper Point Rd. SW, Bldg 16
P.O. Box 7846
Olympia. WA 98507-7846

Representing the Employer: Donna J. Stambaugh, WSBA #18318
Assistant Attorney General
State of Washington
1116 West Riverside Avenue
Spokane, WA 99201-1194

Arbitrator: Sandra Smith Gangle, J.D.
Sandra Smith Gangle, P.C.
P.O. Box 904
Salem, OR 97308-0904

Date of Decision: August 28, 2007

BACKGROUND

This matter came before the arbitrator pursuant to a collective bargaining agreement between the State of Washington ("the Employer") and Washington Federation of State Employees ("the Union") effective between July 1, 2005 and June 30, 2007. *Ex. Jt.-1 (Ex. E-24)*¹.

A grievance was filed in this matter on or about October 17, 2005. *Ex. E-3*. The parties, having been unable to resolve the disputed issue during the grievance procedure, selected Sandra Smith Gangle, J.D., whose office address is P.O. Box 904, Salem, Oregon 97308, through selection procedures of the American Arbitration Association, as the labor arbitrator who would conduct a hearing and render a decision in the matter.

A hearing was conducted on May 23, 2007 in a conference room of the Douglas County Fire District No. 2 in Wenatchee, Washington. The parties were thoroughly and competently represented by their respective attorneys throughout the hearing. The Union/Grievant was represented by Gregory Rhodes, Attorney at Law, of Olympia, Washington. The Employer/State was represented by Assistant Attorney General Donna J. Stambaugh, Spokane, Washington. A court reporter from Bridges & Associates was present throughout the hearing and made a record, which she subsequently reduced to a written transcript² for the arbitrator and the parties.

The Employer did not object to procedural or substantive arbitrability of the issue. The parties were each afforded a full and fair opportunity to present testimony and documentary evidence in support of their respective positions. The parties presented a 30-minute video to the

¹ Employer Exhibits are referenced herein as E-#, Grievant's Exhibits as G-#, Joint Exhibits as Jt-#

² Excerpts from the transcript are referenced herein by the page number, as TR.#.

arbitrator at the beginning of the hearing. The video, which was silent, was made from a tape that had been running automatically in a camera in the Grievant's classroom during one of the two group meetings in which events occurred that ultimately led to the Grievant's termination.

The following witnesses appeared and testified under oath and were subject to cross-examination: (a) ***For the Employer:*** Pam Arena, Administrator of Canyon View Community Facility, Tom Heywood, Supervisor at Canyon View, Andrew Sandoval (Grievant, adverse witness) and Marty Butkovich, Spokane Regional Administrator for Children's Administration, Washington Department of Social and Health Services (DSHS); (b) ***For the Association:*** Andrew Sandoval, Grievant. Also present throughout the hearing were Gary Carlsen, Labor Relations Manager, DSHS, Charlene Spilker, Human Resource Manager, DSHS, and Amy Murphy, Senior Field Representative, Washington Federation of State Employees.

Written briefs were submitted by both parties in lieu of oral closing argument. The arbitrator officially closed the hearing and took the matter under advisement upon receipt of the parties' briefs on July 27, 2007.

The arbitrator has considered all the testimony and evidence offered by the parties at the hearing. She has weighed the evidence and given careful consideration to the arguments of the parties, as contained in their briefs, and any arbitral authority submitted to support the arguments.

STATEMENT OF THE ISSUE

The parties agreed at the hearing that the issue is as follows:

Was there just cause to terminate the Grievant, pursuant to Article 27 of the collective bargaining agreement?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 27
DISCIPLINE

- 27.1 The Employer will not discipline any permanent employee without just cause.
- 27.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions and discharges. Oral reprimands will be identified as such.
* * * * *
- 27.7 Prior to imposing discipline, except oral or written reprimands, the Employer will inform the employee in writing for the reasons for the contemplated discipline and an explanation of the evidence. The Employer will provide the Union with a copy. The employee will be provided an opportunity to respond either at a meeting scheduled by the Employer, or in writing if the employee prefers. A pre-disciplinary meeting with the Employer will be considered time worked.
- 27.8 The Employer will provide an employee with fifteen (15) calendar days' written notice prior to the effective date of a reduction in pay or demotion.
- 27.9 The Employer has the authority to impose discipline, which is then subject to the grievance procedure set forth in Article 29. *****

ARTICLE 29
GRIEVANCE PROCEDURE

29.2 **Terms and Requirements**

A. **Grievance Definition**

A grievance is an allegation by an employee or a group of employees that there has been a violation, misapplication, or misinterpretation of this Agreement, which occurred during the term of this Agreement. The term "grievant" as used in this Article includes the term "grievants".

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29.4 **Filing and Processing — Departments of Corrections and Social and Health Services Employees (Non-Panel Process)**

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D. **Authority of the Arbitrator**

- 1. The arbitrator will:
 - a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement.
 - b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it.

* * * * *

- 3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

E. **Arbitration Costs**

- 1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties.

Ex. Jt-1

STIPULATION

The parties agreed upon the following **Stipulation** at the hearing:

The termination is based solely on the two allegations outlined in the discharge letter.

TR. 14

The **discharge letter**, which is referenced in the stipulation, was issued by Regional Administrator Martin J. Butkovich on October 3, 2005. It provides as follows, in pertinent part:

This is official notification of your dismissal from your position as a Juvenile Rehabilitation Residential Counselor with the Department of Social and Health Services (DSHS) at Canyon View Community Facility, Juvenile Rehabilitation Administration, effective immediately. This action . . . is a result of your conducting group sessions with youth at Canyon View on March 8, 2005 and July 19, 2005, with curriculum which was not listed in the Dialectical Behavior Therapy (DBT) approved curriculum and additionally by your failure to follow your supervisor's and administrator's expectation for the July 19 session of conducting a session using the approved DBT curriculum. You chose a topic that was outside the DBT curriculum and not approved by your supervisor or the administrator.

* * * * *

On March 8, 2005, you conducted a group which you termed a "DBT" group that instructed youth on how to properly wipe themselves following a bowel movement. This was not an approved group nor was it part of the approved curriculum that you were authorized to conduct.

On July 25, 2005, Mr. Tom Heywood, Juvenile Rehabilitation Counselor, found two questionnaires and group notes in the daily log book from a group you conducted on July 19, 2005 which contained inappropriate questions. You admitted that the use of this material was not in the DBT curriculum book. You indicated that you used the material as an "ice breaker" to get the youth involved. You failed to follow the expectation from Ms. Pam Arena, Canyon View CC Program Administrator, or Mr. Heywood, that your groups would be with material from the DBT curriculum book or if not, you would gain approval from Ms. Arena or Mr. Heywood prior to the group session. You failed to use material from the DBT curriculum book and failed to seek approval to use material not identified in the curriculum book. * * * * *

Ex. E-1

STATEMENT OF THE FACTS

The relevant facts of this matter are as follows:

The Grievant was employed for nineteen years at Canyon View Community Facility (Canyon View) in Wenatchee, Washington. His initial assignment was as a nurse (four years). He then worked as a Juvenile Rehabilitation Residential Counselor for fifteen years. He was a licensed chemical dependency counselor.

Between 1994 and 2001, the Grievant received six reprimands and memos regarding inappropriate conduct. Those documents are summarized as follow:

- **May. 18, 1994:** letter of reprimand for unprofessional conduct in pulling down a youth's pants in a "humorous attempt" to get the youth to relate and put him in a better mood; the letter warned that "further corrective and/or disciplinary action" would be taken "if this type of situation reoccurs or you present yourself in an inappropriate manner";
- **March 22, 1996:** letter of reprimand regarding a non-professional, inappropriate and sexist remark the Grievant had made to a female employee at Canyon View, thereby offending her, and referencing "previous occasions" involving "comments or remarks which also hedged on sexual harassment"; the reprimand warned that "further incidents, will initiate more formal action";
- **March 2, 1998:** memo regarding inappropriate discussions with youth and visitors about an investigation that was being conducted regarding the Grievant's personal behaviors;
- **November 6, 1998:** memo concerning an interaction the Grievant had had with youth who were not residents at Canyon View and inappropriate comments he had made to a female employee at Canyon View; as corrective action, the Grievant was required to attend a second sexual-harassment training;
- **August 23, 1999:** letter of reprimand for failing to follow supervisory directives regarding inappropriate verbal and physical interactions with underage female friends of Canyon View youth on separate occasions in October 1997, January 1998 and February 1998;
- **October 8, 2001:** counseling for inappropriate behavior, showing anger and possible intimidation, during an interaction with a youth the Grievant was counseling.

Ex. E-21

Canyon View is run by the Juvenile Rehabilitation Administration (JRA), the division of State of Washington DSHS that provides supervision and rehabilitation of juvenile offenders.

The primary mission of JRA is rehabilitating the young people who are assigned to its jurisdiction by the juvenile court. Accountability is also an important goal.

Canyon View is a minimum security community facility where youth are free to attend school and hold an outside job. The young men assigned there have all committed serious misconduct of a criminal nature, have already been incarcerated for a period of time in a maximum, medium or minimum security institution and have been deemed eligible to transition to a community parole status. Canyon View is also a recovery house certified through the Division of Alcohol and Substance Abuse. All the students assigned there are diagnosed as chemically dependent. Many of them have mental health issues as well. All the counselors at the facility are licensed chemical dependency counselors.

The Grievant underwent training on a variety of counseling techniques during his tenure with JRA. His training record shows that, in September of 2002, he took 16-24 hours of Cognitive Behavioral Therapy (CBT) and Dialectical Behavioral Therapy (DBT) training. *See Ex. E-22, p. 1,2; Ex. E-5, p. 3; Ex. E-22, p.2; TR. 43.* He underwent 56 hours of additional training in the Integrated Training Model (ITM), in monthly segments, during the spring of 2003. *Ex. E-22, p.2, TR. 43-44.*

Tom Heywood, the Grievant's supervisor, has undergone extensive skill-training in CBT and DBT and is considered an expert in the therapy field. He explained both of those protocols, as well as the ITM Model, for the arbitrator. The CBT protocol is designed to help people develop an understanding of their unique, sometimes incorrect, perception of the world, then change that perception through taking specific self-directed action. *TR. 108.* The objective for CBT/DBT counselors at Canyon View is to rehabilitate the juvenile offenders, by using positive

reinforcement of good behaviors, rather than emphasizing punishment of bad behaviors. *TR. 112.* DBT, the protocol that grew out of CBT, deals with emotions. DBT has proven particularly effective with young males who have suffered childhood abuse and need to lessen their drive to pursue self-damaging emotional responses to their past traumas, including chemical dependency and suicide. *TR. 108-112.* The ITM model coordinates CBT and DBT, Heywood explained.

On or about March 10, 2005, one or more Canyon View students reported to Mr. Heywood that the Grievant had conducted a group meeting two days earlier in which he explained how they should wipe themselves after a bowel movement. One of the students raised a question about whether the subject had been appropriate for group discussion. *TR. 49-50, TR. 89, 113.* Manager Pam Arena happened to overhear the conversations and became concerned that the Grievant was teaching inappropriate subject matter in groups. She then contacted her supervisor, Mr. Butkovich, whose office is in Spokane. Mr. Butkovich recommended that she conduct an investigation. *TR. 50-51.*

Students were interviewed and statements taken. *TR. 114, Ex. E-7.* The videotape of the March 8 group meeting was removed from the camera in the classroom where the Grievant's group discussion had taken place and was reviewed. The Grievant's own log notes from the subject group meeting, as transcribed by a secretary, were reviewed. *Ex. E-11.* Those notes confirmed that eight students had participated in the March 8 group. The Grievant identified the topic of the day as "Healthy Habits, Healthy Choices". His detailed summary showed that the discussion had focused on bathroom habits and behaviors and included the subject of contamination that can result from contact with another person's bodily fluids. *Id, TR. 52-5.*

Ms. Arena concluded that the Grievant had conducted an unapproved group discussion on

March 8. He had self-identified a group of new students to form a group. Also, he had addressed subject matter that was not contained in the curriculum he was required to use for group meetings. *TR. 57-58; see, Ex. E-23*³. Ms. Arena recalled that the Grievant had taught the same toileting class as part of a "Healthy Habits, Healthy Choices" program back in the 1990's, but she believed he had been told by a past supervisor to stop using that material. *Tr. 105*.

Mr. Heywood conducted a fact-finding meeting. *TR. 115*. The Grievant acknowledged at that meeting that he had demonstrated for students on March 8 how they should wipe themselves. He said he had broached the subject due to health concerns, because it had come to his attention that some of the students had been soiling the bathrooms in the facility recently. He wanted to warn all the students, especially the new ones, that there was a danger of spreading disease from such messes. *TR. 85. 119*.

The Grievant had taught the same class in the past as part of "Healthy Habits, Healthy Choices" training. *TR. 83-85*. He acknowledged at the hearing however, that an Administrator named Mr. Kent had told him, back in the 1990's, "never to do that [demonstration] again" for community groups. *TR. 152*.

Since students had complained about the subject-matter of the March 8 meeting, as well as other issues that involved possible abuse,⁴ the Grievant said he felt there was a conspiracy against him. He asked supervisors Heywood and Arena to relieve him of the responsibility of conducting groups and taking urinalysis exams from students and that request was granted. The

³ The record is unclear as to the precise curriculum manual that was in use on March 8. The parties agree that Ex. E-23 was not available until after March 8, but that the Grievant was generally familiar with its contents on that date.

⁴ The "other issues" were complaints of conduct by the Grievant that were reportable to the authorities by law. The Grievant's supervisors promptly referred those matters to the Washington State Patrol for investigation. The Grievant was ultimately cleared of wrong-doing on those complaints. The parties' stipulation refers to those additional matters as being excluded from consideration in this arbitration. *See p.5 infra*.

supervisors also changed the Grievant's work schedule, so that he would not be alone with students at any time during his shift. *TR. 60-61.*

In April, and May of 2005, the Grievant underwent training in new applications of the ITM model, called *Coaching on the Floor and Case Management. TR. 121, 138; see also TR. 95.* A comprehensive new manual was issued at that time. *TR. 139, lines 10-15, Ex. E-23.*

In the first week of May, the State Patrol notified the Grievant that the students' allegations of potential abuse had been dismissed as unfounded. The Grievant then asked Mr. Heywood and Ms. Arena to permit him to go back to facilitating a DBT skills group. The Grievant promised that he would stick to the curriculum as set forth in the manual and that he would not address material outside the curriculum without Ms. Arena's express permission. *TR. 62-63, 121-22, Ex. E-16.*

On July, 25, 2005, Mr. Heywood found by happenstance, in a log book that was left in the office area, a document containing a list of ten questions. There was a student's name and sketch on the document as well. Mr. Heywood was disturbed by the questions, which were as follows:

- What race was the Missionary?
- What religion was the Missionary?
- What sex was the Missionary?
- What country was the Missionary in?
- What language did the Missionary try to teach the savage?
- What race was the savage?
- What sex was the savage?
- How old were the savages that were making love?
- What were the sexes of the two lovers?
- What type of weapon did the savage use on the two lovers?

See Ex. E-13.

Mr. Heywood traced the document's origin to a student in the Grievant's counseling group, then reported what he had found to Ms. Arena. Mysteriously, a second document, entitled

"The Story", appeared in Ms. Arena's mailbox soon thereafter. Ms. Arena believed "The Story" was connected to the list of questions. Its content was as follows, in pertinent part:

...The Missionary ... decided to spend those last days teaching the savages the Missionary's native language. So, the Missionary ...chose the savage that would one day become the leader of the tribe....[and] took the savage out to the countryside. . . . [A]s the Missionary continued down the path, the savage stayed behind to investigate a moaning noise coming from behind the boulder. . . . The savage . . .asked the Missionary, "What do you call that?" The Missionary looked over the top of the boulder and was extremely flabbergasted at seeing two savages making passionate love. The Missionary, being too embarrassed to explain to the savage what he saw, said, "That's calledah...ah, that's called 'riding a bicycle'." As the Missionary turned away to leave, the savage suddenly pulled out a weapon and used it to kill the two lovers dead on the spot. The Missionary, appalled by what had just occurred, yelled out, "Why! Did you do that?" The savage responded, "Because, Missionary, that one there was riding my bicycle."

Ex. E-14

Mr. Heywood began an investigation, by interviewing the Grievant's students. *TR. 123*. He learned that the Grievant had read "The Story" to them and then distributed the list of questions for discussion in a group meeting on July 19, 2005. *TR. 69-71*.

Mr. Heywood then reviewed the Grievant's log notes for July 19. The Grievant had described the Group Content for the day as: "How to describe/be mindful of people, places and things, without being judgmental." *Ex. E-15*. He had not referenced "The Story" in the notes.

Ms. Arena conducted a fact-finding meeting with the Grievant. *TR. 71*. He did not deny that he had presented "The Story" and the list of questions. He said he had introduced the material as an "ice-breaker" to the July 19 class. *TR. 72*. The actual subject-matter for the day, he explained, had been "how to be non-judgmental" about race, gender, and national origin. He introduced "The Story" as a "mindfulness exercise", or a way of getting his students to focus on their own possible biases. *TR. 99*. He acknowledged, however, that he had not obtained

permission to use the material, and that the subject was outside the curriculum. *TR. 98.*

From her review of the documents, Ms. Arena concluded that the Grievant had presented material that was not only unapproved, but included sexual content and violence and was culturally offensive. Some of the characters in "The Story" were called "savages". Two Native Americans in the group had been offended by that reference. *TR. 73, 98.*

Ms. Arena placed the Grievant on home assignment, then scheduled a pre-termination hearing, so that the Grievant could offer his reasons why he should not be terminated. Regional Director Martin Butkovich conducted the pre-termination meeting on September 27, 2007, at which the Union represented the Grievant. Mr. Butkovich considered the Grievant's input, then reviewed the Grievant's prior disciplinary record. He ultimately decided to terminate the Grievant. *TR. 215, Ex. E-1, E-2.*

It is that termination that is the subject of the instant grievance.

POSITIONS OF THE PARTIES

A. The Employer: The Employer contends it had just cause, as required by the collective bargaining agreement between the State and Washington Federation of State Employees, to discharge the Grievant.

On March 8, 2005, the Grievant addressed, in a group meeting, a subject that was inappropriate for group discussion with the vulnerable teen-aged youths who were his counselees. The subject, how to wipe oneself after a bowel movement, was not part of the approved curriculum. Some students were embarrassed or offended by the discussion.

Two months later, after taking additional CBT/DBT training, the Grievant requested to renew his groups. His supervisors granted the request, on the express condition — and with the

Grievant's express promise — that he follow the CBT training manual and not teach anything outside the prescribed curriculum.

In spite of management's direction and the Grievant's own commitment, he brought up an unacceptable subject in a July 19, 2005 group meeting. "The Story" and the questions he asked about it were outside the curriculum and had not been pre-approved. Further, "The Story" involved prohibited subject-matter, a combination of sex and violence, and was particularly offensive to Native Americans. The Grievant presented "The Story", with apparent disregard for the negative effect the discussion would have on the very youths he was responsible for counseling according to a strict rehabilitative model.

The Employer contends discharge is the only appropriate sanction. The Grievant intentionally and repeatedly refused to meet the employer's workplace standards. He had undergone repeated training in the requirements of the CBT/DBT curriculum, yet he failed to follow that training and used exceptionally poor judgment in choosing subjects to present in group discussions.

B. The Union: The Union contends the Grievant did nothing that was unauthorized. He had conducted group discussions on personal health and hygiene in the past. One of the discussion topics had been how to wipe oneself after a bowel movement. When he learned that some new admittees to Canyon View were likely making messes in the facility's bathrooms and could be spreading disease, he saw a good reason to address the subject again.

As for "The Story", the Grievant believed the subject matter was appropriate as a "mindfulness" exercise. Mindfulness is a technique that is authorized by the DBT manual, to get students thinking about the skill that is being taught that day. The Grievant had learned from one

of his trainers that group leaders could be creative in developing mindfulness exercises. In this case, the discussion was appropriate in order to illustrate the skill of being non-judgmental, which is included in the curriculum manual.

The Union asserts that the Grievant was not deliberately insubordinate. He had a legitimate purpose when he presented the particular material that his supervisors later found objectionable. The CBT manual focuses on theory and is short on curriculum content. Therefore, each counselor must use his/her discretion and creativity in choosing the subject matter for group discussions.

For those reasons, the Union asks the arbitrator to grant the grievance and reinstate the Grievant with full backpay and benefits.

ANALYSIS AND DECISION

The parties' collective bargaining agreement provides that the Employer may not discipline or discharge any permanent employee without just cause. *Ex. Jt- 1, Article 27.*

Many arbitrators have defined the disciplinary standard of just cause by reference to the "seven tests" which Arbitrator Carroll R. Daugherty theorized are its essential attributes. *See, for example, Enterprise Wire Co., 46 LA 359 (1964).* In recent years, arbitrators have moved away from a mechanical implementation of the seven Daugherty tests. The majority still rely on four basic principles that are contained within those tests, however. Arbitrator Joseph Duffy articulated the four essential requirements of just cause in his 2006 Award in a discharge case between the Employer and the Union. He said the Employer must prove, through clear and convincing evidence, all of the following:

- 1) That the grievant had notice of the rules to be followed and the consequences of non-compliance;
- 2) That the grievant engaged in the alleged misconduct;
- 3) That there was procedural regularity in the investigation of the misconduct; and,
- 4) That the Employer applied discipline in a reasonable and even-handed manner, including using progressive discipline when appropriate.

See, Washington Federation of State Employees and Washington State Department of Social & Health Services, AAA Case No. 75 390 459 05 (Arb. Joseph Duffy, June 2, 2006) at 13.

The arbitrator agrees with Arbitrator Duffy's reasoning. She will now analyze the evidence to determine whether the Employer met the requirements of just cause in this matter.

1. Did the Employer provide notice to the Grievant of the rules to be followed and the consequences of non-compliance?

The evidence shows the Grievant perforated his job duties at Canyon View with little or no direct supervision by his Employer. He was trusted to perform the duties of a rehabilitation counselor in a professional and responsible manner. There is no evidence in the record showing that he was required to submit lesson plans for pre-approval by his supervisor. Also, there is no indication that the Grievant's supervisor ever listened in on his group discussions, in order to evaluate his performance or to provide feedback, positive or negative, on the manner in which he was communicating with students.

The Grievant was responsible for assisting the youth who came to Canyon View, because of a history of serious misconduct and substance abuse problems, to change their bad behavior patterns into good, positive behavior patterns. He received ample training in the most up-to-date

skills and techniques that were designed to accomplish the desired behavior changes, including CBT and DBT. The manual he was to follow shows he was to work on skills such as "Interpersonal Effectiveness", "Problem-Solving", "Distress Tolerance", "Emotion Regulation" and "Self-Respect Effectiveness". *Ex. E-23*. He was left largely on his own, however, to frame his group discussions in a way that would illustrate how those skills would be implemented effectively.

The manual did not address specific subject matter that would be appropriate for group discussion. The manual focused on techniques and skills, not subject-matter content. The Employer simply relied on the Grievant and other counselors to use their own good, sound, mature judgment in choosing appropriate topics.

The Employer's reliance on the Grievant's own judgment for performing his day-to-day duties adequately was curiously naïve. Even in an educational setting, where employees have college degrees and professional certification and have worked with students for many years, it is incumbent on supervisors to be aware of what is going on in individual classes and to monitor the progress that is occurring with the students. Supervisors should be constantly observing, evaluating and providing feedback to the professionals under their direction.

The arbitrator is concerned that the Employer was lax in its supervision of the Grievant. Clearly, supervisors Arena and Heywood had little, if any, knowledge of what the Grievant was discussing with his students in his group meetings. It was only by happenstance that they learned, after the fact, what had taken place on March 8 and July 19, 2005. It can be inferred that they had little knowledge of what was going on at other times as well.

In spite of that difficulty, the arbitrator does find that the Grievant had been apprised of

certain requirements and prohibitions regarding the subject-matter that he should discuss with students at Canyon View. The evidence shows as follows:

1. He was told as far back as 1990 that he should never demonstrate how to wipe himself after a bowel movement in front of community groups. *TR. 152.*
2. There was no express authorization for covering the "Healthy Habits, Healthy Choices" program materials in the CBT/DBT manual. *See generally Ex. E-23.* The "PLEASE Master" segment in the manual does address how to keep oneself healthy, but does not include toileting procedures as a subject for discussion. *TR. 132-33.*
3. The Grievant had undergone sexual harassment training twice, in 1996 and 1998, because he had made inappropriate comments of a sexual nature to female co-workers. *Ex. E-21.*
4. In a reprimand issued to him on August 23, 1999, the Grievant had clearly been told to avoid inappropriate comments that would invade others' privacy, especially the privacy of young persons at Canyon View and their friends. The reprimand provided as follows:

... You have a duty to teach residents appropriate behaviors, allowing them to practice skills in recovery, with the goal for them to become productive members of society. You have a responsibility to act as role model, counselor, mentor, teacher, motivator and activity leader, and to treat clients, coworkers and the public with dignity and respect. . . It is critical that your conversations and interactions with staff, residents and their friends be professional and appropriate and that you be cognizant of invasion of others' private space. You have failed in your responsibilities . . . when you made inappropriate comments to the underage female friends of Canyon View Group Home residents."

See Ex. E-21, Aug. 23, 1999 reprimand.

5. The CBT/DBT manual that was in effect in the spring of 2005 clearly provided on page 6, under "Role Play Directions" that there be "No sexual content", and that "Pleasant imagery [rated as] G or PG" be used in modeling the techniques in the manual.

The Union argues that the "Role Play" directions were not intended to apply to group discussions. The arbitrator disagrees with that interpretation, however. The context of the "no sexual-content" restriction within the manual shows that it was intended to apply to *all* the skill-based training techniques. The skills trainer is called an "actor" rather than a discussion leader or facilitator in the manual. *See Ex. E-23, page 5*. Therefore, it follows logically that all skill-building exercises conducted by the "actors" are considered "role plays".

Furthermore, the restrictions against sexual content and R-rated violence are consistent with house rules at Canyon View, such as "No R-rated movies" or other forms of entertainment that would be "mature, any violence, anything like that." *Testimony of Pam Arena, TR., p. 73*.

Based on the foregoing, the arbitrator concludes that the Grievant had been apprised of his duty to avoid the subjects involving personal toileting, sexual activity and violence in his group meetings. There is no clear evidence in the record, however, that he had ever been informed that he could be terminated if he addressed such inappropriate subject matter.

Nevertheless, arbitrators generally agree that there are certain types of misconduct that are so egregious it is not necessary to provide specific notice of the penalty that can be implemented for committing the misconduct. Arbitrators have found, for instance, that discharge was the appropriate penalty, even for a first offense by a long-time employee, for intentional or willful acts and incidents of gross negligence, where the employee knew or reasonably should have known that a substantial risk of harm could result from the employee's action, yet the employee acted in reckless or wanton disregard of the consequences. *See, e.g., T.W. Recreational Servs.*, 93 LA 302 (Arb. Richard, 1989); BHP Petroleum, 102 LA 321 (Arb. Najita, 1994); Vons Cons.,

100 LA 297 (Arb. Ross, 1992). One arbitrator found, for instance, that just cause existed for summary discharge, where the employee had made racial slurs, thereby ignoring previous warnings regarding offensive language. Eagle Snacks, 103 LA 741 (Arb. Baroni, 1994); *see also*, Fry's Food Stores, 99 LA 1161 (Arb. Hogler, 1992)(summary discharge upheld for a disparaging remark that was directed at a homosexual co-worker).

Ms. Arena and Mr. Heywood testified at the hearing that many of the students at Canyon View had suffered from childhood abuse and could easily be re-traumatized by discussion about private bodily functions. *See, TR. 83, 124*. Relying on that evidence, in the light of arbitral case law authority, the arbitrator finds that the use of such subject matter by an experienced and well-trained counselor, without prior approval by a supervisor, could be grounds for discharge, even if there had been no prior warning of that potential penalty.

II. Did the Employer prove, through clear and convincing evidence, that the grievant engaged in the alleged misconduct?

The evidence is uncontroverted that the Grievant conducted an unapproved group discussion with about seven students, including new admittees, on March 8, 2005 on how to wipe themselves following a bowel movement. The Grievant's own log notes of the meeting confirm that the discussion took place. A video camera was running in the Grievant's classroom during the entire half-hour meeting and the arbitrator viewed the videotape at the hearing. Although there was no sound accompanying the video and it was clear that the Grievant remained fully clothed throughout the lesson, it was clear that the Grievant discussed how to use toilet paper and demonstrated various sitting and wiping positions during the discussion. He also invited the students to mimic his behaviors.

The physical reactions of some students during the presentation indicated that they felt uncomfortable and embarrassed by the discussion. One student rocked back and forth and another stood up and paced around the room. A third turned a table over in front of himself, thereby creating a barrier, blocking his view of the Grievant. Those reactions should have been recognized by the Grievant, as the result of his professional training, as signs that the students were uncomfortable. Through his training and experience he should have known that those students could have been reminded of childhood abuse and that they were being re-traumatized by the discussion. *See, TR. 83.*

As for the discussion about "The Story" on July 19, 2005, the arbitrator is persuaded that the Grievant's supervisors only found the list of questions by accident and might never have learned about "The Story" otherwise. The Grievant "had concealed the matter when he prepared, his log notes of the meeting. When confronted about the documents, the Grievant pretended that they had been used as an "ice-breaker" for introducing the skill of being non-judgmental, which was an approved subject. His concealment, however, demonstrates that he was aware he had conducted an unapproved discussion about prohibited issues of race, sex and violence.

For those reasons the arbitrator finds that the Grievant knew or reasonably should have known he had committed serious misconduct. The evidence is persuasive that the Grievant knew he was in violation of his fundamental duty as a counselor and that he was potentially harming the very students he was trained and assigned to rehabilitate.

III. Was there procedural regularity in the investigation of the misconduct?

There is no contention in this matter that the investigation was either incomplete or unfair. The evidence shows that the Grievant's supervisors interviewed all the students who were

present in the Grievant's group meetings on March 8 and July 19, 2005. They interviewed the Grievant himself. They conducted a pre-termination hearing at which they allowed him to bring a Union representative. They reviewed his disciplinary record. It was only after a full, objective review of the evidence that the decision to discharge was made.

IV. Was the penalty of discharge reasonable and even-handed, under the circumstances?

This case involves the discharge of a long-time, highly-trained employee, who had a responsible position of a professional nature. His disciplinary record was far from spotless, though he had not been disciplined for about four years prior to the events of March and July 2005. His supervisors trusted him to work independently and to follow the requirements of his skill training in a responsible manner. He was trusted to act as a positive role-model and mentor for the vulnerable young men who were assigned to Canyon View.

The Grievant was not treating his students appropriately, however. He was not doing his job according to the protocols he had been trained to follow.

Looking at the evidence in the light most positive for the Grievant, the arbitrator finds that the Grievant's motivation, when he presented the subject of toileting, was to protect the young men at Canyon View from possible spread of disease. He also believed the subject was covered by "Healthy Habits, Healthy Choices" or the "PLEASE Master" programs. His log notes show that he made no effort to conceal the fact that he had addressed the subject. For those reasons, the arbitrator does not find that the Grievant merited discharge because of the toileting discussion alone.

The July 19 meeting is different, however. First of all, the Grievant had been expressly

notified in early May, when he began conducting group meetings again, that he was to follow the prescribed CBT/DBT curriculum only. He had expressly agreed to obtain Ms. Arena's permission for any subject matter outside the curriculum. In spite of that commitment, he failed to seek any supervisor's permission before using "The Story" and its questions in a meeting. Also, the Grievant did not mention "The Story" in his log notes about the July 19 meeting. This shows he intended to conceal the fact that he had introduced an unapproved subject in his group meeting. Most significantly, however, the "The Story" contained highly offensive material that was potential harmful to the very students he was hired to rehabilitate. "The Story" depicted a bizarre scenario in which a Missionary taught a "savage" a new language; then, while walking together, they came upon a couple "making passionate love" and the "savage" murdered the couple because he believed one of the lovers belonged to him. The story combined the prohibited issues of race, sex and violence. It was hardly "G-rated" or "PG-rated". It was clearly inappropriate for use in counseling teen-agers in the rehabilitation program and was potentially harmful to them, as it illustrated precisely the type of violent response to emotional situations that the CBT/DBT protocols are designed to discourage.

This was outrageous behavior that could not be tolerated at Canyon View. Progressive discipline would not be appropriate, as the Grievant had already demonstrated he would not correct his behavior when given the opportunity. Discharge was the only appropriate penalty for the misconduct he had committed, under the just cause standard.

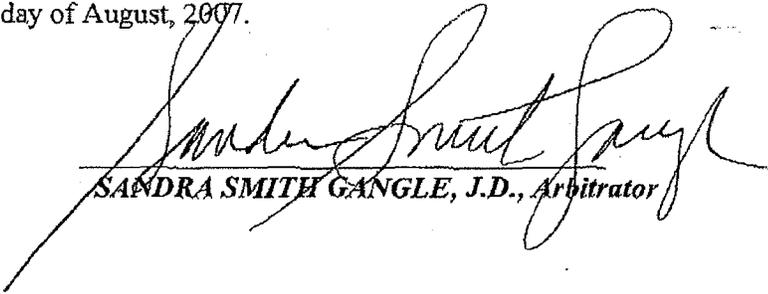
The grievance is denied.

AWARD

For the reasons set forth in the preceding analysis and decision, the arbitrator has determined that the Employer had just cause to discharge the Grievant. The grievance is denied.

The parties shall share equally in the arbitrator's fee and expenses.

DATED this 28th day of August, 2007.


SANDRA SMITH GANGLE, J.D., Arbitrator