BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between		
GRANT COUNTY PROFESSIONAL EMPLOYEES UNION, LOCAL 3377-A, WCCME, AFSCME, AFL-CIO	Case 40	No. 50452
and	MA-8259	
GRANT COUNTY		

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Jon E. Anderson, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Grant County Professional Employees Union, Local 3377-A, WCCME, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by Grant County, herein the County, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on February 25, 1994 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on April 7, 1994, at Lancaster, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on September 15, 1994.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties stipulated to the following:

1. Did the County violate the terms of the applicable labor contract when it suspended the grievant for three (3) days?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

James Gay, hereinafter referred to as the grievant, is employed by the Grant County Department of Social Services as a Social Worker III. The grievant functions in a lead capacity. His primary responsibilities include child abuse/neglect and delinquency cases. He works in an ongoing services unit of the Department.

Over time, the Department has recognized the importance of maintaining appropriate records in order to provide effective and timely protective services to families, children and other clients. To accomplish this, the Department has developed a number of policies and rules. These include, for example, a procedure requiring proper paperwork in juvenile delinquency cases from November, 1991; a policy/procedure issued October 21, 1992 concerning ongoing services and procedures and the required documentation and paperwork; a procedure issued November 10, 1992 for cases automatically referred to the

ongoing unit again emphasizing the importance of the ongoing worker providing pertinent information and turning "written documentation in to direct supervisor for review"; a policy revised December 14, 1992, under which an ongoing worker in child abuse and neglect cases is required to open a strip showing the kind of service being provided and include other relevant information for case tracking; a Department "Reminder" dated January 28, 1993 stating "All GMIS forms and turnaround forms are to be handed in, with the appropriate review, plan, or closing, to your supervisor and not sent directly to Vickie."; a March 17, 1993 memo, which was covered in a staff meeting as well as an inservice training, on the importance of using the SOAP recording format to record all case information; an April 12, 1993 policy on maintaining a master file system for all cases; and, finally, a policy dated August 20, 1993 stating that all paperwork and files "should be maintained in such a manner that they are both orderly and neat."

In early November of 1993 some referrals were received by the Department regarding three of the grievant's ongoing cases. A supervisor, Marian Ballos, received the referrals and went to review the case files on these individuals. She found that the records were incomplete. In one child protective service case involving "D.B." there was no documentation. For example, there was no family assessment, no treatment plan and no indication of any case action or contact with that client. The other two files were also deficient. In one -- a child protective service case file -- a turnaround was missing. 1/ The third dealt with a juvenile delinquency file and related to whether or not action was taken pursuant to a court order. In this case there was no indication of action taken or court orders followed, no closing review or sign off despite the case having been closed in July, 1993. All of the above cases dealt with child safety issues.

Based on the incomplete nature of the above three files, Ballos felt it was appropriate to conduct a further investigation into the status of other files maintained by the grievant. The Department then conducted a review of all of the grievant's files on November 8, 1993. This review was conducted by Ballos and Justin Smith, another supervisor in the Department.

The audit revealed that over "90%" of the grievant's files were missing various pieces of information. According to Smith, some of the material missing was overdue by six months or longer and closed cases had "no documentation he'd ever assessed the family, he'd ever met the family, that he had ever done anything with the family."

On November 15, 1993, Steve Obershaw, the grievant's immediate supervisor, along with other management representatives, held a conference with the grievant regarding the status of his files. At the meeting, the grievant explained that he had a heavy workload and had not had time to stay current with the paperwork. The grievant also explained that "within 48 hours" he could have the case notes completed and in the files. The meeting ended with the grievant confirming that there was no discipline being imposed at that time.

By 9:30 a.m. the following day, November 16, 1993, the grievant completed all the case notes, and placed them in the files.

As a result of the audit, Obershaw consulted with the Department

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1/ A "turnaround" is part of the Department's computer tracking system for files.

Director, John Angeli, and with Personnel Director, Dwain Hoffman. Thereafter, Obershaw issued a three (3) day suspension without pay to the grievant on November 17, 1993. The suspension letter reiterated department policies and procedures that were previously issued and required compliance with; listed deficiencies in the grievant's case files in seven major areas of responsibility; rejected the grievant's explanation for not completing the proper documentation and for not adhering to procedure; indicated the Department would develop a plan for him to bring his files into compliance with agency policies; and finally, included an attachment listing specific deficiencies in 41 of the grievant's case files.

Following the disciplinary action against the grievant, employes in the bargaining unit were "scared"; felt that they might be next to be "suspended"; and, apparently, did a lot of catching up on paperwork.

The grievant's normal caseload is in the low 40's. However, in early September, 1993, the grievant returned from vacation and found that his caseload was extremely high, around 55 cases. The grievant then approached Obershaw and told him that he was "the farthest behind that I'd ever been in my career and things had to change. They just can't keep adding cases." Obershaw's response was that other workers were experiencing the same problems, and that everyone just had to do the best they could.

Obershaw has served as the grievant's supervisor since the summer of 1993. Part of the duties of the supervisor is to conduct periodic reviews of case files with the employe. More commonly, if the grievant submitted files for review, then Obershaw conducted a review. In July 1993, after one such review, Obershaw found that a file was missing a turnaround. Obershaw then told the grievant that he needed the turnaround with the file. The grievant replied that his previous supervisor did not require this. Obershaw reminded the grievant of the proper procedure. He also indicated that he was not seeing the grievant's reviews. In reply, the grievant stated that he was behind on some. Obershaw advised the grievant to get caught up, but gave no time frame by which this was to be accomplished.

At the time the grievant was disciplined, he had cases that required reviews after 6 months, after 90 days, and after 45 days.

The grievant testified that his previous supervisor, Dean Marzofka, never indicated any problems with the quality of his files, nor did Marzofka ever issue the grievant any discipline for the quality of his files. Justin Smith testified, on the other hand, that Marzofka had informed him on several occasions "that he was dissatisfied with Mr. Gay's performance, that he was in the process of trying to work with Mr. Gay on his performance," but that the grievant "was angry and unresponsive and that he took repeated reminders to get him to try and change his behavior."

The County had not issued the grievant any discipline for the quality of his files prior to the instant dispute. Nor did the County warn him that the condition of his files might subject him to discipline. The grievant has been employed by the County for approximately 24 years.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 2 - MANAGEMENT RIGHTS

> 2.01 It is agreed that the management of the County and the direction of employees are vested exclusively in the County, and that this includes, but is not limited to the following: to direct and supervise the work of employees; to hire, promote,

demote, transfer or lay-off employees; to suspend, discharge or otherwise discipline employees for just cause; to plan, direct and control operations; to determine the amount and quality of work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added or modified; to change any existing service practices, methods and facilities; to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules.

2.02 The County's exercise of the foregoing functions shall be limited only by the express provisions of this contract, and the County and the Union have all the rights which they had at law except those expressly bargained away in this Agreement.

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ARTICLE 5 - GRIEVANCE PROCEDURE

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Step Four - Arbitration

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B) Selection of an Arbitrator. The Union shall thereafter request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff. The decision of the arbitrator shall be final and binding on the parties. The arbitrator shall not modify, add to, or delete from the express terms of this Agreement.

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ARTICLE 6 - DISCIPLINE

6.01 The Employer shall not suspend, discharge or otherwise discipline any employee without just cause. When such action is taken against an employee, the employee will receive written notice of such action at the time it is taken, and a copy will be mailed to the Union within two (2) calendar days, except that written notice of oral discipline shall be given to the employee and the Union as soon as possible after the action is taken. Such notice shall include the reasons on which the Employer's action is based.

PARTIES' POSITIONS:

The Union makes the following principal arguments in support of its position. One, the County failed to provide the grievant any notice that the condition of his case files might subject him to discipline. Two, the County has not treated the grievant the same (equally) as other employes. And three, the penalty imposed is out of proportion to the seriousness of the offense as well as the grievant's past work record.

For a remedy, the Union requests that the grievance be sustained, the suspension be removed from the grievant's files and the grievant be made whole for all losses suffered as a result of the County's action.

The County, on the other hand, maintains that the Department established reasonable rules and procedures in accordance with management rights; that the grievant failed to comply with said rules and policies; that, consequently, the County had cause to discipline the grievant; and that the Arbitrator should not substitute his discretion for that of the County in its determination of the appropriate penalty herein. The County adds that the grievant has not been treated differently than any other employe, and that the penalty imposed herein is commensurate with the offense.

As a remedy, the County requests that the grievance be denied, and the matter dismissed.

DISCUSSION:

At issue is whether there is just cause to suspend the grievant.

The County argues that the grievant was suspended for just cause, in accordance with the terms of the collective bargaining agreement, for maintaining files that were seriously deficient, significantly in arrears and not in compliance with agency policies and procedures. The Union, on the other hand, in arguing against just cause basically concedes there may have been some problems with the grievant's files (although not as many as claimed by the County) but claims that the County failed to adhere to certain procedural protections afforded the grievant by the contractual just cause provision.

Both parties cite various standards, the seven Daugherty questions 2/ (the Union alleging some of the tests have not been met; the County arguing they are not applicable to the discipline of a professional social worker for performance deficiencies) and arbitral precedent in support of their position.

Since it is clear that the parties do not share a common understanding of the standards or precedent to be applied herein, the Arbitrator will apply his own test.

This Arbitrator believes there are two basic and fundamental questions in any case involving just cause. One is whether the employe is guilty of the actions complained of, which the County has the duty of so proving by a satisfactory preponderance of the evidence. If the answer to the first question is affirmative, the second basic question is whether the punishment is appropriate, given the offense.

Applying the above standard to the instant case, the Arbitrator first turns his attention to the question of whether the grievant failed to keep his files in the proper manner as alleged by the County.

The record supports a finding for the County on this point. In fact, the Union does not really contest the County's allegation that at least some of the grievant's files were not in compliance with agency policies. Even the grievant admitted that he was behind in his paperwork 3/ and did not file the

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2/ This is an analytical framework devised by the late Carroll R. Daugherty, a Professor of Labor Economics and Labor Relations at Northwestern University and well-established arbitrator. It was his attempt at defining "just cause." His approach has its critics and its shortcomings.

3/ Tr. at 106.

required paperwork in the proper location. 4/ His only explanation for these failures was a heavy workload. 5/ However, other bargaining unit employes also had heavy caseloads, 6/ and additional duties similar to the grievant's. 7/ In comparison, the status of the grievant's files was "appalling." 8/ An audit revealed over "90%" of the grievant's files were missing various pieces of information. 9/

4/ Tr. at 110.

5/ Tr. at 111.

6/ Tr. at 31, 95.

7/ Tr. at 132-136.

8/ Tr. at 95.

9/ Tr. at 16.

Therefore, based on the above, the Arbitrator finds that there is a sufficient factual basis on which to discipline the grievant. The remaining question is whether the punishment is appropriate for the offense.

A review of this question may be undertaken within the context of the issues raised by the Union in arguing against the suspension.

The Union initially argues that the County failed to provide the grievant any notice that the condition of his case files might subject him to discipline. For the reasons listed below, the Arbitrator agrees. It is true, as pointed out by the County, that the grievant was aware that his files were not in compliance with agency policies, that he told his supervisor about this in July, 1993, that he was told to get his files in order, and that in November, at the time of the audit, the grievant had not done so. However, it is also true that the County's "less-than-concerned" attitude toward the condition of the grievant's files gave no indication that the County saw this as a serious problem. In this regard, the Arbitrator points out that when the grievant's supervisor spoke to him in July about getting caught up on his files he "didn't give him a specific timeframe" 10/ to do so. In addition, when the grievant returned from his vacation in September, 1993, and told his supervisor that he was concerned about the condition of his files, the supervisor's response was simply to do the best that he could. 11/ Finally, the grievant's previous supervisor never expressed any dissatisfaction with how the grievant was doing his files. 12/ (Emphasis added) Based on the foregoing, there was no reason for the grievant to believe that the condition of his files would subject him to possible discipline. And, in fact, it is undisputed that the County never specifically/expressly warned the grievant that the condition of his files could subject him to discipline.

The Union also argues that the penalty imposed did not take into consideration the grievant's past work record. The Arbitrator agrees. In particular, the Union claims "a three day suspension is well beyond anything that might be said to be appropriate" because the grievant is a 24-year employe of the department with no prior discipline. This argument on its face provides the basis for rejecting the County's contention that the Union was relying "solely" on the number of years of service of the grievant in claiming the discipline was too severe.

The County also argues "those very same years of service tip the balance in favor of the level of discipline imposed." In this regard, the County

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10/ Tr. at 22.

11/ Tr. at 106-107.

12/ Tr. at 109. The County attempted to rebut this point. However, although the grievant's supervisor testified that the grievant's prior supervisor was not satisfied with the grievant's performance, Tr. at 132, he did not testify about any prior dissatisfaction with the grievant's files.

contends the grievant was given a break with only a three (3) day suspension; he "should have been fired for his gross neglect of duty."

There is no dispute that the grievant knew or should have known what the agency policies and procedures were with respect to the proper maintenance of his files. The record is also clear that based on his many years of service, his position as a Social Worker III, as well as his status as lead worker who helped develop some of the policies in question, 13/ the grievant had a special responsibility to act in a professional manner and follow the policies and procedures of the department and provide proper documentation of service to agency clients. However, it is also true, as noted above, that the Department wasn't always insistent on the proper maintenance of case files. In addition, although the County argues the grievant was given a "break" by his suspension rather than discharge because of his length of service there is no indication in the record that the County considered harsher discipline before imposing the three (3) day suspension. Nor did the County take into consideration the grievant's lack of prior discipline for the status of his files before suspending the grievant despite reviewing his personnel records prior to issuing the letter of discipline. 14/ A prior good work record without discipline normally works to mitigate any discipline imposed. There is no evidence in the record that the County considered this factor before imposing discipline. To the contrary, the County simply considered the terrible condition of his files and the standard of performance expected of him before suspending him for three (3) days. 15/ Based on the foregoing, the Arbitrator rejects the aforesaid argument by the County against mitigation based on the grievant's prior work record.

The Union argues for additional mitigation. However, for the reasons listed below, these arguments must fail. In this regard, the Union first maintains that the County has not treated all employes equally citing one employe who was behind on his paperwork who "was given a couple of weeks to get the deficiency rectified" and two employes who were given a "verbal" reprimand and "letter of instruction" respectively. These examples, however, are distinguishable from the instant dispute. The employe who was given some time to get caught up on his paperwork was not as far behind on his paperwork as the grievant. 16/ The other two employes simply did not have as many problems with

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13/ Tr. at 47.

14/ Tr. at 33.

15/ Tr. at 16.

16/ Tr. at 93.

paperwork as the grievant. 17/

Likewise, the Arbitrator can find nothing discriminatory or improper about the County's audit of the grievant's files. While the process used to investigate this matter may in some ways have been "extraordinary" the condition of the grievant's files warranted it. 18/ In addition, there is no requirement,

17/ Tr. at 80.

18/ Tr. at 16, 41-42 and 95.

contractual or otherwise, that the grievant be put on notice that an audit is occurring. Finally, the record indicates that the files of other employes have been reviewed, even audited in some cases. 19/

The Union further argues that the penalty imposed is far out of proportion to the seriousness of the offense. The Arbitrator disagrees, at least as to the matter of the seriousness of the offense. In this regard the Arbitrator points out the unrebutted testimony of the County's witnesses as to the importance of maintaining the proper information in the case files. 20/ Even the grievant admitted the importance of paperwork in tracking, 21/ the necessity of sometimes going on protected time to get your paperwork up to date 22/ (which the grievant failed to do in the months immediately preceding his suspension despite knowing he was way behind in his paperwork and having discussed the matter in at least two conferences with his supervisor); and the fact that paperwork was necessary. 23/

The County, on the other hand, makes several arguments against mitigation and against the Arbitrator substituting "his discretion for that of the employer in its determination of the appropriate penalty in this case."

In this regard, the County first argues that the determination of the appropriate penalty for the grievant's misconduct is properly a function of management and, consequently, the Arbitrator should refrain from substituting his judgment and discretion herein citing Stockham Pipe Fittings Co., 1 LA 160, 162 (1945) in support thereof. However, that case is distinguishable from the instant dispute. In Stockham Pipe Fittings Co., Arbitrator Whitley P. McCoy upheld the discharge of two employes for fighting, despite the severity of the penalty which deprived one employe of ten (10) years' seniority, because discharge represented the penalty determined by the employer after a fair investigation and because the penalty was consistent with its established practice in similar occurrences. As pointed out by the County, in reaching his decision, Arbitrator McCoy opined:

> . . . If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management. The only

19/ Tr. at 79-80, 86 and 88-89.

20/ See, for example, Tr. at 42-43, 45-46, 51-52, 55, 78-79, 96-99 and 103.

21/ Tr. at 110.

22/ Tr. at 114.

23/ Tr. at 110.

> circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved -- in other words, where there has been abuse of discretion." Stockham Pipe Fittings Co., 1 LA 160, 162 (1945). (Emphasis supplied).

The facts of this case are different. Unlike Stockham Pipe Fittings Co., there is a just cause provision in the parties' collective bargaining agreement which governs all disciplinary actions including discharge. Many arbitrators take a less restricted view of their role in reviewing discipline assessed under agreements requiring cause. 24/ In addition, the grievant herein has been employed by the County over twice as long as the one employe noted above and with no prior discipline for the condition of his files (or apparently anything else). Finally, there is no past practice for imposing a particular penalty for the conduct complained of by the County in the instant case. For the foregoing reasons, the Arbitrator rejects this argument of the County.

Similarly, the Arbitrator rejects the County's reliance on Trans World Airlines, Inc., 41 LA 142 (1963). In that case a majority of the members (Marion Beatty, neutral arbitrator) of a Board of Arbitration upheld the 46-day suspension of an employe whose negligence caused direct damage to company property in excess of $5,000. The Board found that while arbitration is the proper forum to raise an issue that the grievant was unjustly disciplined, an arbitration clause "does not grant to the arbitrator authority to re-determine the whole matter by his own standards as if he were making the original decision." 25/ Based on all the circumstances, the Board concluded the suspension was not arbitrary, capricious, unreasonable or based on mistake. 26/

As previously pointed out, the Arbitrator is not inclined to apply an abuse of discretion standard where just cause is at issue. If a collective bargaining agreement is silent on the issue, arbitrators have the discretion to review discharge and discipline cases of employers by applying either a de novo or an abuse of discretion standard of review. In the Matter of Nicolet High School District v. Nicolet Education Association, 118 Wis. 2d 707, 715 (1984). Here, neither the parties' agreement, past practice nor bargaining history provides for a particular standard of review. As noted above, since the parties do not agree on a standard of review, the Arbitrator will apply his own test.

24/ See Elkouri and Elkouri, How Arbitration Works, Fourth Edition, 665-666 (1985).

25/ Trans World Airlines, Inc., 41 LA 142, 144 (1963).

26/ Supra., at 145.

Apparently, the County's argument for a more restrictive standard of review by the Arbitrator herein also centers around the idea that "discipline of a professional social worker for performance deficiencies" somehow should be treated differently than other discipline cases. The Arbitrator finds nothing persuasive in the record or the County's arguments to support such a claim.

Based on all of the above, the Arbitrator finds that while the County has a factual basis upon which to discipline the grievant, the County committed a serious procedural error in failing to give the grievant proper notice that he faced possible discipline if he did not conform his conduct to Department standards and requirements for proper file maintenance. In addition, the County failed to take into consideration the grievant's prior work record (no prior discipline for the status of his files and no evidence of any prior discipline in his 24 years of employment with the Department) before imposing the suspension. Therefore, the Arbitrator finds it reasonable to conclude that the answer to the stipulated issue is YES, the County violated the just cause provision of the parties' labor contract when it suspended the grievant for three (3) days.

A question remains as to the appropriate remedy.

REMEDY

This is a close question. The County has sufficient reason to discipline the grievant -- the grievant's failure to comply with legitimate department requirements and expectations for maintaining complete case files -- but failed to follow basic elements of fairness in suspending the grievant for three (3) days. In particular, as noted above, the County failed to put the grievant on notice regarding the possible consequences of having incomplete files and failed to take into consideration the grievant's prior work record in suspending him.

There is no dispute that the policies and procedures adopted by the County relate to the effective operation of the Department in serving its various populations. There is also no dispute that the rules, which require a consistent approach to record keeping and documentation, are reasonably related to the orderly, efficient and safe operation of the County's business. 27/ Consequently, the Arbitrator must be careful that any remedy fashioned not materially affect the "wake-up call" given the grievant by the suspension as to his responsibilities for maintaining complete case files.

The Arbitrator is of the opinion that any remedy should take into consideration all of the above factors. Therefore, in view of all of the foregoing and the record as a whole, it is my

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27/ See unrebutted testimony of Marian Ballos, social work supervisor. Tr. at 54-55.

AWARD

1. That the grievance is sustained in part and denied in part.

2. That the three (3) day suspension without pay is modified to a three (3) day suspension, one (1) day without pay and two (2) days with pay.

3. That the County is ordered to make the grievant whole for two (2) days of suspension without pay the grievant served in November, 1993.

4. That the County may, at its discretion, place a copy of this Award and decision in the grievant's personnel file.

Dated at Madison, Wisconsin this 15th day of November, 1994.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator