BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LAFAYETTE COUNTY

and

LOCAL 678, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO

Case 66
No. 54726
MA-9770

Appearances:

Brennan, Steil, Basting & McDougall, S.C., by **Mr. Howard Goldberg**, 433 West Washington Avenue, Suite 100, P.O. Box 990, Madison, Wisconsin 53701-0990, appearing on behalf of the County.

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

ARBITRATION AWARD

Lafayette County, hereinafter referred to as the County, and Local 678, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the discipline of an employe. Hearing on the matter was held in Darlington, Wisconsin on April 25, 1997. A stenographic transcript of the proceedings was prepared and received by the undersigned by May 8, 1997. Post-hearing arguments and reply briefs were received by the undersigned by July 17, 1997. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree upon the framing of the issue and agreed to leave framing of the issue to the undersigned. The undersigned frames the issue as follows:

"Was the three day suspension on August 13, 14 and 15, 1996 for just cause?"

"If not, what is the appropriate remedy?"

"Was the August 8, 1996 written warning regarding the filing of quarterly reports for just cause?"

"If not, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

Article III - Employee Discipline

Non-probationary employees shall not be disciplined, suspended, disciplinarily demoted or discharged without just cause. Written notice of the suspension, discipline, disciplinary demotion or discharge and the reason or reasons for the action shall be given to the employee with a copy to the local Union within three (3) working days after such disciplinary action is taken.

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BACKGROUND

Among its various government operations the County operates a Commission on Aging where in it employs Benefit Specialist Robert Helm, hereinafter referred to as the grievant. The grievant has been employed by the County since January 1, 1978 and at all material times herein his supervision has been bifurcated between Commission on Aging Director Carol E. Benson, who supervises the non-confidential aspects of the grievant's job, and Coalition of Wisconsin Aging Groups (CWAG), Elder Law Center Attorney Mitchell Hagopian, who supervises the confidential and legal aspects of the grievant's job. Hagopian's offices are located in Madison, Wisconsin. The County's benefit specialist is required to explain to clients, the elderly and poor, available benefits, give assistance to clients in dealing with State and Federal agencies, and act as an advocate for the client if benefits have been denied by government agencies or insurance companies. Funds for the County's benefit specialist program are administered by AgeAdvantAge, which is located in Madison and whose executive director is Lucille M. Baker.

On March 19, 1996 Hagopian, accompanied by Elder Law Center Attorney Michele M. Hughes, made an on-site visit to the County. During this time a couple sought advice from the grievant concerning a change in their medical assistance. The grievant miscalculated the couples deductible. Hagopian corrected the matter. Hagopian also noted that the grievant had wrote notes on the clients papers and Hagopian informed the grievant he did not handle the matter

appropriately. The grievant informed Hagopian the clients would be faced with a reduction in benefits in the near future so it really didn't matter as they might as well get used to living with lesser benefits now. Hagopian than met with Benson and expressed his concerns to her.

On May 1, 1996 Hagopian went on Family Leave and was getting paid 10% to handle small things. On May 22, 1996 Hagopian sent the following letter to Benson with a copy sent to Baker:

> Carol Benson
> Lafayette County Commission on Aging
> 600 North Main Street, #107
> Darlington, WI 53530
>
> Re: Bob Helm
>
> Dear Carol,
>
> This letter is a follow-up to the conversation we had following my onsite visit on March 19, 1996. As you will recall, I had an opportunity to observe Bob handle an intake while I was conducting my onsite. Based on my observations, I am again questioning Bob's competency to handle the benefit specialist job duties.
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> The intake presented a fairly typical benefit specialist issue. A married couple came in with five or six notices from the county Human Services Department. The couple did not understand them, although they did seem to understand that their application for Medical Assistance had been denied by the county. After receiving these notices and without examining them, Bob called over to the economic support worker and asked her what the situation was. He wrote the notes of his conversation with this economic support worker down on the one of the original documents which the clients had just presented to him. Apparently the economic support worker told him that the county had not completed processing this case. The worker said that the couple would probably be eligible for the Medical Assistance Deductible program. Bob did not inquire further into the specifics of why this couple was eligible for only the Medical Assistance Deductible program as opposed to any of the other Medical Assistance programs.
>
> In the course of his conversation with the clients, however, it became obvious that these clients had an ongoing relationship with Bob. During 1995 and January and February of 1996, these clients were eligible for SSI as a couple. In February, the wife turned age 62 and began receiving her Social Security benefit. Prior to her

62nd birthday, she had been eligible for SSI based on disability.

Because she had never been eligible for Social Security Disability benefits (presumably because at the time that she became disabled, her "insured status" had lapsed), her income other than SSI was zero. Essentially in February of 1996, this woman's income went from zero to $573 per month. When that income was combined with her husband's income, the couple exceeded the eligibility standard for the SSI program. Apparently, the clients had been notified that their SSI would terminate and, as is normal procedure, were notified that they could apply for Medical Assistance with the county once their SSI ended. These clients apparently immediately went into the county to apply for Medical Assistance benefits. That application triggered the multiplicity of notices from the county. Bob was aware that this woman would begin receiving Social Security income in February, but had not prepared the clients for what would happen to them once this occurred.

Bob then attempted to calculate what this couple's "deductible" would be. Based on the couple's income, he estimated that their deductible would be approximately $130 for the six month deductible period. As I listened to Bob explain this, I also calculated the deductible but believed that their deductible would, in fact, be approximately $1500 for the same six month period. Based on the information Bob had just given them, the clients were prepared to leave, basically satisfied that their situation would not be appreciably worse once the county determined their eligibility. At that point, I advised Bob that I believed he had been using the wrong eligibility information, Bob then proceeded to hand-write a note to one of the local physicians requesting that the physician supply this couple with free samples of the various medications which they were taking. At that point, the clients left.

After the clients left, Bob and I discussed this intake. I asked him why, if he knew the couple would be losing their SSI eligibility due to income, he did not explain to the clients about the three month extension of Medical Assistance eligibility. Essentially, this couple would have continued to receive categorically needy (no deductible) Medical Assistance for three months following the termination of their SSI benefits. Because the couple apparently applied for Medical Assistance in the same month that they lost their SSI eligibility, they prematurely gave up their right to categorically needy status. Bob told me that he believed that these people might as well get used to their new situation sooner rather than later. He also told me that he believed that his note which he believed would qualify these people for free drug samples from the local doctor solved all of their problems. I pointed out to Bob that the Medical Assistance card would have provided these clients with considerably more benefits than simply free prescription drugs.

This case causes me grave concern. First, Bob's virtual unfamiliarity with how to calculate the couple's Medical Assistance deductible is inexcusable. During both January and February monthly trainings, we had gone over in detail precisely the situation presented by these clients. Basically, the Elder Law Center had been preparing benefit specialists for assisting clients in maximizing their eligibility for the Medical Assistance program following the changes to the SSI program. Thus, Bob should have been keenly aware of how to properly calculate this couple's eligibility.

Second, Bob's attitude regarding his clients and getting used to their new situation is unacceptable. Bob's job is to maximize benefits for his clients. Any marginally competent benefit specialist who knew that his clients were losing SSI eligibility due to income would have advised the clients when to apply for Medical Assistance at the county so as to ensure that they would get their three month categorical eligibility and possibly obtain an additional month of eligibility for them. Bob apparently had no interest in doing this for his clients. Bob's comment that he had solved his client's problems by requesting that the local physician supply them with free drugs demonstrated an ignorance of the Medical Assistance program and the benefits of comprehensive health insurance.

Third, Bob's use of client's original documents as note paper is almost beyond comment. It is unprofessional in the extreme.

This was the first opportunity I have ever had to see Bob handle an intake. I am very concerned about his performance. It leads me to re-examine my findings as reflected in my memo to you dated February 19, 1996.

Based on my in-depth review of documents submitted to me from Bob, it had been my impression that the main problem with the Lafayette County Benefit Specialist Program was that complicated issues were not being presented for Bob's consideration. Having now seen Bob actually handle a substantive issue in an unsatisfactory and negligent manner, I am not convinced that my findings with respect to the problems of the benefit specialist program in Lafayette County were accurate. I now suspect that the written products which Bob was submitting to me did not reflect what cases were actually being presented to him in the course of clients contacts. My observations indicate that Bob may be routinely providing clients with inaccurate information about their situations and not recognizing basic advocacy issues which are presented directly to him.

As you know, I am on a leave of absence. I am only working 10% time until August. When I return in August, I believe that you and I need to re-examine

how the benefit specialist program in Lafayette County needs to be handled. Bob is currently scheduled to visit me for an in-service on August 14 at 1:00 p.m. By that time, I believe you and I need to come up with additional measures to deal with the problems I now perceive.

Because AgeAdvantAge has been involved in the effort to improve the benefit specialist program in Lafayette County, I am copying this letter to Lucy Baker.

I will be in touch with you sometime during the week of August 5, 1996 to discuss the concerns raised in this letter as well as any additional information that you have obtained regarding any work plans that Bob has developed since we spoke in March.

Sincerely,

Mitchell Hagopian /s/
Mitchell Hagopian
Attorney

cc: Lucy Baker

After review of Hagopian's letter Baker became concerned about the grievant's competency to handle his job. She concluded she was no longer willing to continue the AgeAdvantAge contract with the County when it expired the following December. On July 3, 1996, Baker wrote the following letter:

Carol Benson
Lafayette Co. Commission on Aging
600 N. Main Street, #107
Darlington, WI 53530

Dear Carol:

I have read with deep concern the May 22nd correspondence of the CWAG Elder Law Center that raises serious questions about the competency of the Lafayette County Benefit Specialist to perform the kind of complex benefits work that he has been trained to do. This follows the November 1995 review of the program by the Center that found that the Benefit Specialist caseload in Lafayette County is

composed of simple cases that should occupy not more than half of his time.

By professional code, training and philosophy Benefit Specialists are pledged to work faithfully with older people who, with declining health and economic resources, are driven to seek help in troubled times. I fail to find one of these principles that has not been compromised or abrogated in the exchange Bob had with the couple seeking assistance and with the back-up attorney immediately following. Given the gravity of the incident that prompted the May letter and the history of problems with this benefit specialist that have been well documented, I am not inclined to extend further contracts for benefit specialist services to Lafayette County.

On July 16th I wish to meet with you to discuss what this will mean to the Lafayette County Benefit Specialist Program. While this is a confidential meeting, you are welcome to invite those who are involved in dealing with this issue. A 10:00 a.m. meeting time is my preference. Please call me with the meeting location.

Sincerely,

Lucille M. Baker /s/
Lucille M. Baker
Executive Director

On July 16, 1996 a meeting of the Commission on Aging was held in closed session, with the grievant, his steward and his union representative in attendance, and Elder Law Center Director Betsy Abramson. Thereat Baker indicated she was not inclined to renew the contract with the County unless some discipline was imposed on the grievant so he understood what he did was wrong, a remedial program was implemented and there was improvement in the County's program. Abramson gave the grievant a copy of the following document which identified a five point plan to improve his work performance:

TO: Carol Benson, Director and Robert Helm, Benefit Specialist

FROM: Betsy Abramson and Mitchell Hagopian

As you know, we have become increasingly concerned about the performance of Bob Helm as the benefit specialist for Lafayette County. Our concerns, most of which have been previously conveyed to you, include, but are not limited to:

(1) Mr. Helm's incorrect advice, lack of program knowledge and insensitivity towards clients as observed by Mr. Hagopian during a March 19, 1996

on-site visit in Mr. Helm's office where Mr. Helm was meeting with a couple related to their SSI and Medical Assistance eligibility. (See Mitchell Hagopian letter to Carol Benson, Lafayette County Commission on Aging, dated May 22, 1996.)

(2) Our conclusion that most of the cases that Mr. Helm is handling do not include advocacy work related to benefits; rather, they involve acting as a liaison person between his client and a public agency, e.g., assisting in the application process, replacing a lost Medicare card or notifying the agency of a change in address. After over fifteen years as a benefit specialist, Mr. Helm should be capable of significantly higher levels of advocacy. (See Mitchell Hagopian letter to Carol Benson, Lafayette County Commission on Aging, dated September 5, 1995.)

As a function of our supervisory role and in order to monitor his dealings with clients and generate a higher volume of more significant cases, we will expect the following of Mr. Helm:

(1) Mr. Helm must complete, to the satisfaction of the assigned legal back-up attorney of the CWAG Elder Law Center, a Benefit Specialist Examination, to be developed by and proctored by, the CWAG Elder Law Center Attorney Mitchell Hagopian. This exam will take place no later than September 1, 1996, in Lafayette County, at a time and date agreed upon by Mr. Hagopian and Mr. Helm.

(2) Mr. Helm must prepare a weekly work plan for the subsequent week, to be completed and FAXed to the CWAG Elder Law Center by the preceding Friday noon each week. This typed weekly work plan should outline Mr. Helm's planned activities including: (a) availability for case intake; (b) casework; (c) filing, file maintenance and reporting; (d) outreach presentations (with specifics as to where he will be and topics to be covered); and (e) other tasks.

(3) Mr. Helm, must complete typed roundtable case discussion sheets (copies of the form have been previously provided to him) for each opened case. Each such case sheet should then be updated the following month to reflect what developments (i.e., additional advocacy) have occurred. Each typed roundtable case discussion sheet, and follow-up addendums, should be

mailed or FAXed to CWAG Elder Law Center on a weekly basis.

(4) Mr. Helm must prepare two written newsletter articles, suitable for publication in the COA newsletter on the following two topics: (a) the MA Deductible Program; and (b) Increasing assets to generate more income under the MA Spousal Impoverishment Program. The first newsletter must be received by the CWAG Elder Law Center by August 15, 1996. The second must be received by September 15, 1996. Both newsletter articles must be typed.

(5) Mr. Helm must develop a typed outreach plan with specific activities and deadlines noted for increasing participation in the Qualified Medicare Beneficiary (QMB), Specified Low-Income Medicare Beneficiary (SLMB) and Partner Care Programs. The plan must be received by the CWAG Elder Law Center no later than September 1, 1996, with updates regarding its implementation submitted to the CWAG Elder Law Center monthly thereafter.

Given the type of cases it appears Mr. Helm has been handling (based on Mitchell Hagopian's detailed examination of Mr. Helm's cases conducted during the summer and fall of 1995), we believe there is ample time in Mr. Helm's work week to accomplish all of the above tasks. We encourage the county to allow Mr. Helm to set aside specific time slots (probably on Fridays) to comply with the weekly duties outlined in (2) and (3), above.

cc: Lafayette County Commission on Aging

Baker indicated the five point plan was an example of the type of remedial action that she had in mind. The Commission on Aging did not make a decision on disciplining the grievant but directed the grievant to file a response to Hagopian's May 22, 1996 letter by July 22, 1996 with the Commission on Aging to meet again on July 26, 1996. On July 26, 1996 the grievant's attorney, Duane M. Jorgenson, submitted the following letter:

Dear Mr. Hagopian;

I have been retained by Bob Helm to represent him concerning the allegations you have made against him in your letter of May 22, 1996 and any subsequent occurrences as a consequence.

Frankly, I find your letter of May 22, 1996 to read like an individual that long ago made up his mind that he did not want Bob Helm serving the elder

population of Lafayette County. You in fact admit as much in your very first paragraph.

You have made several conclusions based upon incomplete and inaccurate factual information. The basis of your complaint concerned a husband and wife who came in without an appointment on a day when you and another attorney were doing an onsite visit.

What you fail to mention in your letter is that the couple involved were never without services. You make much of the issue of the calculation of the deductible. What you obviously chose to ignore is that the actual level of benefits to be received by this client was not going to be changing, and has not changed. Not stopping at that, you characterize Mr. Helm's attitude of one who was uncaring. When in fact the only thing this couple would need to get used to is a different processing procedure. That being the application for Medical Assistance through the county. What I find amazing is that not only do you not mention that fact, but you totally distorted and misrepresented Mr. Helm's actions. The implication of your letter is that this couple was without services. They in fact were not. Further, it can only be concluded that you knew at your writing that they were not without services, nor had they experience a reduction in services.

The only element of truth in your entire letter is that Bob did not correctly tabulate their deductible, if in fact it may have been an issue. Mr. Helm does not dispute that he did not do the math correctly, because he did not consult the MA manual, as his normal practice would be. Mr. Helm did not consult the manual because it was an irrelevant exercise. An exercise suggested by Mr. Hagopian, because Mr. Helm already knew that the notices received were the result of misprocessing of the claim, and Mr. Helm had already been assured by the Human Services worker that this woman would be provided same level of services she had been receiving.

The note requesting medication on the indigent drug program for insulin for the woman was not in response to your questions concerning the deductible, but was done after he ascertained that the notices to the clients were generated due to processing difficulties, that those difficulties were in fact being corrected, but pending that rectification this woman needed insulin, so Mr. Helm saw to it she received that insulin.

Finally, you mentioned that Medical Assistance deductible calculations were included in the January and February training. You appear not even to consider

the possibility that the training being provided may be inadequate. Frankly, if a benefit specialist with the experience and ability of Bob Helm was not getting it right, the problem may be widespread because of substandard

training. Yet it is clear that you never once so much as contemplated that your training may be inadequate.

In reviewing your memo dated July 16, 1996, I believe there are many problems with the approach being called for by you and Betsy Abramson.

1) To subject Mr. Helm to a test, with the sole criteria being the subjective satisfaction of Mitchell Hagopian is ridiculous. Besides being beyond belief, it is I believe discriminatory, in that no other benefit specialist is being subjected to such scrutiny. Further, there is no objective standard or level by which Mr. Helm is to be judged. Further, someone other than yourself must develop the exam, all benefit specialists may be subjected to the same test, and it must be administered and scored by someone other than you. Any other testing conditions are not acceptable.

As to (2) and (3), while these items are potentially beneficial, again nothing is being expected of the CWAG Elder Law Center. The Elder Law Center has enough knowledge of Mr. Helm's work load, to identify just how much time of his week should be devoted to the specific areas outlined in the memo. Presumably every hour devoted to (2) and (3) is time Bob will not be available for case intake. Mr. Helm is entitled to know how much time he is expected to devote to these reporting requirements. Further, Mr. Helm is entitled to expect feedback and interaction from the CWAG Elder Law Center. Again, nothing in (2) and (3) specify what the Elder Law Center responsibilities are and as to feedback and supervision. Mr. Hagopian, given your history and past behavior towards Mr. Helm, my client has a right to know how these documents are going to be used. Are these intended to assist Mr. Helm in his job, or are they going to be used solely as a means to scrutinize Mr. Helm's every move, looking for the slightest human imperfection on his part.

As to (4), given the fact that you apparently expect Mr. Helm to complete these articles on his own time, this requirement is both unacceptable, overburdensome, and unreasonable. If Mr. Helm is to complete these articles as part of his employment, then they should be completed on compensated time. Particularly, if they are to appear in the COA Newsletter. Further, the first article should not be due until October 15, 1996, and the second article until February, 1997. Finally, these articles should be submitted for review and editorial assistance

to someone other than Mitch Hagopian.

As to (5) this has nothing to do with the complaints made in Mitch Hagopian's May 22, 1996 letter. Further, the outreach plan is something that

should be appropriately be developed by Mr. Helm and the Elder Law Center, in consultation with the Lafayette County Commission on Aging. Once again, there appears to be no expectations placed on the Elder Law Center to exercise oversite and supervision.

Finally, I am forced to question your objectivity and your ability to oversee Mr. Helm. Frankly, none of the provisions outlined in the July 16, 1996 memo are acceptable if Mitch Hagopian is going to be providing oversite. It is obvious that you bring with you a predisposition of bias against Mr. Helm. The memo of July 16, 1996, which I must believe is, in large part, your thought product is on its face is discriminatory toward Mr. Helm. I am more than a little troubled by your recalcitrant attitude towards a person whom himself could be served by the services you and your agency purport to offer.

Mr. Helm stands ready to do those things that would provide better services to his clients in Lafayette County. Further, he stands ready to cooperate with the CWAG Elder Law Center, and their role of supervision, provided that supervision is done in a reasonable and responsible manner.

Sincerely yours,

Duane M. Jorgenson /s/
Duane M. Jorgenson

On July 26, 1996 the Commission on Aging met, reviewed Jorgenson's July 22, 1996 letter and asked the grievant if he had anything to add. The grievant replied Jorgenson's letter said everything needed to be said. The Commission on Aging set a meeting for July 29, 1996 to determine what it would do on the matter. On July 29, 1996 the Commission on Aging met, determined the grievant had not prepared and submitted his quarterly outreach plans on a timely basis and directed him to prepare and submit them on a timely basis in the future, warned him that failure to do so could result in additional discipline, up to and including discharge, and placed a copy of the warning in his personnel file. The Commission on Aging also concluded that Hagopian's May 22, 1996 letter describing events was not disputed and decided such findings justified a conclusion the grievant had not performed his job duties in a competent and professional manner. The Commission on Aging set discipline of three days suspension with a copy of the

discipline to be placed in his personnel file and warned the grievant further violations could subject him to additional discipline, including possible discharge. The grievant was also directed to comply with the remedial activities consistent with the five points set forth in the Elder Law Center's July 16, 1996 letter. Thereafter the grievant grieved the discipline and the matter was processed to arbitration in accord with the parties grievance procedure.

County's Position

The County asserts there can be no question the grievant knew he was to prepare and submit quarterly outreach reports on a timely basis. The County asserts these reports were designed to eliminate the deficiencies found by Hagopian when he evaluated the grievant's files. The County argues that Hagopian had concluded the grievant was really only working half time and that the vast majority of his time was spent on simple rather than complex matters. The County contends the grievant's response that he was too busy doing other work to do the reports is really that the grievant considered the reports worthless exercises and he chose to spend his time doing other things. The County points out the Union does not dispute the County's right to compel the grievant to prepare such reports but the Union asserts the warning was unwarranted and untimely as the third quarterly report was submitted in a fashion consistent with prior reports. The County points out the first quarterly report was submitted prior to the start of the quarter, the second not until the quarter was over and the third was submitted after the quarter had started. The County argues all the County did was to officially note that the grievant was required to prepare the reports and if that if he failed to do so he would be subject to discipline. The County concludes the warning was appropriate.

The County also asserts the grievant was given a three (3) day suspension for his conduct at the meeting held with clients on March 19, 1996. The County points out this was the first occasion where Hagopian monitored a meeting between the grievant and a client. The County also points out that the grievant miscalculated a deductible amount, which Hagopian had to correct, wrote on the clients documents, which he shouldn't have done, and, when the clients had left, expressed to Hagopian that his note to qualify the clients for free drug samples from the local doctor had resolved all their problems and that they might as well get use to their new situation sooner than later demonstrated his apparent lack of understanding of the program and a callus disregard of client rights. The County points out the grievant or the Union never disputed these facts. The County asserts it properly investigated the matter and the discipline that was imposed was reasonable.

The County also contends the timeliness issue was never raised by the Union prior to the hearing in this matter. The County also argues the facts in this case are unusual in that the supervisory duties of the grievant are divided between two supervisors one of which is an outside agency. The County acknowledges it retains the right to discipline the grievant. The County points out Hagopian had a timely discussion on the matter with the grievant and with Benson on March 19, 1996. The County also points out that Hagopian's May 22, 1996 letter indicated that

he intended to deal with the matter further when he came back from his family leave in August. The County also points out Baker's involvement caused the matter to be accelerated. The County asserts there was no way it could do anything until Baker started the process. The County also points out this was not a situation where the grievant had the "Sword of Damocles" over his head. The matter was not raised until the County received Baker's July 3, 1996 letter.

The County asserts that it was not unreasonable to wait for Hagopian's return to deal with the matter. The County also asserts the delay caused the grievant no prejudice.

The County also asserts it has the right to direct the grievant to follow the requirements of Hagopian's five (5) point plan. The County also asserts the undersigned does not have the authority to review this plan as the five (5) points are not intended to be discipline. The County argues the requirement to write two (2) newspaper articles clearly falls within the grievant's job description and that the collective bargaining agreement does not prohibit the grievant from being tested.

In its reply brief the County asserts that the Union and the grievant did not raise the timeliness of the discipline until the arbitration hearing. The County asserts that if the Union does not raise the issue during the grievance procedure there is no way it can attempt to make a satisfactory adjustment. Thus the County asserts that if the Union is complaining the County took four (4) months to apply discipline, the Union took nine (9) months to raise the timeliness issue. The County again stresses the Union has not demonstrated there was any problem or prejudice caused by the County's delay.

The County also asserts there was no double jeopardy in this matter. Further, that it is not barred by the collective bargaining agreement from giving the grievant a competency test, particularly when the reason for the testing is for evaluative, not disciplinary purposes. The County also argues that it has disciplined the grievant for his failure to perform his job duties and asserts it is not holding the grievant to the wrong standards. Further, the Union's claim that the grievant did not make inappropriate remarks to Hagopian concerning his clients on March 19, 1996 is not supported by the record.

The County would have the undersigned deny the grievance.

Union's Position

The Union contends the County did not have just cause to discipline the grievant and asserts there is a timeliness of discipline and double jeopardy element. The Union asserts timeliness is an element of just cause and argues the further we recede from prompt action the further we recede from justification. The Union also argues the just cause standard is not met when discipline is unduly delayed because discipline is intended to be corrective, not punitive, and

the County must exercise full discipline within a reasonable amount of time after it had convincing knowledge of an infraction, being prompt and complete. The Union also asserts that to impose a penalty at a later date might give rise to the assumption that it was being imposed for some subsequent misconduct and not for the initial infraction. The Union also contends the pendency of other proceedings does not supersede the implied limitation of a reasonable time for discipline. The Union also argues that double jeopardy is universally accepted in arbitration

and that double jeopardy violations are found in cases lacking prompt disciplinary decisions and unreasonable delay in imposing penalties.

The Union argues there are glaring deficiencies in the County's belated attempt to discipline the grievant. The Union acknowledges the grievant did make errors in calculating a deductible on March 19, 1996 but stresses the matter was corrected on the spot by the supervisor. The Union asserts the County can not resurrect the matter months later as the grounds for discipline. The Union also argues the grievant did not make inappropriate remarks to clients on March 19, 1996, nor to Hagopian. That if the grievant did make inappropriate remarks the time to deal with such misunderstanding was on March 19, 1996. The Union contends a three (3) day suspension constitutes excessive discipline for an employe with an unblemished work record of eighteen (18) years.

The Union also argues the August 8, 1996 written warning is unwarranted and untimely. The Union acknowledges Benson gave the grievant a directive to submit second and third quarter reports by July 5, 1996. The Union asserts the grievant complied, the reports were received by Benson with no admonitions, and later, the Commission on Aging gave the grievant the written warning for late reports.

The Union also argues grievant was given disparate treatment when he was singled out for a competency test and was directed to write newspaper articles. The Union points out publication was never the intent of the directive to write the articles. The Union also points out the County and Elder Law Center were operating under different job descriptions, with the Elder Law Center's job description never being communicated to the grievant.

The Union would have the undersigned sustain the grievance, order the grievant made whole, to direct the County to cleanse his personnel record, and to direct the County to cease and desist disparate treatment.

DISCUSSION

The undersigned notes at the onset that the County clearly has the right to establish a remedial program to ensure the grievant is capably performing his job duties. The only question of concern is which job? The Elder Law Center recommended job description or the County's job

description. Clearly there are distinguishing factors between the two jobs descriptions and the grievant should be made aware of which one he is to comply with. Either job description would allow the County to direct the grievant to develop a sample newspaper article.

The record demonstrates the grievant was disciplined for two acts. Failure to submit quarterly reports and for an incident which occurred on March 22, 1996. The County has claimed that the timeliness issue raised by the Union is without merit as there has been no

showing that the grievant was prejudiced by the delay and further that the Union took nine (9) months to raise such a defense. The undersigned finds no merit in this defense. It is an employer's burden to demonstrate it had just cause to discipline an employe. By the employer's actions, or in this case inaction, the employer views how it demonstrates the seriousness of the employe's offense. Herein the record demonstrates that in neither instance was there immediate discipline (except for Hagopian's verbal admonishment of the grievant on March 22, 1996).

Clearly, the failure to follow a reasonable directive, the completion of quarterly reports, is a matter for which an employer may discipline an employe. The first quarterly report was received in November of 1995. The County took no action when the second quarterly report was not submitted and it took no action until the third quarterly report was late. The undersigned concludes that had the County acted promptly a written warning for the grievant's noncompliance with a work directive would be reasonable. However, the County did not act. The record demonstrates it did not even ask where the second quarterly report was until well into the second quarter. The undersigned therefore concludes a written warning is not reasonable. The undersigned does find that the County can place the grievant on notice that if he fails to properly file timely quarterly reports in the future he can face discipline and that such a notice can be placed in his personnel file.

The record also demonstrates the following. Hagopian is not a testing expert nor is testing a field he has any expertise in. There is no evidence he would know how to validate a testing device, would know how to determine its reliability or know how to properly administer any testing device. It is the undersigned's opinion any measurement device developed and administered by him would be highly suspect as a device which could accurately determine the grievant's job knowledge. Particularly if Hagopian is approaching the matter with a predisposed opinion as to the grievant's capabilities. Needless to say, any results of such a measurement would be relatively useless. This is further complicated by the fact that the Elder Law Center's recommended job description for a Benefit Specialist and the job description the County has hired the grievant to perform are distinguishable from each other and Hagopian was unaware of this. This does not mean the County can not give the grievant an examination to determine if he is capable of performing the duties for which he was hired. However, such an examination, to have any real merit, would need to be developed and administered by individuals who have the knowledge to develop and administer a measuring device which is valid, reliable and pertinent to the job description the County hired the grievant to fill.

Hagopian's lack of knowledge concerning the job description the grievant was hired to perform also raises concerns about the allegations he raised concerning the grievant's job performance in his May 22, 1996 letter to Benson. Hagopian raises the allegation based upon his first and only observation of the grievant's March 19, 1996 interaction with a client that the grievant was not appropriately handling client contacts. Hagopian has the capability to investigate the matter by contacting other clients to determine whether or not the grievant was appropriately handling their cases. He did not do so. Hagopian has the capability to observe

the grievant handling other clients to determine whether the grievant is appropriately handling their cases. He did not do so. He does indicate that based upon this one observation he needs to reevaluate the entire benefit specialist program. He also concludes that this matter can wait almost three (3) months until he returns from a leave of absence on August 5, 1996, or almost five (5) months after the date of the incident.

The undersigned finds that while Hagopian has alleged he is very concerned about the grievant's performance on March 19, 1996, Benson and he discussed the matter on March 19, 1996 and determined, by there inaction, that no immediate action was necessary to correct the grievant's performance and that no action need be taken until August. Further, had Baker not intervened in the matter, no discipline would of been issued to the grievant. The undersigned also finds that Hagopian immediately admonished the grievant on March 19, 1996 for his actions. The undersigned concludes that the admonishment by Hagopian was in effect a verbal reprimand and that such a reprimand can remain in his record. The undersigned notes here there is no evidence in the record as to why Baker waited until July 3, 1996 to contact Benson about this matter. What is puzzling is why Baker is only concerned with the grievant's performance and not the Elder Law Center's. Baker is correct in that the matter, from AgeAdvantAge's perspective, the situation described by Hagopian needed immediate attention. However, the undersigned must conclude that Hagopian immediately admonished the grievant, concluded that the grievant's performance was adequate to accomplish the benefit program, and that no additional action was necessary until he returned in five months from his leave of absence. Based on the above the undersigned finds a three (3) day suspension unreasonable, particularly as this was a first offense for the grievant.

Therefore, based upon the above and foregoing and the testimony, arguments and evidence presented, the undersigned concludes the County did not have just cause to issue the three (3) day suspension and concludes the County did not have just cause to issue the grievant a written warning. The County is directed to reduce the suspension discipline to an oral warning, directed to change the grievant's record to an oral warning, directed to expunge the grievant's record of the written warning, directed to place in his record notice that failure to submit timely quarterly reports may result in discipline, and directed to make the grievant whole for all lost wages.

AWARD

The County did not have just cause to suspend the grievant on August 13, 14 and 15, 1996. The County is directed to reduce the suspension to an oral warning and to make the grievant whole for all lost wages and benefits.

The County did not have just cause to issue the August 8, 1996 written warning regarding the filing of quarterly reports. The County is directed to cleanse the grievant's record of the written warning and to place the grievant on notice that failure to file timely quarterly reports may result in discipline.

Dated at Madison, Wisconsin, this 15th day of October, 1997.

Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

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