

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LAFAYETTE COUNTY COURTHOUSE EMPLOYEES UNION LOCAL 678,
WCCME, AFSCME, AFL-CIO**

and

LAFAYETTE COUNTY

Case 69
No. 55002
MA-9864

(Robert Helm Discharge Grievance)

Appearances:

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

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

INTERIM ARBITRATION AWARD

Pursuant to a request by Lafayette County Courthouse Employees Union Local 678, WCCME, AFSCME, AFL-CIO, herein "Union," and the subsequent concurrence by Lafayette County, herein "County," the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission on November 21, 1997, 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. On April 1, 1998, the Union filed a motion that the discharge grievance of Robert Helm, herein "Grievant," should be sustained on procedural grounds. A hearing on said matter was conducted by the undersigned on April 28, 1998, at Darlington, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on June 1, 1998.

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

STIPULATED ISSUES

1. Did the County violate Article III of the collective bargaining agreement?
2. If so, what is the appropriate remedy?

The parties also agreed that the motion filed by the Union noted above is “assumed” in the stipulated issue and will be resolved when the Arbitrator answers those questions that the parties have stipulated are before him.

FACTUAL BACKGROUND

Robert W. Helm, hereinafter “Grievant,” was employed by the Lafayette County Commission on Aging as a Benefit Specialist for nineteen (19) years.

The Grievant’s job difficulties were discussed with him and Fran Fink, Union Steward, at an Executive Committee meeting of the Commission on Aging on September 23, 1996. At the meeting, the Grievant was advised as to deficiencies noted by his supervisors including poor test results and failure to follow a remedial plan of action developed by Mitchell Hagopian, an employe of the Elder Law Center, associated with the Coalition of Wisconsin Aging Groups, who supervised the professional aspects of the Grievant’s job duties. Other deficiencies discussed included insubordination by the Grievant (he told his boss to “shut up”). The Grievant was instructed by the Committee to adhere to a remedial plan, and was informed that failure to do so would result in “immediate disciplinary action up to and including probable termination.”

By letter dated October 10, 1996, Mitchell Hagopian advised Carol Benson, the Grievant’s supervisor and Director of the Lafayette County Commission on Aging, in material part, as follows:

I am again recommending that the Committee take some disciplinary action against Bob for his failure to comply with my earlier directive that he write an article on the subject of “increasing assets to generate more income under the MA spousal impoverishment program.” I have given him two additional opportunities to come up with an article that actually relates to this subject.

It is my understanding from the conversation which occurred at the September 23 meeting that any additional contact from me regarding deficient performance by Bob Helm would result in his termination. Under the circumstances, I believe that termination would be appropriate.

Please contact me as soon as possible regarding your plan of action with regard to my recommendations.

The Grievant, Union Steward Fink and Union President Paul Godfrey were present at the next meeting of the Commission Executive Committee held on October 24, 1996. At that meeting, the Grievant was again advised of problems with his job performance. He was also given a copy of the letter written by Mitchell Hagopian noted above which outlined the Grievant's continued deficiencies and recommended his termination. In said letter Hagopian outlined his concerns with the Grievant's work performance.

The Committee did not act on this matter at the time but instead adjourned to a later date because the Grievant wanted to have Union Representative Tom Larsen present. The Committee urged all parties concerned to explore the possibility of placing the Grievant in a different job by way of a job swap with another County employe, the possibility of moving the Benefit Specialist Program and position to the Human Services Agency or other possible options that might be available to resolve the dispute. The Committee voted to suspend taking any disciplinary action regarding the Grievant and to explore other solutions for the Grievant and the Commission of Aging until the next Commission on Aging Board meeting.

The Executive Committee next met on November 12, 1996, for the purpose of consulting with counsel. The Committee took no action at this meeting but discussed various options, including termination of the Grievant. The Grievant was not present at said meeting.

On November 14, 1996, the County's counsel, Attorney Howard Goldberg, faxed a copy of a Severance Agreement to both Union Representative Thomas Larsen and County Representative Steven Pickett, the County Clerk. There were discussions at this time between Larsen and the County regarding the settlement of issues regarding the Grievant. Larsen informed the County at this time that the Grievant rejected the proposed settlement agreement because he did not want to resign his employment with the County. Nevertheless, the County renewed its settlement offer several times and settlement discussions continued into December, 1996.

When the parties were unable to reach an agreement concerning the Grievant, the subject of the Grievant's job status was placed on the agenda of the November 18, 1996 meeting of the entire Commission on Aging Board. At that meeting, Mitchell Hagopian again described the Grievant's job deficiencies and lack of cooperation, the activities that the Elder Law Center, the Commission on Aging and the Area Agency on Aging had been involved in

since June of 1995, in an unsuccessful effort to improve the services of the Lafayette County Benefit Specialist program, the poor test results that the Grievant had received on the skills test and the ongoing issues regarding the newsletter articles that the Grievant had been required to prepare, and how the Benefit Specialist Program worked in the other 11 counties that he supervised. Also at said meeting, Hagopian discussed an incident from the previous March which led to the Grievant being assigned additional tasks and to his suspension which are the subjects of another grievance not before this Arbitrator.

Chairman Berg then read a letter dated November 12, 1996, from Lucille Baker, Executive Director of Age AdvantAge, the Area Agency on Aging regarding the future of the contract for the Benefit Specialist Program. In said letter, Baker indicated that she was no longer willing to fund the County to the tune of \$10,000 based on Hagopian's recommendation to terminate the Grievant unless the County took decisive steps "to assure the future quality of your program." Berg then read a letter from Betsy Abramson, Director of the Elder Law Center regarding changing supervisory staff for the Grievant wherein she stated: "I stand by Mitch's decisions and actions in this matter 100%. Accordingly, I will not re-assign a different . . . attorney to serve as legal back-up for the Lafayette County benefit specialist program."

The Grievant was then offered the opportunity to make a response. The Grievant stated that he had no clients complain about his work on the satisfaction surveys that had been done regarding his program.

Union Representative Larsen commented that it seemed that everything was related to the incident of client services in March, that no one was getting wrong information and that there had been improvement in the Grievant's client files and record keeping.

Benson responded that there had been a number of complaints over the past but that they did not come directly from clients. Benson indicated that those complaining were reluctant to proceed and did not want to formalize the complaint process.

Thereafter, the Commission voted to terminate the Grievant effect immediately.

By memo dated November 26, 1996, Union Steward Fink advised Carol Benson and Steve Pickett as follows:

Per Article IV of the Lafayette County Courthouse Employees Union Local 678 contract with Lafayette County, Step 1: Mr. Helm requests a meeting with you to discuss the action taken against him on November 18, 1996.

Mr. Helm is filing a grievance based on the violation of Article III of the contract. He contends that he was discharged without just cause. In addition, no written notice of his discharge nor any reason for the action has been given to Mr. Helm or to the Union.

Mr. Helm and the Union request copies of the minutes of the open and closed sessions of the Commission on Aging Executive Committee Meeting held in Madison on Tuesday, November 12, 1996.

Both Benson and Pickett testified that they did not recall seeing the above memo prior to the hearing. Nancy Kilcoyne testified that she typed said memo and had it delivered to their respective offices.

The Step 1 oral grievance meeting was held on December 4, 1996. Present were the Grievant, Union representatives Larsen and Fink, Carol Benson and Steve Pickett representing the County. Benson was asked to reconsider the Board's decision to terminate the Grievant and responded that she was not able to overturn a Board level decision. The Union representatives also raised an issue regarding the lack of a formal letter containing the specific reasons for the discharge within the time limits set forth in the labor agreement. Pickett responded that this was the first time that such a letter had been requested and that a letter would be forthcoming as soon as possible.

By letter dated December 5, 1996, Director Benson denied Helm's grievance at the oral step as follows:

In response to the issues raised in the oral grievance meeting held on Wednesday, December 4, 1996 the grievance has been denied.

As you are aware, the decision to discharge you from your position as Benefit Specialist for Lafayette County was made by the Commission on Aging Board. As director of the agency I am not in a position to rescind a board level decision.

As discussed, a formal notice of your discharge will be forthcoming and copies of the minutes requested will be made available as soon as they have been approved by the committee.

By letter dated December 13, 1996, Union Representative Larsen filed a Step 2 written grievance on the matter. In said grievance, Larsen alleged that the County did not have just

cause to discharge the Grievant within the meaning of Article III and other applicable provisions of the parties' collective bargaining agreement. Larsen also indicated that the matter "had been discussed pursuant to Step 1 of the grievance procedure with Carol Benson and the matter remains unresolved." For a remedy, the Union requested that the Grievant be reinstated, his work record be purged regarding the matter and that he be made whole for all lost wages and benefits.

By letter dated December 17, 1996, County Clerk Pickett provided the Grievant a letter of discharge which provided as follows:

As you know, your employment with Lafayette County was terminated on November 18, 1996. The Commission on Aging Committee at its meeting on a vote moved to terminate your employment with Lafayette County. The board and its executive committee have reviewed your work over the previous year and a half with the documentation that was presented. At the November 18th meeting, which was held in public session at your request, the board received information regarding your failure to perform your duties and activities as directed by Attorney Mitchell Hagopian. It was following Mr. Hagopian's recommendation and a review of the information, that the committee voted to terminate your employment with Lafayette County. Mr. Helm, you do have the right to appeal this decision as stated in your union contract.

You will continue to be covered at your choice under the Lafayette County Health Insurance Program. You have Cobra rights which will be extended for 18 months.

If you have any questions, please feel free to contact me.

On January 14, 1997, the Lafayette County Grievance Committee denied the grievance and refused to consider the question of "timeliness and accuracy of the notice of your discharge . . . These issues were not specified on the grievance you filed and were not considered by the Grievance Committee."

On January 24, 1997, Union Representative Larsen notified the County that the Union was appealing the Robert Helm Termination Grievance to Arbitration. Larsen's letter referenced the threshold issue regarding Article III notice. The letter stated as follows:

This letter will serve as written notice of the Union's intent to proceed to arbitration in the matter of the grievance concerning the termination of employment on Robert Helm.

We note that the Grievance Committee did not address the issue concerning the County's failure to comply with the provisions of Article III regarding the notification in writing reasons (sic) for the termination. We consider this to be a threshold with regard to the determination if the County had just cause to terminate Robert Helm's employment. As you are aware the Union has raised this issue at each step of the grievance procedure.

It is our understanding that the County would like to combine this grievance with the grievance currently pending arbitration regarding Helm's suspension.

If you have any questions, please contact the writer.

PERTINENT CONTRACTUAL PROVISION

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.

POSITIONS OF THE PARTIES

The Union basically argues that the grievance should be sustained on procedural grounds in that the County failed to provide the Grievant and the Union with a written notice of discharge within three (3) days of November 18, 1996, stating the reason(s) for the discharge. The Union notes that just cause has both procedural and substantive components and that arbitrators will not find just cause for discharge where there is noncompliance with the terms of an agreement which requires post-disciplinary written notice. The Union adds that it has not waived the right to raise an issue regarding the written notice at the arbitration hearing.

The Union argues in support of the above that disciplinary notice must contain specifics as to the reason(s) for discharge and that the Arbitrator cannot ignore specific contract language requiring same because of his lack of authority to modify the agreement as written. The Union adds that the County cannot add at a later date reasons known to it at the time and not cited in the letter of discharge.

The Union adds that the Grievant is entitled to protection from unspecified charges for the foregoing reasons and also to protect the Grievant from being recharged on allegations considered in his suspension which was overturned by Arbitrator Bielarczyk.

Having failed to clearly state the charges in writing within three (3) days of the discharge, the Union alleges that the County is now attempting to modify the reason(s) for discharge. The Union adds that it has been impossible to ascertain at any time material herein the actual reason(s) for the Grievant's discharge.

For a remedy, the Union requests that the Arbitrator sustain the grievance and order the Grievant's immediate reinstatement and coverage under group health insurance, etc., as well as provide other appropriate remedy.

The County, on the other hand, argues that arbitral precedent does not support the Union's position that violation of the notice requirement automatically results in reinstatement of a discharged employee. The County notes that distinctions have been made in previous arbitration decisions based on the severity of the violation and the amount of prejudice, if any, flowing from a notice violation. Where the requirement is only for written notice after discharge, the County argues that the Arbitrator has discretion to determine the appropriate remedy to be imposed when there is a procedural violation of the contract.

In support of its position, the County first argues that reinstatement with back pay is not an appropriate remedy in the instant case because the procedural infirmities were not prejudicial to the Grievant; because an emphasis upon technicalities would be inconsistent with the informal atmosphere of the grievance-arbitration process as practiced over the years by the parties herein where the emphasis has been on resolving grievances, not strictly adhering to the grievance procedure's time lines; and because the end result herein could be quite ludicrous with reinstatement of the Grievant to his former position, because of a minor procedural error, leading to probable discontinuance of the entire program and disruptions in the work force when the Grievant and the present incumbent in the position of Benefit Specialist were laid off and subsequently bumped other employees in an effort to retain their employment with the County.

The County next argues that the Union failed to follow the grievance procedure with regard to its claim. In this regard, the County maintains that the Union could not have filed a grievance in accordance with Sections 1 and 2 of Article IV of the agreement since the Union is basing its grievance on both the lack of detail and lateness of Mr. Pickett's December 17th letter yet filed his grievance protesting same prior to the date that this letter was sent.

In conclusion, the County concedes that it failed to give written notice of the discharge within three working days of the date the Commission on Aging voted to terminate the Grievant. However, the County states that it would be totally inappropriate to award reinstatement because of this procedural technicality which had a negligible impact on the Grievant and the Union. The County adds that the Arbitrator should not reinstate the Grievant to his former position without first considering his job deficiencies.

For all of the foregoing reasons, the County requests that the Grievant's motion be denied.

Both parties, in advancing the above arguments, cited numerous arbitral authorities and precedent in support of their positions.

DISCUSSION

At issue is whether the County violated Article III of the collective bargaining agreement when it failed to timely provide the Grievant and the Union written notice of the Grievant's discharge containing the reason(s) for said action. The Union moves to sustain the instant grievance on procedural grounds while the County takes the opposite position.

The County concedes that it did not provide a written notice of discharge to the Grievant within the three (3) working days of said action as required by Article III. However, the County argues that this was a technical violation of the agreement that caused no harm to the Grievant or Union and does not warrant the absurd result of reinstating the Grievant. The Union, on the other hand, argues that the contract requires such notice so that the Grievant can adequately defend the charges made against him.

The County correctly points out that the Arbitrator has the discretion to determine the appropriate remedy to be imposed where there is a procedural violation of the agreement particularly where there is a procedural irregularity involving the written notice after discharge. The Union also correctly points out that some arbitrators have exercised that discretion to sustain a grievance and put the employe back to work. Other arbitrators, however, take a different approach. (DUNSFORD, *ARBITRAL DISCRETION: THE TESTS OF JUST CAUSE*, IN *ARBITRATION 1989: THE ARBITRATOR'S DISCRETION DURING AND AFTER THE HEARING*, PROCEEDINGS OF THE 42ND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ED. GRUENBERG (BNA BOOKS, 1990), 29, 36.)

As noted above, arbitrators differ on how they approach these issues. There are cases where procedural due process errors are weighed very heavily while in other cases arbitrators have applied a "prejudicial error" rule to such matters. Most arbitrators, however, have taken a middle road. Rather than adopting either of the aforesaid approaches – i.e. viewing procedural due process as essential or assessing whether improper procedure has "prejudiced" the Grievant – these arbitrators seek:

to balance the competing tensions of rigidity and fairness by treating procedural failures as relevant, but not necessarily as invalidating, discipline that is otherwise warranted. It is in these cases that we see most clearly due process concerns dealt with as an aspect of remedy, generally by mitigating otherwise

appropriate discipline. (CHRISTINE D. VERPLOEG, "INVESTIGATORY DUE PROCESS AND ARBITRATION: IS THERE A COMMON TREND IN THE ARBITRAL COMMUNITY?", PROCEEDINGS OF THE 45TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, ED. GLADYS W. GRUENBERG (WASHINGTON, D.C.: BNA BOOKS, 1992)

The undersigned agrees with the above approach, and will address the procedural objections of the Union using the above standard.

In this regard, the County first argues that the procedural infirmities were not prejudicial to the Grievant. For the reasons discussed below, the Arbitrator agrees.

The Union argues, contrary to such a conclusion, that the Grievant and the Union were unable to defend against the Grievant's discharge because the Committee gave no reasons for its decision to terminate the Grievant on November 18, 1996. However, as pointed out by County Clerk Steven Pickett, all parties concerned had met many times in an effort to address the Grievant's work deficiencies, which were the basis for his termination, without success (Tr. 121). The Board of the Commission on Aging had all that information before them when they voted to terminate the Grievant on the aforesaid date (Tr. 123). The Grievant and his representatives were present at all the relevant meetings including the one at which he was terminated. The Grievant was given a copy of a letter, written by Mitchell Hagopian, which outlined his continued deficiencies and recommended his termination (Employer Exhibit No. 5). The Grievant was given an opportunity to present his side of the story (Tr. 16). His representative was also given an opportunity to present information favorable to the Grievant prior to the Board's decision to terminate him (Joint Exhibit No. 2). Based on same, and the entire record to date, the Arbitrator is of the opinion that the Grievant and the Union knew, or should have known of the reasons for his termination despite their statements to the contrary.

The Union also argues that the Grievant was subject to double jeopardy because not only were the charges against him unspecified but because the County is attempting to relitigate allegations considered in the suspension which are not unique to the discharge. However, the parties stipulated at hearing that Bielarczyk's suspension arbitration and decision and record are not part of this proceeding. There, the Arbitrator is unable to address at this time this concern of the Union.

The Union further argues that the reasons given in the County's discharge letter are not specific enough to defend against and allow the County to improperly modify its reasons for termination at this later date. However, based on the instant record the Arbitrator finds that the evidence does not support the Union's claim. Therefore, the Arbitrator rejects this argument of the Union.

The County also argues that the Union failed to follow the grievance procedure with regard to its claim. The County, however, cannot base this claim on its failure to provide written notice on a timely basis as provided in the agreement. There is no dispute that the Union filed its grievance in conformance with the parties' contractual grievance procedure following the County's decision on November 18, 1996, to terminate the Grievant. The Arbitrator also finds, contrary to the County's assertion, that the Union properly raised the aforesaid procedural objection at the oral stage, Step 1 of the grievance procedure (Tr. 45, 91-92 and 149) and maintained this objection throughout the grievance processing. (Union Exhibit Nos. 1, 2, 4, 7; Employer Exhibit No. 3, Tr. 59-60, 62, 99, 104-105, 109).

Finally, the County argues that the parties have been flexible in the past in processing grievances, placing an emphasis on resolving disputes rather than enforcing grievance procedural requirements such as time limits. However, the contract clearly requires the County to provide written notice of the reasons for discharge to the Grievant and the Union within three (3) working days after said disciplinary action is taken. Therefore, the Arbitrator rejects this argument of the County.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the parties relating to the procedural issues. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the above, and the record as a whole, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the County violated Article III of the collective bargaining agreement when it failed to provide a written notice of the Grievant's discharge within three (3) working days as required by the agreement. However, the Arbitrator will address the issue of appropriate remedy at the substantive stage of this arbitration proceeding.

Based on all of the above, and the record as a whole, it is my

INTERIM AWARD

That the Union's Motion to Sustain the grievance is denied. However, the grievance is sustained in part, and the parties are ordered to proceed to hearing on the merits.

Dated at Madison, Wisconsin, this 20th day of July, 1998.

Dennis P. McGilligan /s/

Dennis P. McGilligan, Arbitrator