BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 338
No. 56381
MA-10257

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220-0370, appearing on behalf of the Union.

Mr. Steve Rollins, Corporation Counsel, Manitowoc County, 1110 South 9th Street, Manitowoc, Wisconsin 54220-5374, appearing on behalf of the County

ARBITRATION AWARD

Manitowoc County and Manitowoc County Supportive Services Employees Local 986-A, AFSCME, AFL-CIO are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding. The agreement provides for binding arbitration of disputes. The Union, by request dated April 28, 1998, initiated grievance arbitration and requested the Commission to appoint either a Commissioner or a member of its staff to serve as Arbitrator. Paul A. Hahn was appointed as Arbitrator to hear the grievance. Hearing in this matter was held on May 20, 1998 in the City of Manitowoc, Wisconsin. A transcript was made of the hearing. The parties filed briefs with the Arbitrator for mutual exchange. Copies of the briefs were forwarded to the parties by the Arbitrator on August 13, 1998. The parties were given the opportunity to file reply briefs and did so with exchange through the arbitrator on September 9, 1998. The record was closed on September 9, 1998.

ISSUE

Stipulated Issue

The parties stipulated to the following issue:

Did the Employer violate the 1996-97 collective bargaining agreement by issuing a written reprimand to grievant Kathleen Stahl dated January 6, 1998; if so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 – RECOGNITION AND BARGAINING UNIT

The Employer recognizes the Manitowoc County Supportive Services Employees, Local 986-A, AFSCME, AFL-CIO, as the exclusive bargaining agent of the newly combined Courthouse and Human Services clerical and paraprofessional unit. This unit shall be defined as all employees engaged in the clerical, paraprofessional and other non-excluded operations of the Human Services Department and departments within the Manitowoc County Courthouse. Specifically excluded are Highway Department Employees, Health Care Center Employees, elected officials, supervisory, managerial, professional and temporary employees within the Courthouse, Health Department, and Human Services Departments.

Positions previously in the "Courthouse Employees" bargaining unit shall be considered to be in the "Courthouse Group" for the purposes of this agreement. Positions previously in the "Human Services Department Employees" bargaining unit, except professionals, shall be considered to be in the "Human Services Group".

. . .

ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

. . .

ARTICLE 5 – DISCIPLINARY PROCEDURES

A. Employees may be disciplined for just cause. It is understood and agreed that just progressive discipline shall be followed. The Employer shall provide the employee and Union with a letter setting forth the reason(s) for the disciplinary action.

. . .

ARTICLE 8 – GRIEVANCE PROCEDURE

A. Definition of Grievance: Should any differences arise between the Employer and the Union as to the meaning and application of this Agreement, or as to any question relating to wages, hours, and working conditions, they shall be settled under the provisions of this Article.

. . .

Step 4 – Arbitration:

. . .

c. Arbitration Hearing: The Arbitrator shall with the consent of both parties, use his or her best efforts to mediate the grievance before the Arbitration Hearing. The parties shall attempt to agree in advance on stipulated facts and issues to be used as well as procedures to be followed at the hearing. The Arbitrator selected or appointed shall meet with the parties at the earliest mutually agreeable date to review the evidence and hear testimony. The Arbitrator shall make a decision on the grievance which shall be final and binding on both parties. The decision shall be submitted in writing as soon as possible after the completion of the hearing.

BACKGROUND

This grievance involves Manitowoc County and Manitowoc County Supportive Services Employees Local 986-A, AFSCME, AFL-CIO representing employes of the County set forth in Article 1 – Recognition. (Jt. Ex. 1) The Union alleges a contractual violation by the County for disciplining the grievant by issuing a written warning to the grievant on January 6, 1998 for ". . . failure to adhere to my written and verbal directives concerning outreach." (Jt. Ex. 4) The County takes the position that it had just cause under the collective bargaining agreement to issue the warning. The parties were unable to resolve the dispute; this led to the Union filing a grievance on January 29, 1998. The Employer responded denying the grievance on February 18, 1998. (Jt. Exs. 2 and 3)

Manitowoc County operates an Aging Resource Center. The Aging Resource Center operates nutrition sites and performs outreach to residents of Manitowoc County to make them aware of the nutrition sites. The Center also informs residents about programs operated by the County that would assist the elderly in caring for themselves. The grievant's job title was County Community Supervisor and during the period pertinent to this grievance she was also a site manager at the Mishicot Nutrition site. Part of the grievant's job was to perform outreach to older persons through home visits, meeting with community groups and visiting clubs to inform the elderly of available resources and opportunities. (U. Ex. 1)

The grievant was a County Community Supervisor from July of 1977 until February 16, 1998, when her job was changed to Site Manager; outreach to elderly at their homes was no longer part of her job description. The Director of the Aging Resource Center is Judith Rank. Ms. Rank joined the County as Director of the Aging Resource Center on September 2 of 1997. Rank was the overall supervisor of the grievant; her direct supervisor was Jan Dugan, who held the title of Nutrition Coordinator. Dugan has directly supervised the grievant since 1979.

In the fall of 1997, Director Rank sought to tighten up the activities of the Aging Resource Center to comply with government regulations. By letter of November 4, 1997 the grievant was told that rather than referring people directly to the County's Human Services Department to direct all referrals through the Aging Resource Center. (Er. Ex. 3) Director Rank, on December 3, 1997 issued a directive, by memorandum, to all site managers, including the grievant, that henceforth all site managers were to "correspond" with the Aging Resource Center about consulting with individuals in their homes. (Er. Ex. 5) At a meeting of the site managers, on December 17, 1997, attended by grievant, Director Rank discussed the December 3 memorandum and told all site managers that no one was to conduct "outreach" without prior approval from herself or nutrition coordinator Jan Dugan.

Between December 17, 1997, when the directive was explained by Rank, and January 6, 1998, when a written warning was issued to grievant for violating the directive, the County claims that grievant, in violation of Rank's directive, twice visited the homes of outreach clients without authorization. These two alleged unauthorized visits led to the warning letter subject of the grievance in this matter. The grievant did not deny that she made the visits. The grievant testified only that she did not recall visiting the two subject homes between December 17th and January 6, 1998. Grievant testified that her last visits to the two homes were in November of 1997.

The Union filed a grievance over the warning letter issued to the grievant. The parties processed the grievance through the contractual grievance procedure and were unable to resolve the grievance.

The hearing in this matter was held by the Arbitrator on May 20, 1998 in the City of Manitowoc, Wisconsin. The hearing closed at 3:00 p.m. The hearing was transcribed. The parties were given the opportunity to file briefs and did so with the exchange of briefs through the Arbitrator occurring on August 13, 1998. The parties were given an opportunity to file reply briefs and did so with exchange through the Arbitrator on September 9, 1998. The record was closed on September 9, 1998.

POSITIONS OF THE PARTIES

Union

The Union takes the position that prior to December 17, 1997 the grievant did not receive any directive through Employer Exhibits 3 and 4 to stop doing outreach for either new or existing participants in the Aging Resource Center programs. The Union argues that other

alleged disciplinary incidents involving the grievant were not used by the County to justify its discipline of the grievant. The Union argues that the discipline issued on January 6, 1998 which directs the grievant not to become involved in any more outreach conflicts with the December 3, 1997 directive when grievant and other site managers were told that they could not do outreach unless they had permission from either Director Rank or Jan Dugan. (Jt. Ex. 4 and Er. 5) The Union argues that the Employer did not introduce the best evidence by failing to provide the Arbitrator with the specific dates when the grievant allegedly visited clients she was not supposed to visit between December 17, 1997 and January 6, 1998. Despite the fact that the County, through Director Rank, testified that she had phone memo messages that would have stated the exact dates when the grievant allegedly told Director Rank that she visited the homes of two outreach individuals, said phone logs or memos were never produced at the arbitration hearing. The Union argues that this failure to provide this documentary evidence demonstrates that the Employer has not met its burden to prove the basis for discipline of the grievant. The Union argues further that the grievant has not been shown that she was motivated to defy a direct order and that her testimony sets forth a desire to comply with "evolving directives given her." Lastly, the Union argues that the Employer, having failed to prove the misconduct charged, should withdraw the January 6, 1998 reprimand and remove any reference to the reprimand from any of grievant's files held by the County and make the grievant whole.

County Position

The County states that the grievant engaged in outreach activities that resulted in complaints to the County through the Aging Resource Center. The County states that, in addition to complaints regarding information that the grievant would glean from her outreach activities, the grievant failed to file required reports to the Aging Resource Center. The County states that the grievant, through the memorandum of December 3, 1997 and conversations with Aging Resource Center Director Judy Rank understood that she was not to do further outreach. The County points out that none of the other site managers performed any outreach activities after the December 17, 1997 meeting. The County argues that the grievant informed Rank, following the December 17th meeting, that she had performed outreach activities on two occasions and did so without securing approval from Rank in direct violation of a valid order. Rank then contacted the County's Personnel Director and a written warning was issued following a review of the grievant's personnel file. The County argues that the directive to not conduct outreach activities without prior authorization was reasonable, was given to the grievant and other site managers both in writing and orally and that failure to follow this directive was an act of insubordination.

The County, in attempting to introduce the grievant's prior disciplinary record, argued that the grievant had a disciplinary record that demonstrates a pattern of misconduct characterized by "a continuing refusal to comply with her employer's instructions: . . ." The County argues that the excuses that the grievant offered as to why she should not be given a written warning, that she misunderstood the instruction and that she visited the individuals

prior to the instruction, are either inadequate or untrue. The County argues that the grievant's excuses are simply a pattern of conduct wherein the grievant only hears what she wants to hear.

The County concludes its position by setting forth five defenses to the grievance: that the Director verified that the grievant's outreach visits, subject of the warning letter, took place after December 17th; that the claim that grievant misunderstood the directive not to conduct outreach after December 17 would only be necessary if the grievant had continued to conduct outreach activities after December 17; that if the grievant had not conducted outreach after December 17, 1997, there would not be any reason for the Union to argue that the grievant continued to visit outreach participants based on the belief she could still visit existing and ongoing participants; that the Union never made the argument when the written warning was issued or during any grievance meetings that the grievant claimed, as she did at the arbitration hearing, that she did not perform outreach after December 17; that the grievant acknowledged that in phone calls after the December 17th meeting the Director had discussed outreach with her. The County concludes that the directive to grievant and other site managers not to conduct further outreach was reasonable, was given orally and in writing, and that the grievant's noncompliance with a reasonable work rule justified the discipline received and that the grievance should be denied.

DISCUSSION

The issue in this arbitration presents three sub-issues in deciding whether the County violated the collective bargaining agreement between the parties by disciplining the grievant with a warning letter on January 6, 1998. Was the directive issued to the grievant not to do further outreach a valid directive? Was the grievant aware of and did she understand the directive? Was the grievant in violation of the directive?

I find that the directive to the site managers, including the grievant, was valid and reasonable. The management rights clause of the parties' labor agreement gives the County the right to direct the workforce as represented by the Union. (Jt. Ex. 1) The directive not to perform outreach activities was directly related to the job of the grievant. The directive involved a legitimate concern on the part of the Director of the Aging Resource Center to more closely control the activities of representatives of the Center with the elderly given modifications in government programs. The directive was also issued to ensure that representatives of different programs did not give the elderly clients of the County conflicting advice. Finally, the Union did not argue or take the position that the directive was not reasonable.

I also find that the grievant knew or should have known of the directive. The letter of November 4, 1997 to grievant from Rank is not clear that this meant grievant was not to perform outreach activities. (Er. Ex. 3) Nor is the directive in the December 3, 1997 memorandum as clear as it should have been and by itself, it might not have justified discipline for its violation. (Er. Ex. 5) However, the testimony of Rank and Dugan is clear and credible

that Rank explained the December 3, 1997 memorandum at the meeting on December 17, 1998 informing all the site managers, including the grievant, that they were no longer to do any outreach activities without authorization from either Rank or Dugan. Although the grievant testified that she thought the directive applied only to new clients, I credit the testimony of Rank and Dugan that the directive, as explained by Rank at the December 17th meeting, was clear since no other site managers performed outreach activities after that date without authorization. Rank also testified, without challenge from the grievant, that she spoke with the grievant on two occasions soon after the December17th meeting about outreach activities and further explained Rank's directive. I further find as part of this sub-issue that there was not a need to inform site managers in the December 3 directive or at the December 17th meeting about the consequences of violating a directive of their employer. It is reasonable to find, as I do, that an employe should expect adverse consequences for violating an order of their employer. (Jt. Ex. 4)

The last issue places the creditability of the grievant and Rank as the main conflict which I must consider in reaching a decision in this arbitration. Did the grievant visit MP and S between December 17, 1997 and January 6, 1998 in violation of the directive, as alleged by the County, or did grievant visit them in November of 1997 as she alleges? As arbitrator, I do not have any guiding light to tell me who is being truthful. Memories are often clouded by the lapse of time, emotion and self-interest. Because the grievant has an interest more acute than her supervisor in the outcome of the grievance, the grievant's testimony is deservedly subject to careful scrutiny. In this case, I find the testimony of Rank to be the more creditable.

What is most striking to me about the grievant's testimony is her memory of events. The record cites several outreach activities that the grievant described in detail in her testimony that happened months before the meeting of the site managers on December 17, 1997. And yet, as to that meeting and two phone calls with Rank almost immediately after that meeting, the grievant's testimony is vague, she has little recollection as to what transpired or was discussed. One would have to term this selective recall, which seems to fit a pattern of her employment with the County. Rank testified, without rebuttal by the grievant, that grievant had a habit of not understanding directives. While I did not consider the previous disciplinary record of the grievant for purposes of the discipline in this case, the record should have put the grievant on notice of the consequence for failure to comply with the directives of her supervisors. I agree with the Union that with the introduction of Rank's telephone memos stating when the grievant called to tell Rank of the visits to MP and S after December 17, 1997, my task in deciding this case would have been easier. The same is true for the time cards referenced in the warning letter which might have documented unauthorized activities by the grievant.

Despite these defects in the County's case, I still credit Rank that the grievant told Rank that she visited MP and S after December 17th without authorization. I further credit Rank's testimony that she called one of the two clients, and the client verified the visit took place. Grievant never testified that she did not visit MP and S after December 17th; she testified that she did not recall making the visits. She thought the last time she visited these clients was in November of 1997. Not recalling may well be truthful testimony, but it does not overcome the

forceful and credible testimony by Rank that the unauthorized visits were made by the grievant. I do not believe Rank evidenced any desire to "get" the grievant. Her decision not to use grievant's previous disciplinary record is evidence of that. But given her directive, Rank is much more likely to have made sure of the facts than grievant.

I find that the County proved just cause as required by Article 5 - Disciplinary Procedures of the collective bargaining agreement. (Jt. Ex. 1) The discipline to the grievant was, as it is constituted in the January 6th letter, a warning. (Jt. Ex. 4) It combines a mild form of discipline with advice to the grievant as to why she received the warning. I further find that the County did not violate any requirement of progressive discipline and indeed the Union does not so argue. The collective bargaining agreement does not set out a specific requirement for the initiation or appropriate course of progressive discipline. Absent that, an employer can initiate discipline at any level appropriate to the circumstances of the case. In this case the County levied discipline appropriate to the actions of the grievant.

I have reviewed the record and the briefs of the parties and have decided that I cannot sustain but must deny the grievance.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 25th day of September, 1998.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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