BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUPACA COUNTY PROFESSIONAL EMPLOYEES UNION LOCAL 2771, AFSCME, AFL-CIO

and

WAUPACA COUNTY

Case 108
No. 55950
MA-10125

Appearances:

Mr. Jeffrey J. Wickland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 44, Stevens Point, Wisconsin 54481-0044, appearing on behalf of Waupaca County Professional Employees Union, Local 2771, AFSCME, AFL-CIO.

Godfrey & Kahn, S.C., by **Attorney John E. Thiel**, 100 West Lawrence Street, Appleton, Wisconsin 54911, appearing on behalf of Waupaca County.

ARBITRATION AWARD

Waupaca County and Waupaca County Professional Employees Union Local 2771, AFSCME, AFL-CIO are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union by request to initiate grievance arbitration received by the Commission on December 22, 1997, requested the Commission appoint either a Commissioner or a member of its staff to serve as arbitrator. The Commission appointed Paul A. Hahn as Arbitrator. Hearing in the matter was held on August 26, 1998 in Waupaca, Wisconsin. The hearing was transcribed and the parties filed post-hearing briefs which were received by the Arbitrator on October 21 and 26, 1998. The parties filed reply briefs which were received by the Arbitrator on November 12 and 16, 1998. The record was closed on November 20, 1998.

ISSUE

Union

Did the County have just cause for its discipline of the Grievant in May, 1997? If not, what is the appropriate remedy?

County

Did the County violate Article 2, Section 2.01(D), and Article 8, Sections 8.01 and 8.02 of the Labor Agreement when it issued a written reprimand to the Grievant on May 29, 1997 for his conduct in a meeting held May 22, 1997? If so, what is the appropriate remedy?

Arbitrator

Did the County violate Article 2, Section 2.01(D), and Article 8, Section 8.02 of the labor agreement when it issued a written warning to the Grievant on May 29, 1997 for his conduct in a meeting held on May 22, 1997? If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 – RECOGNITION

1.01 The Employer recognizes Waupaca County Professional Employees, Local 2771, AFSCME, AFL-CIO, as the certified bargaining agent per Wisconsin Employment Relations Commission Decision No. 20853-B for all regular full-time and regular part-time employees of the Waupaca County Department of Human Services, including all regular full-time and regular part-time professional employees of Waupaca County Human Services, Courthouse, and the social workers at Lakeview Manor, excluding supervisor, confidential, managerial, casual, seasonal, temporary and farm employees. Pursuant to the provisions of Section 111.70 of the Municipal Employment Relations Act, said labor (re)organization is the exclusive collective bargaining representative of all such employees for the purposes of collective bargaining with the above named municipal employer its lawfully authorized representatives, on questions of wages, hours, and conditions of employment.

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The Employer possesses all management rights except as otherwise specifically provided in this agreement and applicable law. These rights include, but are not limited to the following:

A) To direct all operations;

B) To establish reasonable work rules and schedules of work;

C) To hire, promote, transfer, schedule and assign employees;

D) To suspend, demote, transfer, discharge, and take other disciplinary action against employees for just cause;

E) To layoff employees because of lack of work or other legitimate reasons;

F) To maintain the efficiency of operations;

G) To take reasonable action, if necessary, to comply with state or federal law;

H) To introduce new or improved methods or facilities or to change existing methods or facilities;

I) To determine the kinds and amounts of services to be performed as pertains to the operations and the number and kinds of classifications to perform such services;

J) To contract out for goods and services, provided, however, that no employee shall be on layoff or laid off or suffer a reduction of hours as a result of such subcontracting;

K) To take whatever action is necessary to carry out the functions of the County in situations of emergency;

L) To designate a person in charge to manage that department in the absence of the department head.

2.02 It is further agreed by the Employer that the management rights shall not be used for purposes of undermining the Union or discriminating against any of its members. The Employer agrees to exercise said rights reasonably.

. . .

ARTICLE 5 – RULES AND REGULATIONS

5.01 The Employer may adopt and shall publish adopted rules and regulations which may be amended from time to time.

. . .

ARTICLE 8 – DISCIPLINARY PROCEDURE

8.01 The following disciplinary procedure is intended as a legitimate management device to inform the employee of work habits, etc., which are not

consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

8.02 Any employee may be demoted, suspended or discharged or otherwise disciplined for just cause.

. . .

ARTICLE 10 – GRIEVANCE PROCEDURE

10.01 Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract or a question of safety.

. . .

10.02 The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. The grievant employee shall first bring his/her complaint to the grievance committee of the Union. If it is determined after investigation by the Union that a grievance does exist, it shall be processed in the manner described as follows:

. . .

Step 4:

. . .

Arbitration proceedings shall be implemented in a manner prescribed by the arbitrator. The decision of the arbitrator shall be final and binding on both parties, subject to judicial review. In rendering his/her decision, the arbitrator shall neither add to, detract from, nor modify any of the provisions of this agreement. The arbitrator shall be requested to render his/her decision within thirty (30) days after close of hearing or receipt of briefs, whichever is later.

STATEMENT OF THE CASE

This grievance arbitration involves the Waupaca County Department of Health and Human Services and Waupaca County Professional Employees Local 2771, representing the employes set forth in Article 1, Recognition. (Jt. 1) The Union alleges a contractual violation by the County Health and Human Services Department for issuance of a written warning to the Grievant, on May 29, 1997 for walking out of a meeting with the Director of the Department on May 22, 1997. (Jt. 2)

The Grievant is a clinical social worker employed by the Waupaca County Department of Health and Human Services and has been employed by the Department for nine years. In the fall of 1996 the Grievant and other employes of the Health and Human Services Department were involved in changing the treatment of Department clients to a more family-based program. This change of direction involved some disruption within the Department, particularly as it related to Department supervisor, Lauri Nichols. Grievant raised various concerns about the family-based treatment program in the Fall of 1996 and addressed those concerns in meetings with representatives of the County and the Department's governing board in November and December of 1996. In the meantime, the Grievant filed a complaint against Nichols with the Wisconsin Department of Regulation and Licensing. (Jt. 5 and Union 1) Nichols, upon receiving a copy of the letter that Grievant sent to the Department of Regulation and Licensing Board filed a sexual harassment complaint against the Grievant and another Department employe, Dave Forsberg. (Jt. 5)

The County's Personnel Director, Jeannette Helgeson, commenced the sexual harassment complaint investigation on or about April 17, 1997. (Jt. 5) The Grievant was advised of the charges at a meeting with Helgeson, Jeff Siewert, Corporation Counsel, and Alan Stauffer, Union Steward, and by letter from Helgeson dated April 28, 1997. (Jt. 5) The Grievant discussed the allegations of sexual harassment with Helgeson at the meeting and also advised her of employment issues in the Department and his belief that the complaint by Nichols may be evidence of retaliation. (Union 1) The Grievant responded to the charges of sexual harassment in writing on May 7, 1997 and included in his response a recommendation that Helgeson speak with various co-workers. (Union 1) Helgeson completed her investigation and prepared an investigative report. (Jt. 5) Helgeson did not speak to any of the witnesses offered by the Grievant nor did she listen to the tape of a November 1996 meeting as had been requested by the Grievant. The investigative report stated that neither the Grievant nor Forsberg had discriminated against Nichols. (Jt. 5) However, the investigative report stated that certain statements attributed to the Grievant and Forsberg were unprofessional and inappropriate. (Jt. 5)

On May 22, 1997 Helgeson and Dennis Dornfeld, Director of the Department of Health and Human Services, met with Nichols at 3:00 p.m., Forsberg at 3:30 and the Grievant at 4:00 p.m. to discuss the results and recommendations outlined in the investigative report. (Jt. 5) The meetings took place in Dornfeld's office. At the meetings with Nichols and Forsberg, Helgeson and Dornfeld presented the report, discussed it and discussed various recommendations to resolve relationship problems between the three employes. Nichols and Forsberg remained in their meetings, which lasted approximately one-half hour, until the meetings were terminated by Dornfeld.

At 4:00 p.m. Helgeson and Dornfeld met with the Grievant along with Union Representative Alan Stauffer. The Grievant was presented with the report and, after approximately ten minutes, in the midst of a discussion regarding the report and its recommendations, the Grievant became visibly upset and walked out of the meeting.

On May 29, 1997, the County issued the Grievant a written warning for insubordination for walking out of the May 22 meeting. (Jt. 2) The Union filed a grievance on behalf of the Grievant on May 29, 1997. The grievance was presented to management on June 9, 1997. (Jt. 2)

The parties processed the grievance through the contractual grievance procedure and were unable to resolve the grievance. No issue was raised as to the arbitrability of the grievance. The hearing in this matter was held by the Arbitrator on August 26, 1998 in the City of Waupaca. The hearing closed at 4:20 p.m. The hearing was transcribed. The parties were given the opportunity and filed briefs. The briefs were submitted to the Arbitrator on October 26 and October 21. Reply briefs were submitted to the Arbitrator on November 12 and November 16. The record was closed by the Arbitrator on November 20, 1998.

POSITION OF THE PARTIES

Union Position

The Union anchors its position to Arbitrator Carroll R. Daugherty's seven basic elements test in a just cause disciplinary case. The Union set forth the seven tests as follows:

1. NOTICE: Did the employer forewarn the employee that certain behavior could result in discipline? Was the employee forewarned of the type of discipline that could result?

2. REASONABLE RULE OR ORDER: Was the employer's rule(s) or managerial order reasonably related to the orderly, efficient and safe operation of its business and to the performance that the employer might properly expect of the employee?

3. INVESTIGATION: Did the employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. FAIR INVESTIGATION: Was the employer's investigation conducted fairly and objectively?

5. PROOF: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. EQUAL TREATMENT: Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?

7. PENALTY: Was the degree of discipline administered by the employer in a particular case reasonably related to the seriousness of the employee's *proven* offense and the record of service with the employer? 1/

1/ ENTERPRISE WIRE CO., 46 LA 359, 363-365 (DAUGHERTY, 1966).

The Union argues that since several of the above questions "may" be answered with a "no" response in this case. The Union states that it is clear that the County did not prove just cause for the discipline to the Grievant. The Union recognizes that insubordination is a serious offense but, the Union argues, there was no mutuality between the Grievant and Dornfeld or Helgeson as to the meaning or purpose of the meeting on May 22, 1997 that Helgeson scheduled to discuss the sexual harassment investigation report. Further there were no understood rules regarding the meeting as to what might happen to the Grievant if the Grievant left the meeting. The Union takes the position that the Grievant understood that he was required to attend the meeting but because the report's recommendations were voluntary, it was Grievant's option to reject these recommendations and leave the meeting. The Union points out that the Grievant was not told to remain at the meeting when he decided to leave nor was he called back after he left.

The Union pleads that because of the tension between the parties in Dornfeld's office on May 22, 1997 and Grievant's own emotional state, Grievant did the best thing by terminating his role and presence at the meeting. The Union also propounds that the County failed to conduct a proper and fair investigation before the warning letter was given to the Grievant on May 29, 1997. The Union's position is that by not speaking to the Grievant before issuing the discipline, the County failed to obtain the substantial evidence or proof necessary to find Grievant guilty of insubordination. The Union also contends that if Dornfeld believed Grievant's behavior was so severe and insubordinate, why then did he wait a full week to issue the discipline. The Union takes the position that Dornfeld has never disciplined anyone for walking out of a meeting. Finally the Union takes the position that the County reacted hastily and improperly to the events at and surrounding the meeting on May 22, 1997. the Grievant was not insubordinate and the discipline was without just cause and therefore the Union requests the Arbitrator to sustain the grievance and direct the County to remove the discipline from the Grievant's personnel file.

Position of the County

The County takes the position that under the collective bargaining agreement and its personnel policies the County had the authority to discipline for just cause and, in fact, there was just cause for the discipline of a written warning to the Grievant. (Jt. 1 and 4) The County argues that the Grievant knew the policies and had signed a statement acknowledging receipt of the policies and therefore knew that his behavior could result in a finding of insubordination resulting in discipline. (Jt. 3 and 4) The County takes the position that by walking out of the meeting with Dornfeld and Helgeson the Grievant was insubordinate. The County discussed in its initial post hearing brief several arbitration cases with facts that the County argues parallel the facts in this case, wherein arbitrators have upheld discipline to an employe for actions that the County argues were similar to the Grievant in this case.

The County points out that Nichols and Forsberg remained in their meetings until the meetings were over. The County claims that hearing testimony confirmed that Grievant was angry and uncooperative and admitted under oath that he left his meeting knowing that the meeting was not over. Contrary to the Union, the County takes the position that only

management, Dornfeld and Helgeson, could know when the meeting was to be terminated. When the meeting terminated was a decision for management and not for the Grievant to initiate by walking out of the meeting.

The County also cites the seven tests for a finding of just cause discipline by arbitrator Daugherty. Additionally, the County cites two tests by Arbitrator House for determining whether an employer has just cause to discipline an employe.

> The stock issues in a discipline case are: (1) is the employe guilty of the immediate misconduct alleged, and (2) if so, is the penalty imposed reasonable under all the relevant circumstances? 2/

2/ BLUE CROSS/BLUE SHIELD 104 LA 634, 640 (HOUSE, 1995).

The County maintains that the action of the Grievant in leaving the meeting with Dornfeld and Helgeson, before the meeting was terminated, is a form of insubordination supported by the arbitral precedent described in the County's initial brief in this matter. The County claims that it has a right to impose discipline at any level ranging from a verbal reprimand to discharge under the collective bargaining agreement and its personnel policies and that insubordination is misconduct severe enough to warrant a written warning. The County disputes the Union's contention that the County disciplined the Grievant only because the Grievant did not accept the results of the discrimination investigation. Lastly, the County contends that the Arbitrator should not substitute his judgment on discipline for that of the County, as such is permitted only where there has been an abuse of discretion by the employer which is not the case before this Arbitrator. The County requests that the Arbitrator uphold the discipline and deny the grievance.

DISCUSSION

I find that the facts in this case are essentially without dispute. Both parties established that there was a period of turmoil in the Department of Health and Human Services starting in late 1996 and carrying over into 1997. At the center of this personnel situation were the Grievant and supervisor Nichols. Nichols was not Grievant's immediate supervisor but her actions and comments led Grievant to file a complaint with a State licensing agency which in turn led to a filing of a discrimination complaint against Grievant and another employe by Nichols. A discrimination investigation by Personnel Director Helgeson followed. Helgeson wrote a report and meetings were scheduled on May 22, 1997 with Nichols, Grievant and the other employe, Forsberg. This dispute centers on Grievant's actions at his meeting with Helgeson and Dornfeld on May 22, 1997. This is a discipline case and the burden of proof is on the County to prove that the warning letter issued to the Grievant on May 29, 1997 was for just cause as required by the parties' labor agreement.

Both parties used the seven tests developed by arbitrator Daugherty in the ENTERPRISE WIRE case (cite omitted) to determine whether the County in this case met the just cause standard. As the Union and County obviously attached significance to these tests, I will answer the seven questions based on my review of the record, briefs of the parties and applicable case law.

The first test asks whether the employer gave the employe notice of the consequences of the employe's conduct. The Union argues that the Grievant did not know what was expected of him at the meeting and further that the arrangements and purpose of the meeting were unclear and not mutually understood. I find that the Union argument tends to complicate a simple situation. The Grievant knew that he had been directed to attend a meeting with Dornberg and Helgeson, at which his Union would be present, to discuss the findings of Helgeson's discrimination investigation. The meeting was not voluntary and was within the County's right to call, with which Union representative Stauffer agreed. Nor was the County required to tell Grievant exactly what would happen to him if he walked out of the meeting before being allowed by his superiors to leave. The County directs the Arbitrator to the personnel policies to prove that Grievant knew or should have known what might happen based on his conduct and that such conduct was insubordinate, meriting discipline under the policy. (Jt. 3) Even without the personnel policies I believe the Grievant could reasonably be expected to have had knowledge of the probable consequences of his walking out of a meeting with his superiors. It is not possible to write a specific policy to cover every possible action by an employe. Grievant in particular as a professional employe should have known his conduct would not be acceptable. 3/

3/ As Arbitrator Daugherty sets forth in the footnotes to his seven tests, "communication" of rules and penalties is not always necessary. "This is because certain offenses such as insubordination . . . are so serious that any employe in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable." ENTERPRISE WIRE, SUPRA.

The second test deals with whether the "rule" is reasonable. Again, there is nothing in the County's policies or in the labor agreement about walking out of a meeting; there does not have to be such a rule. As discussed and substantiated by the County in its brief in chief, arbitrators have consistently upheld discipline of employes for leaving meetings with their superiors before they were given permission to do so. To allow employes to walk out of such meetings would impede the efficiency of the County's operation. Further, neither the Grievant nor his representative disputed the right of the County to call the meeting. Grievant knew what the meeting was for and after being given an opportunity to read Helgeson's report, Grievant knew that the recommendations were voluntary and did not require him to do anything if he did not want to. I find that it was reasonable for the County to call the meeting with the Grievant and require him to stay at the meeting until released by Helgeson or Dornfeld.

The third and fourth tests, which I discuss together, ask whether the employer conducted a reasonable and fair investigation before the discipline of the employe. I find these questions can be answered in the affirmative. The disciplining authority, Dornfeld, was at the meeting. Dornfeld hardly needed to conduct more investigation to determine if the Grievant walked out of the meeting. Grievant's actions were confirmed by Helgeson, also present at the May 22 meeting. And since the discipline was for leaving the meeting, there was little more Dornfeld needed to do other than determine whether he believed discipline was warranted and if so, what discipline he should issue to the Grievant. The Union's main argument why the County did not carry out a fair investigation is that Dornfeld never spoke to the Grievant before issuing the discipline. I do not find such a requirement necessary under the facts present in this case. While speaking to the Grievant may have allowed the Grievant to offer defenses for his action of leaving the meeting before being given permission to do so, as Grievant does now, it would not have altered the fact that Dornfeld was there when Grievant left and it is clear why Grievant left. The Grievant creditably testified that his reason for leaving was that he was getting upset; he then interrupted Dornfeld and walked out. Speaking to Grievant before disciplining him may have been good procedure, but it does not negate the fact that at the point Grievant walked out, Dornfeld knew all he needed to know to make his decision. An investigation does not have to be perfect only "reasonable and fair." Consultation with the Grievant would, in this case, not have added any facts not known to Dornfeld. In addition, Dornfeld consulted with the County's labor counsel before making his decision.

The next test asks whether the employer had proof that the employe was guilty as charged. I find that the County proved that the Grievant left the meeting without authorization to do so. Grievant by his own admission became upset as he read the report, stood up, interrupted Department Head Dornfeld by raising his hand and, in essence, said he did not have to put up with this treatment and walked out. The Grievant, to his credit, did not deny that he walked out of the meeting. The Union argues that since the recommendations at conciliation were voluntary it was permissible for the Grievant to leave as there was nothing more to discuss. At that point, argues the Union, the meeting terminated. I do not agree. In a meeting called by management, only the employer knows when the meeting is over and only the employer can end the meeting; such was clearly not the case here. The meeting lasted ten minutes; the meetings with Nichols and Forsberg each lasted thirty minutes, the time allotted by the County to speak with each of the participants in the investigation. Both parties agreed that insubordination is a serious offense. There is substantial case law to the effect, as cited by the County, that leaving a meeting called by management without permission is insubordination. Dornbrook had all the evidence that he needed as he and Helegson were present to substantiate that Grievant walked out of the meeting without permission.

The next test shifts, to some degree, the burden of proof to the Union; was the County's treatment of this Grievant consistent with the treatment of other employes in similar circumstances. Neither party introduced evidence of a similar situation. The Union could only argue, as it did, that Dornfeld had never disciplined anyone before for walking out of a management called meeting. Absent any evidence to the contrary, which the Union never offered, this appears to be a case of first impression in the Department of Health and Human

Services. Dornfeld testified without contradiction that he has never had an employe walk out of a meeting with him before. Therefore there is no evidence that the County treated Grievant differently than other employes; this test has been met by the County.

The last test asks whether the discipline was reasonable in relation to the seriousness of the proven offense and the employment record of the Grievant. There is little question in my mind that the Grievant in this case is a dedicated employe who takes seriously his profession and his particular position with the County. This was Grievant's first discipline in nine years of employment with the County. Grievant was upset with the report and the findings that he had made unprofessional comments related to Nichols. The Union argues that Grievant did the right thing in getting up and leaving given that he was angry and getting more so. The Grievant called it taking a "time out," a term perhaps used in his work for the County. I believe it to be a key point, given Grievant's work and his professionalism, that he should have been able to control his anger and continue and complete the meeting; he was facing circumstances that he no doubt faces every day in his job. The Union argues that Grievant was never directed to stay at the meeting, but the Grievant admitted he did not know if he would have stayed if so directed. Grievant testified that he would have returned to the meeting but that is only speculation, and by then he still would have been guilty of leaving the meeting without authorization. I believe the County took Grievant's record as an employe into consideration in deciding on the punishment. Rather than being critical of the week it took the County to decide on the punishment, as argued by the Union, I believe it is an example of responsible management that the County took a reasonable time (a week) to determine, with the assistance of the County's labor counsel on a reasonable punishment. The County in this case was not arbitrary in deciding on a written warning as punishment under the circumstances of this case. The punishment therefore, under this last test, was reasonable.

There is one other line of defense that the Grievant argues on which I must decide. The Grievant testified that at a grievance meeting Dornfeld excused his leaving the May 22 meeting because of his agitated state; Donfeld knew he needed a "time out." The Union then argues that the only reason for the discipline was the fact that the Grievant refused to accept the findings and recommendation of the report. Dornfeld on rebuttal refuted Grievant's testimony that he understood and approved of Grievant's leaving the meeting because he recognized that the Grievant needed some time. Arbitrators take varying positions about the admissibility and evidentiary worth of admissions against interest and statements against interest made during grievance meetings. I take the position that grievance meetings are meant for attempts at resolution of grievances and to give the parties the opportunity to learn the other side's case and position. In my view, allowing statements made by parties and grievants during grievance meetings to be held against a grievant or an employer at an arbitration hearing, can only inhibit the free flow of information during the grievance procedure as well as hamper attempts at compromise in the future. Too often grievance meetings are perfunctory at best without real consideration of the issues. The safer course for me in this case given the conflicting testimony about what Dornfeld said at the grievance meeting is to discount the grievance meeting conversations which I now do.

Lastly, I believe it is important to note that I believe what the Grievant is really upset about is his belief that he was being retaliated against by the County for his efforts during the personnel situation in 1996 and early 1997. Grievant believes that he was assured there would be no recriminations and believes the sex discrimination charge and investigative report are retaliation. However, the County cannot be responsible for the charge filed by Nichols and had an obligation to investigate that charge. The County could not have legally prevented Nichols from pursuing her charge even if it had wanted to do so. I believe and find that the County disciplined the Grievant solely for leaving the meeting on May 22, 1997. I find that the County took into account the Grievant's record and service with the County in disciplining Grievant with a mild form of corrective discipline, a written warning. Therefore, I cannot sustain but must deny the grievance.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 17th day of December, 1998.

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

rb
5785.doc