

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CALUMET COUNTY

and

**CALUMET COUNTY COURTHOUSE
EMPLOYEES LOCAL 1362, AFSCME, AFL-CIO**

Case 102
No. 56848
MA-10434

(Lisa Fox Grievance)

Appearances:

Ms. Helen M. Isferding, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083 on behalf of the Union and the Grievant.

Mr. Charles E. Carlson, Carlson Dettmann Associates, LLC., 901 Demming Way, Suite 201, Madison, Wisconsin 53717-1920, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1998-2000 collective bargaining agreement between Calumet County (County) and Calumet County Courthouse Employees, Local 1362, AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the termination of Lisa Fox. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was scheduled and held on January 25, 26, 27 and 28, 1999 at Chilton, Wisconsin. A stenographic transcript of the proceedings was made and received by March 4, 1999. At the hearing, the parties agreed that the Arbitrator would follow Commission policy regarding when to issue the Award herein. The parties' initial briefs were

received by the Arbitrator by May 20, 1999 and were exchanged by the Examiner thereafter. The parties filed their reply briefs herein by June 29, 1999, whereupon the record in this case was closed.

ISSUE

The parties stipulated that the following issue should be determined in this case:

Did the Employer violate the collective bargaining agreement when it terminated Lisa Fox on July 29, 1998? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE VII - MANAGEMENT RIGHTS RESERVED

7.01 - Unless otherwise herein provided, the management of the work force and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reasons 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 for such period of time involved in the matter. . .

STIPULATIONS OF THE PARTIES

The parties stipulated that the grievance is properly before the Arbitrator. They also stipulated that as of the date of her termination, the Grievant's rate of pay was \$13.03/per hour.

BACKGROUND

The County (with a population of 37,000) operates a Child Support Agency which is responsible for enforcing child support orders issued by courts. The County has a contractual arrangement with the State of Wisconsin to assure that the responsible parent is paying court-ordered child support, and the State in return has an elaborate set of rules and regulations which it expects the County child support workers to apply to their cases. The County's Child Support Agency (CSA) has approximately 1400 open child support case files. The Agency collects approximately five million dollars annually in child support payments. The Agency is currently staffed by 2.5 FTE Child Support Specialists, 1.25 FTE Child Support Clerks, and two FTE Secretaries. Melanie Buchinger is the Corporation Counsel for Calumet County as

well as the Child Support Agency Director. Buchinger has held the CSA Directorship since May, 1998. The County receives both State and Federal funds and is required to comply with State rules and regulations as well as Federal rules and regulations in order to continue receiving these funds for CSA programs.

As a general matter, the County requires individuals to pay a \$10.00 fee to begin the process of County assistance to locate a parent, determine paternity, support and/or health insurance coverage issues for minor children must. The CSA and/or District Attorney's offices then take over the case. The Corporation Counsel/CSA Director represents the CSA in all the civil litigation. If criminal cases need to be filed and pursued, the local District Attorney and his office handle those cases for the CSA. Notably, the District Attorney has been successful in charging a separate felony for each four-month period of a payor's failure to pay child support. The District Attorney has discretion whether to prosecute these cases. Section 48.63, Stats., limits information which child support workers may release. This section also provides for a monetary fine or imprisonment for violation of this section:

48.63 Limitation on giving Information. Except as provided under s. 49.32(9), (10) and (10m), no person may use or disclose information concerning applicants and recipients of relief funded by a relief block grant, aid to families with dependent children, Wisconsin works under ss. 49.141 to 49.161, social services, child and spousal support and establishment of paternity services under s. 49.22 or supplemental payments under s. 49.77 for any purpose not connected with the administration of the programs. Any person violating this section may be fined not less than \$25 nor more than \$500 or imprisoned in the county jail not less than 10 days nor more than one year or both.

The State of Wisconsin also provides the CSA with Procedures which the CSA is contractually bound to follow and which read, in relevant part as follows regarding confidentiality:

2.1 What is Confidentiality?

Information about child support, spousal support or maintenance (alimony), and paternity cases must be kept confidential. The nature of IV-D case work is such that a great deal of personal information regarding custodial persons (CPs), noncustodial parents (NCPs), children and alleged fathers is collected. It is the child support agency's (CSA's) duty to protect this information and ensure that it is used only for IV-D program purposes. Child support staff should discuss cases only with authorized personnel and only when necessary to administer the program.

3.5 Prohibited Disclosure

Federal regulations prohibit disclosure to any committee or legislative body (federal, state, or local) of any information that identifies any applicant or recipient by name, or by name and address.

Without proper written authorization, the CSA is prohibited from disclosing information from a case record to:

- * The new spouse or a relative of the parties in the case.
- * A private individual or business that is usually related to business or personal matters, such as bill collecting.
- * An official or individual not connected with the CSA, who requests privileged information.

All CSA employees receive a set of the State Procedures Manual and they have access to copies of the State Statutes. (Fox had copies of these documents). Each year, the State of Wisconsin and the County put on various training programs for CSA employees. Fox participated in these programs at which confidentiality was discussed from time to time. Fox's job description as well as the job analysis questionnaire for her position also stated the requirement that she keep child support information confidential.

Fox's Job Questionnaire read, in relevant part, as follows:

...

ESSENTIAL ACCOUNTABILITIES	Maintain high degree of confidentiality on all cases at all times
EXPECTED OUTCOMES (RESULTS)	Privacy of parties is protected. County is protected from legal repercussions.
HOW ARE OUTCOMES EVALUATED	Number of lawsuits brought against the County.

...

The County also has a policy manual, Chapter 3 of which reads, in relevant part, as follows:

SECTION 1 – GENERAL EMPLOYMENT INFORMATION

...

1.07 Conflicts of Interest and Misconduct

...

B. No employee shall commit any of the following acts:

...

2. Perform an act which he knows is in excess of his lawful authority or which he knows is forbidden by law to do in his official capacity.
3. Whether by act of commission or omission, exercise a discretionary power in a manner inconsistent with the duties of his office or employment or the rights of others and with intent to obtain a dishonest advantage for himself or another;

...

C. Any employee that commits any of the above prohibitive acts may be subject to discipline pursuant to the Discipline and Discharge Section of these Personnel Policies and Procedures.

...

SECTION 4 – DISCIPLINE AND DISCHARGE

4.01 Cause for Discipline or Discharge – No employee, after having successfully completed his probationary period, shall be disciplined or dismissed from County employment without cause. Listed below are examples of behavior or actions which shall be sufficient cause for discipline and discharge.

- A. Incompetence or inefficiency in the performance of duties.
- B. Physical or mental incompetency.

- C. Any use of, or working while under the influence of, intoxicating beverages while on duty unless authorized by the Department Head for undercover work.
- D. Conviction of a felony, misdemeanor, or ordinance violation involving morality.
- E. Willful misconduct or insubordination.
- F. Carelessness and negligence in the handling or control of County property or the unauthorized appropriation of County property for their own use.
- G. Discourteous, insulting, abusive or inflammatory conduct toward the public, an employer or fellow employee.
- H. Unauthorized absence.
- I. Abuse of sick leave privileges.
- J. Acceptance of bribes.
- K. Proven dishonesty in performance of duties.
- L. Willful falsification of a time card.
- M. Sleeping during working hours.
- N. Leaving job without permission.
- O. Violation of County policies.

4.02 Disciplinary Procedure – Discipline shall be applied to all County employees for violation of the Personnel and General Administrative Policies. Prior to taking any disciplinary action, the County shall conduct an adequate investigation, prepare a list of potential violations, provide a copy to the employee for comment, and meet with the employee to discuss the allegations and the response. If the alleged violation so seriously undermines the confidence of the County in the employee’s ability to perform their duties, the Administrative Coordinator may approve suspension of the employee with pay until the investigation is complete and the employee has an opportunity to respond to the allegations. Normally, discipline is given in the following sequence:

- A. First offense – the employee will be given a verbal reprimand in private. The Department Head or immediate supervisor shall give the employee the reason for being disciplined and also the manner in which the employee shall correct his problem in the future.

- B. Second offense – the employee shall be given a written reprimand with a copy to the Administrative Coordinator and the Committee Chair. The written reprimand shall be signed by the Department Head or immediate supervisor and by the employee who is acknowledging receipt. A copy shall be provided to the employee and give the rule or policy broken and a manner to improve performance. Written reprimands shall be placed in the employee’s personnel file.
- C. Third offense – the employee shall be suspended without pay, or demoted, by the Department Head. Suspensions shall be discussed with, and approved by, the Administrative Coordinator before such actions are taken.
- D. Fourth offense – the employee may be discharged by the Department Head and the Administrative Coordinator, followed by a letter to the terminated employee and placed in his personnel file. The Administrative Coordinator shall notify the Chair of the Home Committee of the intention to suspend or discharge. The Salary and Personnel Committee will be informed of suspensions and terminations.

4.03 As indicated above, this is normal procedure for discipline, however, in situations where the act of the employee is so severe, the employer may advance the sequence in the discipline procedure, or demote the employee, after review with the Administrative Coordinator and the County Board Chair.

...

Lisa Fox became a County employe in April, 1983. In 1986, she transferred to the CSA, and in 1987 she was promoted to the position of Child Support Specialist, the position she held until her termination on July 29, 1998. In August, 1995, CSA Director Buchinger nominated Fox for the Child Support Worker of the Year Award with the State of Wisconsin Child Support Enforcement Association. The memo in which Buchinger nominated Fox for this award read, in relevant part as follows:

...

I would like to nominate my senior child support specialist, Lisa Fox, for child support worker of the year. Lisa is an eight year employee of the Child Support Agency and has really done a stellar job.

This year, Lisa implemented our criminal felony for non-support program. First, she convinced the District Attorney's office of the need to prosecute non-paying parents criminally. (No small feat). Then, she created a system where cases were prepared for the District Attorney's Office – payment histories done, arrears verified, employment information gathered and collated, potential defenses explored and defused, and previous court actions reviewed and summarized. She then drafts the criminal complaint, organizes all of the information so that the D.A.'s office can follow the history, and meets with the D.A. for signature. She appears as the main witness for the State attending all court hearings and conferences. She then determines the recommendation for sentencing. Lastly, after conviction, she follows up with probation and parole officers to make sure the terms of probation are met and child support is paid.

This has been a very time consuming and frustrating process. The D.A.'s office often changes its mind as to what it wants, how it wants the information presented. The probation and parole officers often need to be prompted to complete the follow through. Throughout it all, Lisa has diligently and doggedly persisted. The effort has proved to be worthwhile. This year we have filed about 20 criminal felonies for non-support. Most of the criminal defendants are now paying in on a regular basis. Lisa also contacted the local newspaper and asked the paper to print the convictions for non-payment and the penalties. The effect is that many non-paying parents suddenly feel the need to pay regularly. It has been a very effective and well thought out campaign.

...

The last annual evaluation Lisa Fox received was completed at the end of January, 1997. For the most part, Fox received high marks regarding her quantity and quality of work, but Buchinger made negative comments regarding Fox's interpersonal skills and attitude. Some of the comments placed on Fox's evaluation read, in relevant part, as follows:

...

Other Comments: In terms of quality, quantity of work, Lisa has no equal. She works very hard, and produces quality work.

Areas of Concern: (1) Interpersonal skills: If possible, Lisa's interpersonal skills have deteriorated over the last 2 yrs. It's as if she no longer cares about trying to promote a harmonious environment. When she's angry, the secretaries, other specialist, other members of the courthouse employees, public and me, all suffer.

I do not mean to imply that this is a daily problem. It is very cyclical in nature. It happens several times a year and lasts for a few weeks. Then it disappears again. My concern is that these times are becoming more frequent. Lisa is unrepentant about them. This needs to be addressed and cured forthwith.

- (2) Assignment of work to support staff: Lisa's aware of this and appears to be working on consistently assigning work.
- (3) Grammar: A grammar class would benefit Lisa greatly.

Overall, I can no long (sic) define Lisa as a "very good employee". I can say that I am pleased with her work product and volume. I cannot say that I am pleased about her attitude and interpersonal skills. She appears to be aware of (sic) problem. I will strongly urge her (sic) resolve it. Failure to do so will result in some serious consequences.

Fox did not object to the contents of this evaluation. As of the date of her termination, Fox had a clean work record, a written warning regarding Fox's office attire having been removed from her record after she grieved it.

FACTS

On May 15, 1998, Fox and her fiance, Paul Roberts had spent the day landscaping in their yard and decided to go out to dinner after cleaning up. They then went to the Central House where they had two drinks and thereafter had dinner. They then had two after-dinner drinks at the Central House and, as the Central House was closing, they decided to go out for more drinks with two friends they had met at the Central House, Dale and Ellie Hinz. 1/

1/ Neither Dale nor Ellie Hinz testified in this case.

After the Central House closed, the group went to Crazy's Bar and had one drink. The four then went to Cheers Bar, arriving at approximately 12:45 a.m. Shortly after the four arrived, Dana Barnett, a bar patron, pulled out a long earring from Fox's ear as she walked past Fox. At this point, Fox told Ellie Hinz that "Dana has a problem with her father never paying child support, and she takes it out on me." Friends of Dana Barnett heard this comment and told Dana who then hit Lisa Fox in the face. Fox went down to the floor after the blow. Paul Roberts took Lisa Fox out of the bar at this point. After Roberts, Fox and the Hinzes left the bar, they stood outside talking. Barnett came up to Fox again. Fox pushed

Barnett and Barnett hit Fox. Lisa Fox began yelling for help and ran out into the street when she saw Officer Walter Pendel's squad car driving by. Fox waived for Pendel to stop and Fox literally came in through the driver's side window of Pendel's squad car, very upset. 2/ Fox

2/ Fox specifically denied climbing into Pendel's squad car through the driver's side window and stated that she only leaned in the window. Fox also stated that she did not give her statement to Pendel because she does not like him.

told Pendel that Dana Barnett had hit her. Officer Pendel convinced Fox to remove her upper body from his squad car so that he could pull his car over and park it. Pendel then interviewed witnesses to the fight between Fox and Barnett but decided that as most were intoxicated and very upset, the investigation should occur another time. Pendel then told Fox that she should go home and she would be contacted regarding whether she wished to file a complaint. Officer Pendel stated that Fox was intoxicated when he spoke to her on May 16th.

After giving it more thought and speaking again to Officer Pendel and to Officer Larry Seipel, and giving Seipel a statement regarding the incident (at 4:30 a.m. on May 24, 1998), Fox filed a formal complaint against Barnett. 3/ During her interview with Seipel, Fox

3/ Officer Seipel stated that in the early morning hours of May 24th, when he arrived at Fox's residence to take her statement, Fox had been drinking and, in his opinion, was too intoxicated to drive.

told Seipel she was concerned about her job if she filed a complaint against Barnett and that there were bad feelings between her and Barnett involving support payments from Dana's father. In her statement to the police, Fox also stated that Fred Broker and Dale and Ellie Hinz were witnesses to the incidents with Barnett. 4/

4/ In her statement to the police as well as in testimony herein, Fox asserted that Barnett's sister, Jody Franzen, had also struck her. It should be noted that no complaint was filed against Franzen and that Franzen denied hitting Fox on the evening in question in her testimony herein. Fred Broker did not testify herein.

Sometime after Fox filed her complaint with the police, Dana Barnett called the County and left a message for John Keuler, Administrative Coordinator, to call her back regarding Fox's behavior in Cheers Bar on May 16th. Keuler then investigated Barnett's complaint. Barnett told Keuler that she had had an altercation with Fox at Cheers Bar and that two other people heard Lisa Fox call Dana Barnett a bitch and state that her father had not paid child support. 5/ Barnett indicated that the two witnesses were Holly Pagel and Jody Franzen.

5/ It should be noted that Barnett pled guilty to two counts of disorderly conduct arising out of the fight she had with Fox on May 16, 1998 and that she paid fines in excess of \$350.00.

Keuler then called Franzen and Pagel who confirmed that the confrontation had occurred as Barnett had described it. Keuler then met with Corporation Counsel, Melody Buchinger, and set a meeting with Fox, Union President Ruth Diedrich, Buchinger and himself for June 17, 1998 to discuss the complaint filed by Barnett.

As a result of the June 17 meeting, the County issued Lisa Fox a warning letter which read, in relevant part, as follows:

. . .

This is to confirm our discussion of June 17, 1998 with John Keuler and Ruth Dietrich. John Keuler received a telephone call about two weeks ago from someone who indicated that you were in a tavern in Chilton, intoxicated, and were discussing a child support case in a loud manner. This story was confirmed by two additional people. You acknowledged that you did say something about a child support matter to a non-party at that time.

This is a very serious matter. The confidentiality of our records is of paramount importance. Federal, state and agency rules prohibit disclosure of any information gained while employed by the Child Support Agency. You must never again discuss a child support case outside of the office environment.

This letter constitutes a written warning and will be placed in your personnel file. If there are further events of a similar nature, progressive discipline will be applied, up to and possibly including termination.

In addition, I would strongly encourage you to contact the Employees' Assistance Program and participate in an Alcohol and Other Drugs Assessment. I would further urge you to follow through on any treatment recommendations that may be made.

...

It should be noted that at the June 17 meeting, Lisa Fox admitted that she had said that Dana Barnett hated her because she had never gotten Barnett's father to pay child support. However, Fox stated that she had said this to her friend Ellie Hinz and not to Dana Barnett.

During the June 17 meeting, Keuler and Buchinger told Fox that if she agreed to the warning letter which would issue regarding the matter, that this would be the end of the case, and that no further investigation would be conducted by the County; but that if Fox chose to fight the warning letter, that the County would hire a private investigator to look into all of the facts regarding Lisa's breach of confidentiality in child support cases over the years.

After the issuance of the June 17th letter, Lisa wrote the County the following letter dated June 28, 1998 which read, as follows:

...

This letter is to inform you that I have met with the union and discussed the situation. I must inform you I will not sign the letter received from you dated June 17, 1998. I do not agree to the contents of the letter.

Please inform me if the letter has been placed in my personnel file.

...

On June 29, Fox told Buchinger that she would not agree to the June 17 letter and that she did not want it in her personnel file; that she (Fox) had nothing to hide; that she was not an alcoholic, and that she was not going to have anything in her file that said that she was. As a result of Fox's conversation with Buchinger and receipt of the above-quoted letter, the County decided to suspend Fox with pay effective June 29, 1998, pending a complete investigation of Barnett's allegations as well as allegations that Fox had violated departmental confidentiality on other occasions as well.

The County then retained a private investigator, Kirk Moore, who conducted an investigation which he completed by approximately July 13, 1998. Kirk Moore is not connected to the County in any way. Moore contacted Fox several times but Fox declined to give Moore a statement.

On July 23, 1998, the County held a meeting with Union Representative Isferding and Union President Diedrich, Keuler, County Representatives Carlson and Buchinger as well as Fox. Fox was invited at that time to give a statement regarding the allegations that the County described had been made against her. The County at this time advised Fox of the specific nature of the allegations against her, and that the County wished Fox to make complete and truthful answers to those allegations. Fox declined to give any statements to the County regarding the allegations against her at that time. At this meeting, the County did not offer Fox a copy of Moore's investigatory report regarding Fox's activities.

On July 27, 1998, the above-listed parties reconvened. At this time, Fox denied all of the allegations made against her except for the allegation regarding the Dana Barnett incident on May 16 which Fox stated she had already answered in a previous meeting. Fox also stated that she did not have a drinking problem. On July 29, Keuler, Buchinger, Isferding and Fox met again. At this meeting, Fox again denied the allegations made against her and claimed that the allegations were made as a part of a vast conspiracy engineered by Dana Barnett. Fox also stated that she was not intoxicated on any of the days outlined in the investigation, and that she did not have a drinking problem. Following the July 29 meeting, Buchinger issued the following letter to Fox, which read in relevant part, as follows:

...

John Keuler received a telephone call from Dana Barnett on June 5, 1998 complaining that you were in a bar in Chilton on May 16, 1998 and were discussing her father's child support case in a loud, intoxicated tone of voice. Dana provided John with the names of two additional witnesses to the incident. John checked with both of the witnesses who confirmed that the incident had happened as Dana described.

A meeting was held on June 17, 1998 with Ruth Diedrich, John Keuler, you and me. At that meeting, you admitted that you had discussed a child support matter with a non-party at the bar that evening. A discussion was held wherein you were offered the following:

1. You would admit that the incident happened as described, a letter of written reprimand would be placed in your file, and the matter would be concluded. The letter would contain a statement urging you seek an alcohol assessment and follow through with any treatment recommendations. In addition, you would agree to cease and desist all further discussions of child support matters with non-parties. If you accepted this, the matter would be concluded. The County would consider the matter closed, and you would not file a grievance.

2. However, if you declined this resolution, the letter would be withdrawn and an investigation would ensue into the incident. You were further advised that the County was aware that there were many unconfirmed rumors about you acting in a similar fashion – that is, discussing child support cases in public while intoxicated. In the past, these allegations had come up as unconfirmed rumors. Since no one had ever come forward with first hand information, the matters were never investigated. Nonetheless, these rumors were discussed with you each time I became aware of them and you always denied them. You were told that the private investigator would investigate any and all other complaints against you that were uncovered in his investigation of the Dana Barnett incident.

At the conclusion of the June 17, 1998 meeting, you accepted the letter of reprimand. A letter of written reprimand was drafted for your personnel file consistent with the compromise as set forth above.

On June 29, 1998, you advised me that you wished to grieve the letter in your file as a result of discussions with your Union Steward and Representative, and that you did not believe the allegations contained therein were true. You were again advised that the result of withdrawing the letter would be an investigation. You said you would take your chances with the investigator because you did not believe the Dana Barnett matter happened as alleged. You were suspended with pay on June 29, 1998, pending the investigation since the allegations were so serious that they undermined the County's confidence in your ability to do your job.

The County hired Kirk Moore, a private investigator, with Advantage Investigations, to look into the matter. Mr. Moore conducted the investigation. A copy of his report has been provided to your Union Representative, Helen Isferding.

The allegations fall into several categories:

1. Discussions With the Adult Children About Their Father's Case:
 - a. Dana Barnett indicated that in May, 1998 you talked about her father's child support case in a loud, intoxicated voice. Jody Franzen, Holly Pagel and Bob Cullen all verify that this happened. Dana further stated that this is not the first time that this has happened. She advised the investigator of several other incidents when this had happened. One incident was reported to me, but it was unconfirmed. Bob Cullen, Wanda Nett and Jody Franzen also verify that this is not the first time that you had discussed her father's case while intoxicated in the bar.
 - b. Jody Franzen also told the same story about discussions of her father's child support case on multiple occasions.
 - c. Jessie Hephner indicated that in January of 1998, you approached him and discussed his father's child support case with him. You were again intoxicated and called his father a deadbeat.
2. Discussions About Their Own Cases:
 - a. Cynthia Flaherty indicated that about a year ago you approached her in the Klotten Oasis tavern, while intoxicated, and began to discuss her case in a loud, drunken tone of voice. Ms. Flaherty indicated that several people heard the discussion and that she asked you to stop talking about the case. She further states that she has heard you discussing other men's cases, calling them "deadbeats" or wondering aloud why they weren't more worried about their child support payments. She indicates that this happened approximately six different times in the last two years.
 - b. Keith Oakley indicates that there was an incident when you approached him, intoxicated, and made a comment like - What are you doing in a bar when you have child support arrears and are not taking care of your children?
 - c. Barry Brokaw indicates similar types of statements were made to him on three separate occasions. This occurred twice in taverns and once at an apartment party. The comments Mr. Brokaw ascribes to you are - What are you doing in a bar when you are not making your child support payments regularly? In one incident, you allegedly slapped Mr. Brokaw. Wanda Nett confirms these events.

3. Discussions of Other People's Child Support Cases:
 - a. Kurt Seefeld indicates that you discussed his girlfriend's child support case with him at a party last fall.
 - b. Terry Duchow indicates that last summer you told him that you would take care of his friend's (Bradd Theil's) child support case if Mr. Duchow would perform a sexual favor for you. Again, you were reported to be in a state of intoxication.
4. Misuse of Position:
 - a. Kris Hauser indicates that she was a witness to the bar fight that you had with Dana Barnett. She states that she contacted you to discuss her child support case and that you stated that you would expedite the case if she made a statement to the police.
5. Other Confirmatory Witnesses: The following individuals have indicated to the investigator that they have heard you, intoxicated, in a bar, discussing child support matters:
 - a. Michael Boll
 - b. Bob Cullen
 - c. Holly Pagel
 - d. Wanda Nett
 - e. Cynthia Flaherty
6. Other Uncontacted Confirmatory Witnesses: These individuals were identified as witnesses, but were not contacted by the investigatory, as of today's date:
 - a. Norbert Schilling
 - b. Dale Hinz
 - c. Ed Lorenz
7. Abusive, Discourteous, Insulting Behavior Toward Fellow Employees:
 - a. District Attorney Ken Kratz indicates that you approached him at a party in June 1998, in a state of intoxication, and behaved in an insulting and discourteous manner to him.

- b. Assistant District Attorney Heather Krause also indicates that she was present at that party and that you were in a state of intoxication. She further indicates that you were hugging and kissing her in an insulting and discourteous manner.
- c. Sheriff Oscar Beilke indicates that he also was present at the party identified above and that you were acting in drunken, insulting and discourteous manner to him and the guests at the party.
- d. Jailor Todd Konen also indicates that you were at the above party in a state of intoxication, and that you touched him in an inappropriate manner. Said behavior was both insulting and discourteous.
- e. Jailor Kurt Kohler also indicates that you did the same thing to him at that party. He also found it to be both insulting and discourteous.
- f. Janet Johnson indicates that in May, 1998, you approached her, in a state of intoxication, and was verbally abusive to her. Your behavior was both insulting and discourteous to her.

...

After a review of all of the information, I believe that there is one theme running through all of the events. You are abusing alcohol on a frequent basis and when you do, you violate the confidentiality rules of this Agency. I believe that the greater weight of the credible evidence supports the events stated by the witnesses. I do not believe you when you say that these events did not happen. I do not believe that there is a conspiracy against you orchestrated by Dana Barnett.

Specifically, I believe that you have violated the confidentiality rules as set forth in 45 CRF 303.21, et. al., Sec. 46.25, 46.93, Wis. Stats., Wisconsin Child Support Procedures, Encyclopedia, Unit 3, and County policies. I find specifically that your behavior as set forth above also violates the Calumet County Personnel and General Administrative Policies, Chapter 3, sec. 4.01(e) Willful misconduct; (g) Discourteous, insulting, abusive or inflammatory conduct toward the public, an employer or fellow employee; (j) Acceptance of bribes; and (o) Violation of County policies. Further, because you have not provided a truthful account now or at earlier times when I have contacted you about the unconfirmed rumors, I conclude that you also have violated sec. 4.01(k), Proven Dishonesty in performance of duties. I find your actions to be

so severe that I am proceeding under sec. 4.03, Chapter 3, Personnel and General Administrative Policies, accelerated discipline.

The nature and the multitude of the violations are very serious. Your behavior has opened the County up to civil liability. Your own actions could be the basis for criminal and civil liability. However, in weighing the events, it is apparent that the recurrent theme in all of these events is an abuse of alcohol on a consistent basis. This is a mitigating factor which I took into consideration in determining the appropriate discipline. I would very much like to see you get some help for this problem. On the other hand, you cannot be allowed to be in a position where the County has to rely on your ability to keep protected information confidential.

Therefore, I, together with John Keuler, Wilma Springer and Vern Gonzo (County Board Member) offered to you the following options:

1. You would be placed on medical leave until you completed an Alcohol and Other Drug Assessment with an accredited AODA counselor. If a substance abuse problem was found,
 - A. You would follow through with all treatment recommendations set forth by the Counselor for a two year period, or until you were released from treatment by the Counselor.
 - B. You would sign a release allowing the County to monitor your progress with the assessment and treatment plan.
 - C. Upon release back to work by the Counselor, the next available position that you were qualified for that does not involve confidential or sensitive information would be yours.
 - D. This would be the end of the matter. There would be no grievances or other legal action taken by either party.
2. If you refused to complete the AODA assessment, you would be terminated. You were given until July 29, 1998 at 8:00 a.m. to make your decision as to whether or not you would accept Option 1. Further, if the assessment was done and no substance abuse problem was identified, you would also be terminated.

We have extended to you every option available to resolve this matter in the least punitive manner possible, given the severity of the violations. We offered to you a letter of reprimand and help before the investigation was begun. You refused that. We offered to allow you to maintain county employment if you would address your drinking problem. You have refused that. We cannot allow the integrity of the County to be further compromised. Therefore, I must advise you that it is the edict of Vern Gonzo, John Keuler, Wilma Springer and myself, that we have no alternative but to terminate you effective July 29, 1998.

This decision may be grieved under the terms of the collective bargaining agreement between Calumet County and the Courthouse Bargaining Unit.

...

Ms. Fox filed a grievance contesting her discharge, which listed Article VII, Management Rights Reserved, Section 7.01, any other article of the collective bargaining agreement that pertained to the grievance, as well as any Article of the February, 1998 Personnel and General Administrative Policies which might pertain. Fox exhausted the grievance arbitration procedure, and the case was brought on for arbitration before the undersigned.

Facts Surrounding Credibility of Witnesses

The following list indicates each individual listed in the County's July 29th letter and the status of their testimony, if any, herein:

1. Witnesses who failed to testify to or denied the incidents they previously reported to either the County or to Investigator Moore as described in the County's July 29th letter:
 - a. Terry Duchow – He essentially denied all of Moore's report.
 - b. Barry Brokaw – He denied the slapping incident but confirmed that on two occasions, Fox discussed with him his child support case in a tavern in a loud voice so that others could hear. (Fox stated Brokaw asked her about his obligation to pay for insurance and uninsured medical bills for his children and that she answered his question.)

2. Witnesses listed in the July 29th letter who did not testify herein:
 - a. Todd Konen
 - b. Kurt Kohler
 - c. Kurt Seefeld
 - d. Jessie Hephner (Fox denied speaking to Hephner about child support cases.)
 - e. Missy Hanna

3. Witnesses who were never contacted by the County and who did not testify in this case:
 - a. Norbert Schilling
 - b. Dale Hinz
 - c. Ellie Hinz
 - d. Ed Lorenz

Holly Pagel and Jody Franzen stated that Lisa Fox spoke in a very loud manner at Cheers Bar early in the morning of May 16 and stated words to the effect, that Dana Barnett didn't like her because she didn't make Dana's dad pay child support. Barnett stated that Fox made the comment recounted by Pagel and Franzen to Pagel on May 16th. Barnett also stated Fox had made the same comment to her many times in the past 3 to 4 years. Fox stated that she made the comment to her friend Ellie Hinz, not in a loud voice after Dana Barnett pulled her earring out. Fox also stated that the Barnett girls are out to get her. 6/

6/ In April, 1994, Fox sent Jody Franzen the following letter on CSA letterhead in her capacity as Child Support Specialist:

. . .

Mr. Franzen was in my office explaining his problem concerning his increase of his share of babysitting expenses. He has explained to me that either he is paying for a babysitter directly from his house when he has the children while working or paying one-half of the day care expenses (sic) have increased. Now you have informed him that you are joining Vic Tanning for fitness relating to your school course and he is to pay one-half of this, I think this is getting out of hand. Day Care is only for when you are attending school or working, going out or unrated (sic) school, and work activities, that he is aware of, is not included.

This office does not get involved with visitation problems, but because he is ordered to pay one-half of babysitting for the children, that is related to child support. I have advised Mr. Franzen to contact a private attorney and bring the case before the court and ask for full physical placement of the children based on his present responsibilities and expenses of the children, this will eliminate additional babysitting and care expenses of the children.

I suggest you talk with Mr. Franzen and review your schedule to assure him you are having (sic) one-half of your physical placement obligation of the children, if not I suggest you make some changes in your schedule.

. . .

Witness Bob Cullen confirmed that on one or two occasions in the year prior to her discharge, he heard Fox say in a tavern that the Barnett girls were mad at her because she had dropped their dad's case. Fox did not specifically contradict Cullen. Also undenied by Fox was the testimony of Wanda Nett, who stated that in the past three or four years, she heard Fox talk about child support cases in bars at least 10 times while Fox was intoxicated. Nett also confirmed that Kris Hauser had told her (Nett) that she did not want to give a statement in the Dana Barnett case because Lisa Fox could jeopardize her (Hauser's) child support case. Hauser stated herein that Fox told her to give a statement to Officer Pendel and that she (Fox) would see what she could do about Hauser's child support case. 7/ Fox described her conversation with Hauser differently, implicitly denying Hauser and Nett's testimony.

7/ Officer Seipel stated that he has gotten reliable information from Kris Hauser concerning various police department cases and that Hauser has never given Seipel inaccurate information.

Lisa Fox also failed to completely deny a statement made at the instant hearing by Cynthia Flaherty to the effect that many times in the past several years Flaherty saw Fox enter bars drunk and heard Fox talk to various people about their child support obligations. Flaherty also stated that in the past two years, she heard Fox call one person an unfit mother and another person a deadbeat dad. (Both of these conversations occurred in bars.) Fox denied the incident regarding the unfit mother comment and stated that she never spoke to the woman

involved in that case in a bar and explained that the woman hates her. Fox also stated she was not intoxicated when she allegedly made the “deadbeat dad” comment.

In regard to the statements of Keith Oakley, Fox merely stated herein that she did not know the man. On the other hand, Oakley testified that approximately five and one-half years ago, (when both were in a bar drinking), Fox had asked him how he could afford to be in a bar, referring to his child support payment arrearage. In addition, Michael Boll, the owner of several taverns involved in this case, indicated that he barred Fox from entering his bars ten years ago because of her intoxication and because Fox had smashed a glass on the bar. Boll stated that Fox often confronted patrons in a loud manner, annoying the patrons. Fox denied confronting Boll’s patrons regarding child support cases.

In regard to the incidents in which Fox was allegedly discourteous, abusive, insulting or inflammatory to employees of the County, the District Attorney, Ken Kratz stated that Fox was intoxicated at the Sheriff’s party after the golf outing. Kratz essentially confirmed the testimony of Assistant District Attorney Krause who stated that Fox told her and Kratz that she (Fox) did not respect Kratz and that she (Fox) would support Kratz’ opponent in the next election. It should be noted that Fox did not specifically deny either of these encounters. Finally, Sheriff Beilke stated that Fox came to his party and became intoxicated; and that she engaged in lap dancing with one of the male jailers while at the party. Fox admitted that she engaged in lap dancing at that party. In regard to the statements Fox made to Janet Johnson in May, 1998, Johnson stated that Fox had called her boyfriend a “jerk” or an “asshole” when Johnson met Fox at a local park. Fox did not specifically deny the details of this incident, but attempted to explain it away in her testimony herein.

POSITIONS OF THE PARTIES

County

The County argued that the contract allows it to discharge employees for “proper cause”, although the contract does not define the term “proper cause”. The County also noted that it has a policy on discipline and discharge which it asserted it followed in the Fox case. In this regard, the County noted that the record was clear that Fox knew of the State and Federal prohibitions against disclosure of child support matters and that any disclosure would also violate County policy. The County argued that Buchinger had regularly reviewed County policy regarding confidentiality and indeed had done so after each rumor regarding Fox’s breach of confidentiality which Buchinger had received in the past. In addition, the County noted that both Fox’s job description and the job questionnaire underlying her position stated that Fox must live up to the County’s requirements regarding confidentiality.

The County argued extensively regarding each part of Kirk Moore's report, urging that it was fully supported by other record testimony. In addition, regarding witnesses who did not testify, such as Hephner and Seefeld, the County argued that the unavailability of Hephner (in California) should allow the arbitrator to fully consider the Moore report regarding the Hephner incident. Finally, regarding Seefeld's statements, the County urged that the Moore report was a credible document on its own, and that Fox's pattern of conduct also supported the fact that the statements made by Seefeld to Moore should be credited even without his testimony herein.

In regard to County policy, the County argued that Fox had violated parts E, G, K and O of the Policy by her actions proven in the Moore investigation and by the County's separate investigation of internal matters. In this regard, the County noted that Fox's conduct toward her co-workers (such as Kratz, Krause, Johnson and others at the Beilke party) constituted discourteous, insulting, abusive or inflammatory conduct toward public employees. The County noted that Lisa's acts, (although off-duty) because they were directed at County employees, demonstrate that there is a sufficient employment nexus for the County to have considered these acts in determining to discharge Fox. Furthermore, the County noted that all of the employees who interacted with Fox played important roles in the child support area which were crucial for a good working relationship and successful prosecution of child support cases. The County urged that Fox had engaged in proven dishonesty and/or the taking of bribes in performing her duties (Section K of the Policy) by her conduct toward Kris Hauser.

The County noted that it had conducted a full and fair investigation and had afforded Fox due process. Yet Fox was unwilling to admit any wrongdoing and to take responsibility for her conduct. As she refused any remedial action offered by the County, the County believed it appropriately discharged her. Therefore, the County urged that the grievance should be denied and dismissed in its entirety.

Union

The Union argued that the County lacked just cause for discharging Lisa Fox. In this regard, the Union noted that the County failed to forewarn Fox of the possible or probable consequences of her violating the County's rules regarding confidentiality. The Union noted that Fox was never told by any County manager what conduct would lead to discharge or other discipline. In addition, the Union noted that Fox had a clean work record at the time of her discharge and that she had received no prior warnings regarding any breaches of confidentiality and was therefore never given a chance to correct any perceived misconduct. As the Employer's rules and policies clearly state that discipline should be corrective if possible, not punitive, the Union urged the Arbitrator to sustain the grievance.

The Union argued that the confidentiality rule was not reasonably related to the orderly, efficient and safe operation of the County's child support business or to the performance of the job that the Employer could properly expect from Fox. In this regard, the Union noted that the Employer's rules were unclear and that Fox's remark to Ellie Hinz at Cheers after Dana Barnett attacked her was entirely understandable.

The Union urged that the investigation was neither fair nor timely, nor objective. In this regard, the Union noted that Corporation Counsel Melody Buchinger was judge, jury, investigator and instigator of the investigation against Fox; that the County did not bother to contact Fox's witnesses, relying instead on friends of the Barnett sisters. Second, the Union asserted that the investigation was out of time – that the accusations that were collected against Fox were five to ten years old. The Union also noted that the County has never been sued or had a client of Fox's complain about Fox. In regard to the manner in which the County proceeded against Fox, the Union urged that the County essentially subjected Fox to double jeopardy by imposing discipline upon her and then later increasing the discipline for the same alleged misconduct. In addition, the Union noted that Buchinger essentially admitted her bias when she testified regarding the instructions that she gave Kirk Moore in launching his investigation against Fox, to uncover everything that could be confirmed against Fox, making the investigation a witch hunt.

The Union then analyzed the testimony of each witness and observed as follows. In regard to Dana Barnett's testimony, the Union contended that that testimony demonstrated Barnett's lack of concern for confidentiality and her interest in avenging herself against Fox or leveraging Fox so that Fox would drop the charges against Barnett. The Union also noted that the testimony of certain witnesses failed to confirm the content of the discharge letter. In this regard, the Union asserted that an analysis of Holly Pagel's testimony when compared to that of Dana Barnett, demonstrated that the Employer failed to prove that Fox yelled any prohibited comment in Cheers Bar on May 16th or that Fox engaged in any wrongdoing whatsoever. In addition, the Union noted that Bob Cullen failed to testify in support of Moore's report; and that Seefeld was not called as a witness, nor were the two jailers and Jessie Hephner, so that the allegations surrounding these individuals should be disregarded by the Arbitrator. The testimony of Cindy Flaherty was imprecise and internally contradictory; the testimony of Barry Brokaw, Terry Duchow and Keith Oakley varied significantly from the accounts placed in the termination letter, making those allegations against Fox incredible; Kris Hauser's testimony failed to prove that Fox had threatened Hauser and demonstrated, instead, that Hauser was incredible; and allegations regarding Michael Boll were too stale (having occurred seven to ten years ago) and imprecise to fairly stand against Fox in this case.

In regard to Buchinger's internal investigation of incidents among employees and Fox, the Union noted that no complaints were made to Buchinger regarding Fox but that Buchinger sought statements from County employees against Fox. In regard to the allegations surrounding the Sheriff's party and statements made by District Attorney Krantz and Assistant District Attorney Krause and Sheriff Beilke, the Union urged that the evidence failed to confirm that Fox was abusive, discourteous or insulting to any of these County employees. In regard to the incident involving Janet Johnson, the same conclusion could be reached as no abusive, discourteous or insulting conduct was reported by Johnson herein.

In regard to the penalty meted out by the County, the Union argued that discharge was too severe for the offense proven. The Union noted that Fox was an employee of 13 years with a clean work record who had been nominated for Child Support Worker of the Year in 1995; that the only offense that was proven herein was a comment which Fox admitted that she made to Ellie Hinz on May 16th, which the Union felt was entirely understandable under the circumstances. Finally, the Union observed that there was no evidence that the County had applied its rules even-handedly and without discrimination, and that therefore the proper cause provision of the labor agreement was violated by the County's termination of Fox. The Union argued that Fox should be put back to work, given a chance to correct her conduct, and made whole.

REPLY BRIEFS

County

The County disagreed that the Arbitrator must apply the seven tests for just cause as the Union urged in its initial brief. In the County's view, when an employee violates the employer's properly-adopted policies or state and federal laws, as Fox did here, the employer's disciplinary decision should be given substantial deference. According to the County, the real questions in this case should be whether Fox did what she was accused of doing, and whether the discharge was warranted based on the facts of the case.

In any event, the County contended that it met the seven tests for just cause and that the Union has misconstrued testimony and exhibits and characterized and disregarded evidence which would support the County's view. In regard to the notice requirement, the County noted that Fox received copies of County work rules, policies and state and federal laws and regulations which required Fox to keep confidential information she learned in the CSA; that the County continuously provided training in confidentiality to Fox; and that Fox signed a position description questionnaire in which she promised to keep cases confidential. Despite this, Fox lied about her prior breaches of confidentiality when confronted by Buchinger with rumors thereon. The County noted that Fox admitted to Officer Siepel that her job could be in jeopardy when she gave a statement regarding her complaint against Dana Barnett. When Fox

rejected the County's offered letter of reprimand, she also acknowledged that she knew that more serious consequences could flow from this rejection. The County also observed that it should not have been necessary for the County to tell Fox that the release of confidential information could cause her discharge – that Fox knew, or should have known, that divulging confidential information could lead to her discharge. Indeed, the allegations as well as the County's decision to suspend Fox with pay demonstrated the seriousness of the allegations against Fox.

In regard to the reasonableness of the confidentiality rule and the quality of the investigation, the County noted that the Union failed to contest the reasonableness of the confidentiality rule during the grievance process, and that the evidence failed to show that Fox was in fact confused regarding a proper definition for confidentiality. In this regard, the County found the evidence provided by Fox regarding "most wanted" posters unconvincing.

Regarding the quality of the investigation, the County observed that there was no evidence that Buchinger was out to get Fox. In this regard, the County pointed out that Buchinger suggested Fox for an award; that in her 1996 evaluation of Fox, Buchinger listed problems with Fox's work which Fox did not contest; that Buchinger accepted Fox's word regarding rumors of confidentiality breaches by Fox in prior years; that Buchinger offered Fox a letter of reprimand before proceeding with a more in-depth investigation; that the County hired a private investigator to investigate Fox; that Fox refused to give her story to the private investigator before the investigation was closed; that Fox was given a copy of the investigator's report and an opportunity to respond to charges after the investigation closed; that the County Board and the County Administrator concurred with Buchinger's recommendation to fire Fox, proving that it was not Buchinger's sole decision; that prior to discharge, the County offered Fox alternatives to discharge which she refused and that Fox's grievance was fully processed by the County. Thus, the County urged that it was unfair for the Union to attack Buchinger in these circumstances and that if Fox had no problem with alcohol, she should have taken the written reprimand and completed the alcohol assessment to show the County that they were incorrect on this point.

Finally, the County objected to the Union's argument that the County had subjected Fox to double jeopardy. In this regard, the County contended the fact that it had made an offer of a written reprimand prior to launching a broader investigation did not in fact constitute double jeopardy. It was Fox who, of her own free will, decided that she would rather take her chances with the broader investigation, rather than accept the written reprimand.

In regard to the level of proof, the County urged that the record supports its assertions that it had proper cause to discharge Fox and that the investigation was fair and objective. The County noted that there was no evidence that any witnesses were out to get Fox and that any inconsistencies between the witnesses' statements to investigator Moore and their testimony herein were minor. The County noted that all witnesses were sequestered at the Union's request. The County contended that Barnett's motivation in complaining about Fox's conduct on May 16 was irrelevant.

In regard to Kris Hauser, the County found it incomprehensible that the Union would attack her, as Hauser had no axe to grind and Hauser's testimony was corroborated by Wanda Nett. In the County's view, this case is about a breach of confidentiality, not specifically about the fight which occurred on May 16th. The County urged that it was not relevant that County employees had not complained on their own about Fox's actions; that Fox's actions toward her co-workers had been discourteous, abusive and insulting by any reasonable person's standard.

In regard to the level of the penalty and the equality of treatment factors, the County noted that there had been no prior cases similar to Fox's case; that the County's policy indicates that discipline can be accelerated in appropriate cases; that the evidence showed that Fox did in fact do all of the things she was accused of; and that members of the public were entitled to Fox's help and protection as a Child Support Worker which Fox failed to give them due to her many breaches of confidentiality.

Union

The Union argued that the distinction between "proper" cause and "just" cause is one that most arbitrators do not recognize and therefore, the undersigned should apply a just cause standard herein. The Union observed that the witnesses who testified in this case had failed to swear to the information they gave investigator Moore for his report, and that in their testimony herein, they failed to swear to the truth of the report, only stating herein that what they told Moore was properly written down. In addition, regarding those who did not testify in this case, the Moore report allegations should be entirely disregarded, in the Union's view.

The Union contended that Fox cannot be faulted for not working on Kris Hauser's case prior to her discharge; that Fox was suspended and never had the opportunity to work on Hauser's case at the time that Hauser told Fox she saw the fight between Fox and Barnett. The Union argued that there was no employment nexus proven between the Sheriff's party and Fox's activities. Only if the behavior harms the Employer's product or reputation, and the behavior renders the employee unable to perform duties or appear at work and the behavior leads to a refusal, reluctance or inability of other employees to work with the person, should the Arbitrator find activities outside of work to be the proper subject for discipline. In this regard,

the Union noted that no employees complained to the County about Fox's activities and therefore the maximum punishment which should have been given in this case was a written warning which would have given Fox an opportunity to correct whatever perceived misconduct she had engaged in. Thus, the Union urged the Arbitrator to find that the County had failed to prove it had proper cause to discharge Lisa Fox, and to order the County to reinstate Fox with full back pay.

DISCUSSION

This case concerns serious allegations of off-duty misconduct involving alcohol by a long-term employee whose work record was completely clean at the time of her discharge. The Union has argued that an employment nexus test should be used in this case and that if a proper test is applied, the Arbitrator must reach the conclusion that the County was not privileged to discharge Fox. The Union urged that the following employment nexus test, used by some arbitrators in similar cases, should be applied herein:

- (1) Does the employee's behavior harm the Employer's product or reputation?
- (2) Does the behavior render the employee unable to perform his/her duties or to appear at work?
- (3) Has the behavior led to the refusal, reluctance, or inability of other employees to work with the employee involved in the behavior?

In my view, the above test is not particularly relevant to this case. Rather, the above test is one which would generally be applicable to an employee who makes pejorative statements regarding the employer's product or reputation while off-duty. In contrast, this case concerns Fox's off-duty comments divulging confidential information regarding the County's CSA cases. The release of such information, if it occurred, would not necessarily harm the CSA product or reputation; and such release may or may not offend members of the public or cause Fox's fellow employees to refuse to work with her. Also, making such comments would not necessarily render Fox unable to perform her duties or appear at work. The express and stringent requirement of both the State and Federal government concerning confidentiality in child support cases makes this case different from the private sector cases in which the above-described employment nexus test has been used. Therefore, the appropriate inquiry in regard to the issue of employment nexus is, in my view, whether the off-duty misconduct was related to Fox's employment, and whether her misconduct had a foreseeable adverse impact on the County's CSA business. In my opinion, the breach of confidentiality allegations made against Fox, if true, were certainly related to Fox's employment, and would just as certainly have a

foreseeable adverse impact upon the CSA's business and its reputation. Therefore, I find that the allegations made against Fox, if true, could constitute a basis for her discharge in appropriate circumstances.

Close scrutiny and comparison of the testimony herein indicates that Fox not only has a drinking problem, but that, when she drinks too much, she often makes comments in public about confidential Child Support Agency cases to individuals not involved in those cases. Looking first at the incident of May 16, I find that Holly Pagel and Jody Franzen's version of what occurred during that evening appears to be more credible than Fox's version. In this regard, I note that the Union failed to show that Holly Pagel had any reason to lie about the incident which gave rise to the fight between Fox and Barnett on the evening of May 16; that Dana Barnett's actions after the comment was made about her father not paying child support, buttress Pagel and Franzen's versions.

In addition, I note that neither Dale nor Ellie Hinz was asked to testify in this case, and no explanation therefor was given by the Union. It is also significant, in my view, that Fox essentially admitted making the statement regarding Barnett's father not paying child support. Also, Wanda Nett, Bob Cullen, Cynthia Flaherty, Michael Boll and Keith Oakley all confirmed that over the past five years, they have heard Fox talking about child support cases in taverns while she had been drinking. It simply stretches credulity that all of these members of the public, who were subpoenaed to testify herein, would lie under oath about these matters, or that they would conspire together "to get" Fox, as she has contended. Compared to the testimony of these private individuals, is Lisa Fox's testimony in which she either denies, attempts to explain away, or fails to address the allegations made against her. Given the substantial evidence demonstrating Fox's breaches of confidentiality, I find that Fox breached confidentiality, essentially as stated by the witnesses who appeared before me.

I have not credited any of Dana Barnett's testimony as her testimony is directly contradicted by Holly Pagel and her sister, Jody Franzen. (Indeed, Dana Barnett's fight with Fox on May 16th only makes sense if the comment that Fox made regarding child support in the Cheers Bar on May 16th was made concerning Dana Barnett, and not Holly Pagel.) I also find that the testimony of Wanda Nett and Kris Hauser should be credited. In this regard, I note that there was no evidence to show that either Nett or Hauser had any axe to grind in this proceeding; that Officer Seipel stated that Hauser had been a reliable informant for him in the past; and that Fox's attempt to explain away her conversation with Hauser (regarding giving Officer Pendel a statement) was corroborated by no one while Hauser's statements in this regard were corroborated by Wanda Nett and Officer Pendel. Fox's general credibility is also called into question by her specific denial of Officer Pendel's testimony that on May 16th Fox attempted to "climb into" his squad car through the driver's side window. Pendel, as an officer of the law and an individual with no ulterior motives herein must be believed.

In regard to the allegations made concerning fellow employes, I note that Assistant District Attorney Krause essentially confirmed that Fox was at least disrespectful to the District Attorney at Sheriff Beilke's party, and all witnesses who testified regarding that party indicated that Fox was intoxicated that evening. I note in addition that Fox failed to deny the lap dancing incident at the Sheriff's party. In regard to the testimony of Janet Johnson, there is no reason to disbelieve Ms. Johnson. Fox's explanation of that encounter was, in my view, unpersuasive. Thus, the County demonstrated that Fox had made several comments to fellow employes which were discourteous, insulting, abusive or inflammatory under Section 4 of the County's Employment Manual (Section 4.01(G)).

In all of the circumstances of this case, the record demonstrates that the County presented clear and convincing evidence that Fox had engaged in breaches of confidentiality, as alleged and that she had violated Section 4.01(G) of the County's Employment Manual. Although I agree with the Union's assertions that some of the allegations made against Fox were quite old, I find them to be telling patterns of conduct which Fox continued up to the date of her discharge. The letter Fox wrote to Franzen in April, 1994, also demonstrates that Fox enjoyed wielding power at the CSA and was willing to go beyond her CSA authority to do so.

The Union has argued that the County failed to give Fox adequate notice that breaches of confidentiality would result in discharge. In the circumstances of this case, I disagree. Here, the State and Federal authorities have made it clear that such breaches are punishable as misdemeanors and are not meant to be tolerated in Child Support Programs. Fox had copies of the relevant State and Federal rules, regulations and statutes at her disposal, and she was regularly trained on these points. Fox's job description and questionnaire also clearly required her to maintain the confidentiality of her cases. In these circumstances, it was unnecessary for the County to spell out the actions it would take were confidentiality breached. Indeed, Fox was clearly aware of the seriousness of her actions. This is demonstrated by Fox's comment to Officer Seipel on May 24th, that she thought her job was in jeopardy if she pursued a complaint against Dana Barnett because there was a long-term dispute between her and Dana involving support and Dana's father. I also reject the Union's arguments that the County's confidentiality rule was not reasonably related to the orderly, efficient and safe operation of the County's CSA business. The County's rules regarding confidentiality are essential to the orderly and efficient delivery of Child Support Services in the County. Ineed, I do not see how the CSA could function without such rules, given State and Federal requirements as well as the contractual requirements placed on the CSA by these entities. The fact that the County was never sued regarding any of Fox's CSA cases is irrelevant to this case.

In addition, I disagree with the Union regarding the quality of the investigation here as well as its claims concerning double jeopardy. In regard to the former, no evidence was offered to support the Union's claims that Buchinger was somehow unfair to Fox during the investigation against Fox. It is clear on this record that Buchinger treated Fox fairly and that

she did not make the decisions to investigate Fox further or to discharge Fox on her own. In addition, the Union's claim that the County subjected Fox to double jeopardy by its initial offer of a written warning which, if rejected, would result in further investigation into breaches of confidentiality is unpersuasive. This is not double jeopardy – a concept in which the employee is essentially disciplined twice for the same offense. As Fox freely rejected the offered written warning, knowing a deeper investigation would result which could reveal new allegations of misconduct for which she could be held accountable, she cannot now claim that her choice subjected her to double jeopardy.

The Union claimed that the County failed to show it has applied its rules even-handedly and without discrimination. In this regard, I note that there has never been another case such as the instant one in the County. Therefore, the Union cannot reasonably claim discrimination in rule application. I also note that no evidence was proffered by the Union to show it has previously objected to the County's confidentiality rules.

I turn now to the appropriate level of punishment for Fox's breaches of confidentiality and her mistreatment of fellow employees. This Arbitrator has rarely disturbed an employer's determination, in its discretion, of the level of discipline to be meted out. However, in this case, where Fox's work record was clean and she had been employed for 13 years, I believe termination is too harsh a penalty even for the serious misconduct she engaged in. In my view, Fox deserves another chance, the chance the County should have given her, (similar to the chance it originally offered her, and which she rejected) to complete assessment and treatment for her problems with alcohol and to return to work. Given Fox's proven misconduct, however, I have not ordered any backpay and I have made the reinstatement conditional upon her completion of assessment for alcohol addiction. I have also made it clear in my Award that any further breach of confidentiality by Fox after her return to work can result in her immediate discharge. Furthermore, if Fox refuses to complete assessment and treatment for her problem with alcohol, the County need not reinstate her, as her reinstatement and continued employment are also expressly conditioned upon her completion of such assessment and all necessary treatment. This award represents a last chance for Ms. Fox.

Based upon the relevant evidence and argument herein, I issue the following

AWARD

The County violated the collective bargaining agreement when it terminated Lisa Fox. Fox shall be reinstated, without backpay but with full seniority, to her former position or a position substantially similar thereto conditioned upon her completion of assessment for alcoholism. Fox's reinstatement and continued employment after her return to work are also expressly conditioned upon Fox's successful completion of any recommended treatment for her

problem with alcohol after her reinstatement. In addition, should Fox commit any breach of confidentiality after her return to work, the County may discharge her forthwith pursuant to this Award. If Fox refuses to agree to assessment and treatment, her discharge shall stand.

Dated at Oshkosh, Wisconsin this 20th day of August, 1999.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator