

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**MARATHON COUNTY SOCIAL SERVICES DEPARTMENT
PARAPROFESSIONAL AND CLERICAL EMPLOYEES
UNION, LOCAL 2492, AFSCME, AFL-CIO**

and

MARATHON COUNTY

Case 268
No. 57955
MA-10791

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., by **Attorney Dean R. Dietrich**, appearing on behalf of the County.

ARBITRATION AWARD

Marathon County Social Services Department Paraprofessional and Clerical Employees Union, Local 2492, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Marathon County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a written reprimand. The undersigned was so designated. Hearing was held in Wausau, Wisconsin, on November 11, 1999. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which was filed on February 4, 2000.

BACKGROUND

The grievant has been employed by the County for the last ten years and has been a Child Support Specialist since October, 1996. On May 7, 1999, the grievant was given a written reprimand from Jane Huebsch, the Support Program Manager, which stated, in pertinent part, as follows:

You are issued this written reprimand for making demeaning, judgmental statements to program participants, the improper release of confidential information, and for failing to keep your supervisor informed of your absences.

More specifically, you are reprimanded for:

1. Statements to clients that are inappropriate and/or demeaning. Such statements are beyond the scope of your role as a Child Support Worker.
2. The improper release of confidential information about child support cases to individuals and agencies. This is a violation of the state rules which cannot be repeated.
3. Failure to keep management informed when you are not coming to work due to an illness or personal emergency. We expect a call within one-half hour of your scheduled start time. We serve clients and we need to know what is happening so that appointments can be handled or rescheduled and work can be reassigned should there be a need to do so.

These are very serious offenses which if repeated could result in more serious disciplinary actions begin (sic) taken against you, including the termination of your employment.

On May 14, 1999, a grievance was filed over the letter of reprimand. The grievance was denied and proceeded through the grievance procedure to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the Employer violate the collective bargaining agreement by issuing a written reprimand to the grievant, Lyn McCarthy?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

Article 2 – Management Rights

The County possesses the sole right to operate the department and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:

. . .

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

. . .

COUNTY’S POSITION

The County contends that it had just cause for issuing the written reprimand to the grievant. It submits that the grievant had previously been warned about making inappropriate remarks to clients and other members of the public, the improper release of information and had been repeatedly warned about her failure to notify her supervisor and the clerical staff that she would be late or absent from work. It insists that it had “just cause” as defined by arbitral authorities to discipline the grievant. It asserts that the grievant had been verbally reprimanded. It submits that in 1998, the grievant was given a verbal reprimand by Robin Bentley, the Program Supervisor for the Child Support Department, for making inappropriate statements to clients and others. It claims that Ms. Bentley told her she should refrain from making comments that could be taken as derogatory or demeaning to a client or the public. It states that in April, 1999, Client A reported to Jane Huebsch, the Support Program Manager, comments made to her by the grievant. It notes that the grievant admitted that she may have said things to Client A that were taken in a demeaning fashion. The County argues that the comments were contrary to the dignity and respect to be afforded all participants in the Child Support Program and it had just cause to issue the written reprimand for the inappropriate comments made to Client A.

The County points out that the Wisconsin Child Support Procedures Manual addresses confidentiality and the release of confidential records, and in particular, limits the disclosure of information regarding applicants and recipients of the establishment of paternity. It observes that in December, 1997, a concern was made to Ms. Bentley that the grievant had inappropriately released information regarding a file she was working on. It notes that it was

unclear whether or not the grievant had released this information, but Ms. Bentley explained to the grievant she needed to be more careful about what she said and agreeing with a statement made by another person could be construed as disclosing information.

As to the written reprimand, the County contends that the grievant worked on a paternity file which was closed without paternity being established. It notes that four months later, based on newspaper accounts that Client X was the father of a child that he was accused of causing the death of, the grievant obtained the birth query and faxed it to the District Attorney's Office. It argues that this information from a closed file was confidential, was released even though the District Attorney made no request or inquiry, and this was not a paternity case and the case did not involve the Social Services Department. It asserts that the grievant showed a clear disregard for the Department's policies and duties to safeguard confidential information and she was appropriately reprimanded.

The County maintains that the most obvious item in the grievant's written reprimand is her continuous failure to notify Ms. Bentley and staff when she will be absent or late for work. It points out that Ms. Bentley discussed the need to follow the contract when reporting absences or reporting late as well as notifying her and a member of the clerical staff and this discussion was followed up by written memorandum dated August 7, 1998. It contends that in 1999, the grievant failed on numerous occasions to follow the appropriate procedures when she was absent from work. It concludes that a written reprimand was long overdue and reasonable and appropriate under the circumstances.

The County alleges that the grievant admitted the items listed in the written reprimand but put forward a number of excuses to justify her misconduct. It insists these "excuses" are "full of holes" and simply are not reasonable. It submits that these "excuses" lack any substance and the grievant's claim that the conversations with her superiors were not verbal reprimands because she was not formally told so is puzzling as these were not passing conversations but held in private and specifically addressed each issue. It rejects the grievant's claim that her supervisors and others disliked her and were causing problems for her. The grievant's assertion as to misunderstanding the directions related to calling in when she was absent or late is not credible, according to the County, as evidenced by the numerous notes Ms. Bentley left on the grievant's time sheets. Also, the County claims the grievant's excuse concerning the release of confidential information is not credible. It insists that the grievant's testimony lacks credibility as it conflicts with more credible testimony and the documentary evidence. The County argues that the Arbitrator should defer to the County's judgment as to the penalty imposed. It cites arbitral authorities for the proposition that unless the Employer has acted in an arbitrary or unreasonable fashion in assessing the penalty, it should not be changed. It also asserts that prior warnings and the grievant's past record may be considered in determining the proper penalty and here the grievant has a history of performance deficiencies for which she was specifically counseled, so the written reprimand should be upheld. It seeks dismissal of the grievance.

UNION'S POSITION

The Union contends that the misconduct alleged by the County is not of a serious nature. It asserts that in such cases, it is universally recognized that progressive discipline should apply and the County's Personnel Policies and Procedures Manual sets out a progressive sequence of disciplinary steps commencing with a verbal reprimand. It argues that the written reprimand in this case bypasses the verbal reprimand provided in the County's manual and the Union believes that the County acted in bad faith by bypassing the initial disciplinary step.

As for the first specific charge, the Union disputes the County's claim that the grievant admitted making demeaning statements to a client and allege that the statements made to the client may have caused the client to feel demeaned but the grievant could not control the feelings of the client nor how she interpreted the grievant's remarks, especially when the client is learning disabled and unusually fragile emotionally. It notes that exactly what was said is not known and as the client did not testify, the grievant was not allowed to confront her accuser. It argues that the County could have produced the witness and its failure to do so violated the grievant's right to fundamental due process, so the assertion of alleged misconduct must fail.

As to the second charge of release of confidential information, the Union states that the "release of confidential information" was upon a request of the District Attorney's Office and no action was taken for some three months after the incident. The Union believes that this was an attempt to "lie in the weeds" while building a case against the grievant. It claims that the County's conduct was unfair and contrary to the purpose and intent of progressive discipline. The Union maintains that the grievant learned what she knew to be incorrect news and discussed with a co-worker whether the information would be helpful. It observes that she then asked the District Attorney's Office if it might be helpful and the District Attorney's Office indicated it might and requested certain documents which the grievant supplied and later she advised her supervisor of her actions which indicates the grievant did not know her conduct violated any rule. The Union questions whether the release of information related to a serious crime can be any violation of law. It argues that even if there was a technical breach of confidentiality, it was simply an understandable error in judgment.

With respect to the third item, failure to keep management informed of absences and tardiness, the Union believes that this is primarily the result of a communication breakdown between employees and supervision. It submits that the grievant attempted to notify her supervisor of lateness and/or absences by leaving messages with clerical employees and this was deemed acceptable to the supervisor, but the grievant later discovered one of the clerical employees had oftentimes neglected to pass on the message to the supervisor.

It concludes that the County did not have just cause to discipline the grievant as the penalty was too harsh and inconsistent with the County's own policies and the assertions made by the County lack foundation. It states that the reprimand is totally devoid of merit and should be dismissed.

COUNTY'S REPLY

The County contends that the grievant's actions were of a serious nature and it had just cause to discipline her. It argues that the grievant disregarded the requirement to treat everyone with respect and dignity and to be concerned with disability and cultural accommodations, such as "personal subject matters," when she made comments to Client A. It disputes the Union's attempt to discredit Client A as not credible on the basis that Ms. Huebsch personally interviewed Client A who had taken written notes about the treatment she received from the grievant and claims it was reasonable for the County to find her credible. It notes that the comments would offend anyone whether disabled or not or "unusually fragile emotionally" and the comments are inappropriate and will not be tolerated in a Social Services Department setting.

The County notes that the Procedural Manual provides that records are available to the District Attorney's Office but not for any purpose unconnected with the administration of programs. It claims that the grievant released confidential information unrelated to the administration of Client X's paternity action which had been closed for four months. The County observes that information was requested by the District Attorney's Office only after the grievant telephoned the District Attorney's Office and informed that office that the Child Support Agency had information relative to the accused's relationship to the deceased child. It argues that had the grievant made no call, the alleged request would not have taken place and it is speculative that the District Attorney would ever have become aware of the closed paternity action had not the grievant volunteered the information. It submits that none of the Union's arguments excuse the grievant's misconduct and contrary to the Union's failure to recognize the seriousness of the grievant's actions, many arbitrators have upheld discipline and termination for such conduct. It concludes that a written reprimand is reasonable for the grievant's breach of confidentiality.

As to the grievant's failure to properly notify management when absent from work, the County states that it is baffled that a 13 year employee can claim a communications breakdown when she received several verbal warnings in addition to written notes and memorandums addressing her irresponsibility in notifying her Employer of her absences. It insists that her conduct shows a lack of respect toward her Employer and is clearly misconduct.

The County maintains that a written reprimand was appropriate in light of the grievant's cumulative conduct. It asserts that the record establishes that the County did not

bypass the verbal reprimand stage of progressive discipline. It notes that arbitrators have concluded an admonishment of an employee constitutes a verbal reprimand. It also contends that divulging confidential information is serious enough conduct to bypass progressive discipline. It takes the position that in light of the facts of this matter, the written reprimand was appropriate. The County answers the Union's allegation of bad faith by issuing the written reprimand three months after the breach of confidentiality by observing that the grievant's performance and conduct was cumulative and addressed all concerns in the written reprimand and the decision when to do so does not alleviate the fact that the grievant did commit the items in the written reprimand.

The County insists it had just cause for the written reprimand. The grievant committed the allegations in the written reprimand, she was put on notice as to treating everyone with dignity, to maintain confidentiality and the procedures for reporting her absences, and the penalty imposed is reasonable in light of the grievant's actions. It concludes the written reprimand was for just cause and the grievance should be dismissed in its entirety.

UNION'S REPLY

The Union contends that the County's brief is similar in many respects to the discipline of the grievant in that it has a foundation of erroneous or half-baked facts to support flawed arguments. The Union points out that in its brief the County contends numerous times that the grievant was issued prior verbal reprimands; however, it contends the record is clear that the grievant was not verbally reprimanded, but rather, she was counseled as she was learning the various duties and responsibilities of her new job. It asserts that in 1998, the grievant was a new employee to the Child Support position and it was natural to make good faith errors in learning the job and the guidance of supervisors should not result in concocted reprimands which the County desperately attempts to do.

Contrary to the County assertion, the Union observes that the grievant and a co-worker testified that they almost never referred to the Wisconsin Child Support Procedures Manual in their everyday work. The Union denies that the record establishes that the grievant made demeaning remarks and the County did not produce a single witness to directly substantiate these alleged remarks. It denies that Ms. Bentley ever personally observed the grievant interact with clients and there was no direct testimony that a co-worker had witnessed such conversations. It asserts that the County misstated that Huebsch received a verbal complaint when it was Tina Anderson who did and then Social Services Director Dale Van Mieghen responded that no breach of confidentiality or other misconduct could be attributed to the grievant. It claims that the grievant did not admit that she said things to Client A that were taken in a demeaning fashion but that she may have made remarks which Client A may have interpreted to be offensive. The Union objects to the evidence of call-ins for absence from January through November, 1999, stating that the discipline occurred in 1998. The Union states that grievant received informal memos about reporting her absences and latenesses for

work but these did not constitute discipline of any sort. The Union states that the County had inaccurate facts asserting that fellow workers were “angry”; rather, this was a reference to clients. It notes that the County gets its facts wrong and then makes bogus arguments based on these.

The Union concludes that the County’s case is totally without merit. It argues that the County failed to prove the grievant demeaned or was otherwise offensive to a client. It claims the grievant acted in good faith in advising the District Attorney about information related to a serious criminal matter. It maintains that the grievant also acted in a reasonably good faith manner in complying with her supervisors’ request as to reporting absences. It notes that the grievant is a long-term employe with a good work record. It insists that if some level of discipline is found to be appropriate, a written warning is too harsh.

DISCUSSION

The issue presented is whether there was just cause for the grievant’s written reprimand. To establish just cause, the following questions must be answered. Did the grievant commit the offenses? Was she on notice that the offenses were prohibited? If so, does the punishment fit the crime? The first question is whether the evidence establishes that the grievant committed the offenses for which she was reprimanded. The grievant is alleged to have made inappropriate and/or demeaning statements to clients. The grievant tacitly admitted this charge in that her grievance seeks to change the written reprimand to a verbal reprimand claiming the punishment is too harsh (Exhibit 3). As to her conversation with Client A, the grievant denied making any statement about adoption and claimed Client A was very demanding. She did not feel what she said to Client A was demeaning although Client A may have taken it that way. She noted that Client A suffers from a learning disability and may have felt demeaned whereas a normal person would not. The grievant is obligated to treat everyone with respect and dignity and that includes persons with learning disabilities and not just normal people. The grievant’s own admission that Client A may have taken the grievant’s statements as demeaning indicates that statements were made to Client A which were inappropriate. For example, statements made to a child may induce a different reaction than to an adult. The grievant understands her audience, and her statements that may lead the recipient of the statement to feel demeaned indicate that the grievant did not treat Client A with respect and dignity. Her comments were not necessary and not appropriate under the circumstances. The evidence establishes this allegation.

As to the second charge of releasing confidential information, the evidence establishes that the grievant did so. The evidence established that in response to the news, the grievant called the District Attorney’s Office about information she had learned while performing her duties and then provided information to the District Attorney’s Office. If the grievant was concerned that this information should go to the District Attorney’s Office, she should have cleared it with her supervisor before she did anything rather than after. It was not the

grievant's responsibility to clarify news reports by using confidential information from a case record that has been closed. The grievant had no authority to release the information and the grievant's release of the information was prohibited by the Child Support Procedures.

With respect to the third charge, the failure to keep management informed when not coming into work due to illness or personal emergency, the evidence established that the grievant did not follow the proper procedures. By a memo dated August 7, 1998, the grievant was instructed that she had to follow the contract and call in no later than one-half hour after she was scheduled to report and to notify her supervisor as well as a member of the clerical staff (Exhibit 10). The grievant's excuse that a clerical employee did not forward her information to the supervisor indicates she did not follow the proper procedure, plus the October 22, 1998 and April 21, 1999 notes attached to her leave requests indicate that the grievant did not comply with the August 7, 1998 memorandum (Exhibit 10). The grievant's testimony that she did not get any direction as to calling in and she was not properly trained is not credible based on the memo and other documentation (Exhibits 10 and 11). Thus, it is concluded that the evidence establishes this charge.

The next question is whether or not the grievant was on notice that her conduct was improper. The grievant was aware that making demeaning or inappropriate remarks was inappropriate and the new worker training overview spells out the requirement to treat everyone with respect and dignity (Exhibit 12). It should be noted that the grievant began in her present position in October, 1996, so she had three years of experience in the position and dealt with clients during this time and knew the requirement to treat clients with dignity and respect.

With respect to maintaining confidentiality, the subject was addressed in new worker training (Exhibit 12), was discussed in staff meetings on a regular basis, is in the Child Support Procedures Manual (Exhibit 13), and in 1997, the County discussed confidentiality with the grievant (Exhibit 14).

As far as the failure to properly notify the County about absences and lateness, the grievant was given a memorandum on August 7, 1998, which spells out exactly what was required of her with respect to reporting her absences. Thus, it is concluded the grievant was on notice that her conduct was improper.

The next issue is whether the punishment fits the crime. The grievant contends that she should receive a verbal reprimand rather than a written reprimand and the County alleges that she has already been given verbal reprimands. It is not necessary to say the magic words "verbal reprimand" for a verbal reprimand to be given. A verbal reprimand is merely an oral admonishment that conduct is not acceptable and should not be repeated. It is a "word to the wise." With respect to the grievant's failure to inform her supervisor of her absences/latenesses, the grievant was clearly given a verbal reprimand. The memo of August 7, 1998, follows up on a verbal discussion where the grievant was told her actions were unacceptable

and that the grievant will abide by the policy. It is obvious that ignoring these admonishments would result in more than just another verbal warning. As far as making demeaning statements to Client A, if this were the only charge against the grievant then it may merit a verbal reprimand. With respect to the breach of confidentiality, this is a serious offense and the grievant's rationale for its release simply makes no sense. This charge warrants a written reprimand.

Given all the facts and circumstances, when the three charges are considered in total, the written reprimand was not too harsh a punishment but, in fact, is appropriate for the offenses by the grievant.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes the following

AWARD

The County did not violate the collective bargaining agreement by issuing a written reprimand to the grievant on May 7, 1999, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 25th day of February, 2000.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator