BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**MANITOWOC COUNTY**

and

**AFSCME LOCAL 986-A, AFL-CIO**

Case 365
No. 59621
MA-11358

(Vanne Grievance)

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**Appearances:**

von Briesen, Purtell & Roper, S.C., by **Attorney James R. Korom**, 411 East Wisconsin Avenue, Suite 700, Milwaukee, WI 53202-4470, on behalf of the County.

**Mr. Michael J. Wilson**, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903 and **Mr. Neil Rainford**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 14002 County Road C, Valders, WI 54245, on behalf of the Union and the Grievant.

## ARBITRATION AWARD

According to the terms of the 2000-2001 collective bargaining agreement between Manitowoc County (County) and Manitowoc County Supportive Services Employees Local 986-A, 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 discharge of Child Support receptionist Beth Vanne. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was held at Manitowoc, Wisconsin, on April 24, 2001. A stenographic transcript of the proceedings was made and received by May 14, 2001. The parties agreed to file their initial briefs post-marked June 22, 2001, which the Arbitrator would thereafter exchange. The parties reserved the right to file reply briefs. All briefs were received by August 13, 2001, whereupon the record was closed.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

## ISSUES

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

Did Manitowoc County have just cause to discharge the Grievant, Beth Vanne? If not, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 5 – DISCIPLINARY PROCEDURES

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

B. Discharge: When an employee is discharged or terminated by the Employer, a written discharge or termination report shall be prepared stating the effective date and the reason(s) for the discharge or termination. One (1) copy of the report shall be retained by the Employer, one (1) copy shall be given to the employee, and one (1) copy shall be filed with the Union.

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### ARTICLE 6 – UNION REPRESENTATION

An employee shall be entitled to Union representation upon request when being interviewed for disciplinary purposes that may result in discipline or disciplinary hearings.

## FACTS

The Grievant, Beth Vanne, has been employed as the receptionist in the County's Child Support Office for several years. It is not evident that Vanne was ever disciplined prior to her discharge on July 6, 2000. 1/

*1/ As the County put no evidence in regarding Vanne's past work record, I conclude that she had received no prior warnings or discipline.*

On an unknown date in the Spring of 2000, D.O. 2/ went to the County Job Center. D.O. was then on medical assistance for her baby and the County Job Center referred D.O. to the County Child Support Agency. Thereafter, D.O. went to the County's Child Support agency with the intention of filing a paternity suit against the putative father of her newborn baby. It is unknown who greeted D.O. at the County Child Support office and who took the initial paperwork in this case. However, the case was ultimately assigned to caseworker Jill Mertens who drafted the legal paperwork and filed the paternity suit in County Court.

Sometime in early June, Jill Mertens received word that the putative father that D.O. had named in her paternity suit had been excluded by genetic testing. Mertens then called D.O. and told her of the results of the genetic testing. Mertens asked D.O. to name another man as the putative father and stated that the County would then pursue that second man as the father of D.O.'s baby. On the telephone, D.O. named K.H. Mertens then had the County Child Support Secretary Julie Dietrich type an affidavit and send it to D.O. which was necessary to open a second paternity file for D.O.'s baby.

On or about Monday, June 12, 2000, D.O. dropped off the affidavit to the County Child Support agency, naming K.H. as the father of her baby. Thereafter, Mertens did the legal paperwork necessary to begin a paternity action against K.H. 3/ D.O. stated that on June 12, 2000, when she dropped off the affidavit, it was notarized by "whoever was at the front desk" at the time. 4/ Mertens then filed the paternity case in Circuit Court on Wednesday, June 14, 2000. All of the copies had been stamped "received" by the Court but only one copy of the paternity papers had been filed with the Court. The others were held by Mertens for later pick-up by or service on K.H., according to Agency practice. 5/

*2/ The initials of the person who filed the relevant paternity actions with the County's Child Support Agency will be used in this case, as will the initials of the father of D.O.'s baby.*

*3/ Mertens stated that Child Support Secretary Dietrich assists her with drafting and typing such legal paperwork.*

*4/ The County did not submit this affidavit into the record herein.*

*5/ Mertens stated that she followed her normal practice in D.O.'s case of sending a letter to the putative father after the case was filed in court, stating that the father (K.H.) could pick up the legal paperwork at the Child Support office to avoid being charged service fees by the County Sheriff's Department.*

In the afternoon of June 14, 2000, D.O. left work and picked her three children up at daycare. 6/ D.O. noticed K.H. stopped at a stoplight near her home as she was proceeding home in her car with her children. K.H. followed D.O. to her home and parked behind her in her driveway. D.O. backed up in order to indicate that K.H. should not remain parked behind her in the driveway. K.H. then removed his car from D.O.'s driveway. D.O. and her children, got out of the car at this point. K.H. got out of his car. The two older children played in the grass while D.O. and K.H. had a conversation, as follows. K.H. asked D.O. when he would get the papers on his child support case. D.O. responded that she did not know what he was talking about because no one was supposed to know. K.H. responded that Carrie Mott had told Holly Jacquart (K.H.'s girlfriend) about it at the gas station (where Jacquart worked) that day. D.O. responded that she did not know what K.H. was talking about. K.H. responded that this was what he heard, that Beth Vanne had told Carrie Mott that he was the father of D.O.'s baby and that Mott had told Jacquart that she would keep her (Jacquart) informed regarding the case. 7/

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***6/ D.O. has two sons, five and seven years old, and a baby girl who was then approximately five months old.***

***7/ K.H. did not testify herein.***

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At approximately 4:00 p.m., D.O. called Mertens to complain about Beth Vanne's breach in confidentiality she had heard of through K.H. Mertens then spoke with Child Support Director Angoli and informed her of the reported breach of confidentiality by Vanne. Angoli then called D.O. to confirm the conversation and asked D.O. to bring her own written statement in with her the next day when Angoli intended to interview D.O. regarding the matter. 8/ Angoli and Corporation Counsel Rollins, as well as the County Personnel Director Cornils, then decided to take sworn statements from witnesses to try to determine whether Vanne had, in fact, breached confidentiality. As a result, Cornils and Angoli interviewed D.O., Sue Blaha (K.H.'s mother), Mott, Jacquart and Beth Vanne and took sworn statements recorded by a court reporter from all of these witnesses. 9/

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***8/ The County did not offer this statement into the record herein, although D.O. did testify in this case.***

***9/ Neither Beth Vanne nor her union representative were present for any of the statements other than Vanne's, and the Union was not allowed to question Vanne during her statement. Vanne was not advised before giving her statement to the County that she could be subject to felony prosecution for a breach of confidentiality.***

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It is undisputed herein that Vanne is responsible to open files for the County Child Support Agency. Child Support Secretary Dietrich is also empowered and expected to open case files for the Agency. There is no evidence to show that Vanne opened either the initial paternity case file for D.O. or the paternity case file regarding K.H., as no specific tracking is done of who, in fact, opens each case file. Indeed, Caseworker Mertens stated that she could not be sure who had opened D.O.'s files. Mertens stated that D.O. did not come into the office to file the case regarding K.H. Rather, the initiation of that matter was done over the telephone between Mertens and D.O. after the first putative father of D.O.'s baby was excluded by genetic testing. Mertens also stated that Dietrich normally assists her in drafting and typing the necessary paperwork in paternity cases. Mertens also admitted that her agency shares information with the Job Center, the Department of Social Services, the Corporation Counsel and the Clerk of Courts offices, although there was no evidence herein that any sharing of information occurred regarding D.O.'s cases. Mertens stated that if the Receptionist (Vanne) is not at the desk in the entryway, anyone who works for the Agency is expected to handle walk-ins and fill in for the Receptionist. Mertens also stated that there was no reference in the first paternity file to K.H.; that only after the new file was opened was any reference to K.H. made in any County file.

Both Jacquart and K.H.'s mother, Sue Blaha, testified herein regarding a conversation that Jacquart had with Mott regarding the paternity of D.O.'s baby. 10/ On Wednesday, June 14, 2000, sometime in the morning, Mott entered the UniMart gas station, which has surveillance cameras set on the register. Jacquart was working the register that day. Mott asked Jacquart how she was doing and when her baby was due. (Jacquart was then pregnant with K.H.'s baby.) Mott then asked Jacquart whether she knew that K.H. was the father of D.O.'s baby. Jacquart replied that there had been rumors to that affect which had circulated earlier but that K.H. had not received any paperwork from the Child Support Agency. Mott stated that the case was going through the courts at that moment. Jacquart was surprised and upset by this and she asked how Mott knew this. Mott told her that Beth Vanne had told her that the case was being processed. Mott also stated that she would keep Jacquart posted on the status of the case. This ended the conversation. Blaha, who also then worked at the UniMart as the store supervisor, essentially corroborated Jacquart's testimony herein.

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***10/ The Union objected to Jacquart and Blaha's testimony on the grounds of hearsay. It was allowed over objection.***

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During its investigation of the case, the County took Mott's sworn statement in which she denied ever having a conversation with Jacquart. The County decided to check Mott's claim (under oath) that she could not have had a conversation with Jacquart on June 14th because she was at work, by calling Mott's employer on June 22, 2000. In a conversation with an agent of Mott's employer, the County was told that Mott was not at work on the morning of June 14, 2000. 11/ Although the UniMart maintains video tapes of register activity, the

County did not submit any evidence to show it had attempted to acquire a copy of the tape relevant herein, which presumably would have shown Jacquart and Mott's conversation. Mott was not called as a witness in this case.

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***11/ The Union objected to this evidence on hearsay grounds.***

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A great deal of unrefuted evidence was submitted, which indicated that Beth Vanne had been trained in depth in confidentiality policies, both under the County's rules and State and IRS rules; that Vanne had signed off on various documents indicating that she had read the updates on the County's confidentiality policy; and that Vanne had viewed a video regarding confidentiality issued by the State of Wisconsin. In addition, in her sworn statement before the County, Vanne admitted that a breach of confidentiality was a serious matter that might cause the County to terminate an employee. 12/

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***12/ Beth Vanne refused to testify in this matter, on advice of Union Representative Wilson, given the fact that the County stated herein that Vanne could be subject to fines and felony charges leveled against her for her alleged breach of confidentiality. As Vanne had not been subpoenaed and did not have counsel present and as she declined to testify under threat of prosecution, the Arbitrator denied the County's request at the end of its case that the Arbitrator require Vanne to testify without a subpoena. The County never offered Vanne immunity against criminal charges if she agreed to testify herein.***

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As a result of this investigation, the County decided to terminate Vanne effective July 6, 2000, for breaching the confidentiality of the Child Support Agency in the D.O. case. 13/ After July 6, 2000, the Union timely filed a grievance in this case, asserting that the County did not have just cause to discharge Beth Vanne. On July 31, 2000, the County denied the grievance and indicated that the Union's request for copies of the sworn statements taken during the County's investigation could be granted if the County secured personal releases from the witnesses allowing it to disclose the information to the Union. It is unclear whether those releases were garnered by the County.

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***13/ On June 28, 2000, the County gave Vanne a summary of the evidence, including the identification of all witnesses who had given sworn statements in her case, and an opportunity to add any additional information she felt should be considered in the final decision. Vanne offered no new information.***

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## POSITIONS OF THE PARTIES

### The County

The County argued that this case raises the issue of the co-conspirator hearsay exception and the right of the employer to compel testimony in a grievance arbitration proceeding, although the County also contended that it made a just cause case against Vanne to support her discharge. In this regard, the County noted that Vanne knew that a breach of confidentiality was wrong and a serious, dischargeable offense. The County conducted an excellent investigation and also checked Carrie Mott's alibi regarding whether she could have had a conversation with Holly Jacquart regarding the paternity of D.O.'s baby. In addition, the County found no evidence to show that Jacquart and Blaha would lie regarding the conversation that Mott had with Jacquart. Furthermore, the County noted that copies of all documents pertinent to the case were provided to the Union.

The County argued that the correct burden of proof in this case is the clear and convincing evidence standard. Because the Grievant's behavior involves the possibility of criminal prosecution under Sec. 48.63, Stats., a clear and convincing evidentiary standard is the standard most readily applied in such cases. In this case, the statement of Carrie Mott to Holly Jacquart (and overheard by Sue Blaha) should be considered evidence that the Grievant divulged confidential information. In this regard, the County noted that most arbitrators admit hearsay "for what it is worth." But these statements are not hearsay because they are the "statements of a co-conspirator" of the Grievant. The County noted that a conspiracy can be proved by circumstantial evidence and that the statements of the co-conspirator are admissible despite their hearsay character under an exception for co-conspirator's statements under Wisconsin evidence law.

The crime, which Vanne conspired to commit with Mott, was the divulging of confidential information regarding an application for Social Services. Wisconsin Statute 48.63 provides for fines and imprisonment for disclosing information having to do with child support matters. No intent, motive or personal gain is necessary to be proved in these cases. In the County's view, Mott's statement to Jacquart (and Blaha's corroboration thereof) proved the conspiracy. In this regard, the County noted that few people were aware of this information; that Mott was a close friend of Vanne's and that there was no motive for Blaha and Jacquart to lie or to otherwise have access to this information unless it had already been revealed by Vanne to Mott. Thus, Jacquart and Blaha's testimony demonstrates the crime of Vanne's uttering the words to Mott is similar to a situation where a witness testifies "that she saw a defendant exchange cocaine for a wad of cash" in order to establish that a drug crime had occurred. STATE V. DORCEY, 103 WIS.2D 152, 158 (1981).

The County urged that the Union should have called Mott to the stand and that it was not the County's responsibility to do so. Therefore the Arbitrator should draw a negative inference against Vanne for her refusal to testify and for the Union's failure to call Mott. Thus, in the County's view, there was more than adequate proof of wrongdoing by Vanne to

support her discharge. The County also contended that if they cannot use the statements of witnesses like Jacquart and Blaha, then child support workers could "wreak havoc" upon families by divulging confidential information and the employee or the friend to whom the employee has revealed information will deny the revelation so that no violation of confidentiality rules could ever be proved.

Also, in the County's view, Mott's statement can be admitted under the catch-all exception to the hearsay rule because there is no reason to believe that Jacquart and Blaha would lie about what they heard Mott say. In this regard, the County noted that Sec. 908.03(24) states an exception to the hearsay rule for "a statement not specifically covered by any other exception, but having comparable circumstantial guarantees of trustworthiness." Where, as here there is corroboration by a second witness (Blaha) this provides circumstantial guarantee of trustworthiness, at least in part. In addition, the circumstances of the situation show a sincere and accurate statement would naturally be uttered and that no plan of falsification would have been formed regarding the hearsay between Blaha and Jacquart. Indeed, the County noted that Blaha and Jacquart did not know Vanne or Mott particularly well and had no reason to lie regarding Mott's statement concerning what Vanne told Mott.

The County urged that the majority of Arbitrators hold that a Fifth Amendment right of a criminal defendant to remain silent is not applicable in an arbitration setting. In this case, the County argued that the Arbitrator should have forced the Grievant to take the stand, assert her Fifth Amendment privilege, thus giving the County the opportunity to grant Vanne immunity in exchange for her testimony (use immunity).

In any event, the County argued that the Arbitrator should draw a negative inference from the Grievant's refusal to testify at the arbitration proceeding and her failure (thereby) to rebut evidence of misconduct given by Jacquart and Blaha that she leaked confidential information to Mott. If the Grievant had taken the stand, the County noted that it would have had to rebut that evidence by calling Mott or other witnesses. This did not occur.

The County nonetheless argued that it had proved with sufficient evidence that it had just cause to terminate the Grievant and that the Union's case consisted of merely hearsay objections and the Grievant's refusal to testify. Thus, as Vanne was "one of only a few people who knew" that D.O. had filed a paternity action against K.H., the Arbitrator should sustain the discharge and dismiss the grievance.

**The Union**

The Union urged that there was no reliable proof that Vanne even knew of D.O.'s case filing or that Vanne told Mott about it. The Union also argued that Vanne and Mott could not be considered co-conspirators and that the County's case is based only upon hearsay without corroboration.

The Union argued that the burden of proof in this case should be the beyond a reasonable doubt standard as the alleged misconduct Vanne engaged in is also a felony. The County submitted evidence in the arbitration case that the alleged breach of confidentiality by Vanne constituted a felony. Therefore, the County itself essentially proved that the standard in this case should be beyond a reasonable doubt as a criminal charge could be made against Vanne following the arbitration hearing. The Union noted that before Vanne testified in the County's investigation, the County failed to inform Vanne that her testimony could subject her to felony prosecution. Based upon the County's submission of exhibits 15-A and 16 as well as its stance in the hearing that Vanne could be prosecuted for her alleged breach of confidentiality, any statement by Vanne at the arbitration hearing could be used against her in a criminal case at a later time and she was well advised to refuse to testify in the case. In any event, the Union urged that the County failed to meet this strict burden of proof that Vanne breached confidentiality.

The Union noted that Vanne was within her rights to decline to testify when the County raised the possibility of prosecuting her on a felony charge. Furthermore, the Union argued that the Arbitrator is not required to draw a negative inference from Vanne's refusal to testify. In this regard, the Union noted that it was the County that decided not to call Mott and to rely instead on hearsay exceptions and conspiracy theories. The Union quoted from Black's Law Dictionary regarding the definition of a conspiracy, as follows:

> An agreement by two or more persons to commit an unlawful act; a combination for an unlawful purpose . . .

The Union noted that an exception to the hearsay rule occurs when one co-conspirator's act and statements, if made during and in the furtherance of the conspiracy, can become admissible against a defendant even if the statements are made in the defendant's absence. Thus, the Union urged that the two elements of a conspiracy are missing from this case. Those elements are the agreement among two or more persons to direct their conduct toward the realization of a criminal objective which each co-conspirator must individually and consciously intend and in which each co-conspirator has an individual stake. Because neither of these elements is present in the instant case, the County's argument regarding a conspiracy should be rejected by the Arbitrator.

One of the key witnesses in this proceeding was Carrie Mott. The County decided that the Arbitrator should not hear Mott's live testimony, thus depriving Vanne of the opportunity to cross-examine Mott. Indeed, the Union noted that Mott had testified in the County's investigation that no conversation had occurred between her and Holly Jacquart, as alleged. However, in this arbitration proceeding, the County chose to use hearsay and argue exceptions to the hearsay rule and to deprive Mott of participation in this proceeding.

As the County offered no corroboration of the hearsay evidence given by Jacquart and Blaha, that evidence should be found to be insufficient to support Vanne's discharge. The simple fact is that rumors, guessing, fabrication or other people might account for the leaked information regarding the K.H. paternity action and there was no non-hearsay admissible evidence to show that Vanne had actually revealed confidential information regarding the K.H. paternity action to Mott.

The Union argued that Jacquart was impeached during her testimony in this case. In this regard, the Union noted that Jacquart could not recall facts, that she reported that she had heard rumors about D.O.'s baby's father and that she had spoken to a friend of hers regarding D.O.'s baby. In addition, the Union argued that Blaha should also be found incredible. In this regard, the Union noted that Blaha stated that she and Jacquart did not speak about the conversation Jacquart had with Mott or about the interview that Jacquart had had with the County regarding Vanne's case. These matters, the Union asserted, were either contrary to human nature or were grounds to find these witnesses incredible.

The Arbitrator need not draw a negative inference in a case such as this where the County has failed to establish its case by "probative evidence." In this regard, the Union noted that Jacquart claimed that Vanne had divulged other confidential information but could give no specifics regarding these matters. Child Support Worker Mertens could not confirm that Vanne initiated the case file in the K.H. paternity matter. Indeed, the County never proved that Vanne even knew of the K.H. paternity action prior to its filing. Therefore, the Union urged that the grievance be sustained and Vanne be ordered reinstated with full back pay.

## REPLY BRIEFS

### The County

The County urged that Vanne should have been required to take the stand at the arbitration hearing. In this regard, the County contended that the Union wanted to "have it both ways" – to prevent a key witness from testifying and then claim that there is no evidence of wrongdoing on the record. In order to avoid this problem, the County argued that the Arbitrator should determine whether there was just cause at the time the County did its investigation to discharge Vanne. As the County credited the testimony of Blaha and Jacquart over that of Mott and Vanne, it reasonably found that Vanne was the source of the confidential information and that therefore she should be discharged for breaching confidentiality.

In addition, the County urged that the Arbitrator can draw a negative inference from Vanne's refusal to testify herein. In addition, the County urged that Vanne's "intent" and her "individual stake" in breaching the confidentiality would have been explored by the County on cross examination of Vanne, in an attempt to prove its conspiracy theory. Therefore, the Arbitrator should find that a conspiracy existed as there is no evidence in the record that it did

not exist. As this is a civil not a criminal case, the Fifth Amendment right to be free of self-incrimination does not arise. In any event, the record and common sense show that the elements of a criminal conspiracy were met by the County in this case.

The County urged that the Union's attempt to attack Blaha and Jacquart's credibility was ineffective as their testimony stood unrefutted in the record. The County also noted that on June 12th, D.O. was the only person who knew of the paternity action, yet by June 14th, Jacquart, Blaha and K.H. had been told of it as well. If clients of the child support agency were to conclude that their legal actions would be subject to the rumor mill, they might be reluctant to come forward.

The County urged that the Union should have called Carrie Mott to the stand. In this regard, the Union noted that if a party fails to call a material witness within its control and fails to explain why that action has not been taken, in Wisconsin, civil juries can infer that the evidence the witness would have given would have been unfavorable to the party who failed to call the witness. As Carrie Mott was the Grievant's friend, she was in the Grievant's control and the Union should bear the burden of calling Carrie Mott and it should suffer the consequences of adverse inferences for its failure to call her. In any event, the County queried, what would Mott have testified to that the Union would not have objected to on hearsay grounds. In sum, the County urged that it should have been allowed to "prove its case through the testimony of" Vanne.

**Union**

The Union noted that the County had asserted that the crime that Mott and Vanne conspired to commit was the divulging of confidential information concerning an application for social services. However, the County failed to prove any of the elements of a conspiracy: agreement, intent, or individual stake in the conspiracy. Here, Mott is presumed to be a criminal co-conspirator and to have been Vanne's friend, although these two "facts" were not proved by the County at the arbitration hearing. Thus, the County has at least misrepresented the facts of this case.

In addition, the Union pointed out that the County failed to produce hard evidence regarding the conversation between Jacquart and Mott. Here, the evidence indicated that the UniMart had videotapes which could have been acquired by the County of the conversation between Jacquart and Mott. Child Support Agency Director Angoli also never actually confirmed that Mott was not at work on the date of her alleged conversation with Jacquart--only that Mott was employed by a temporary agency on that day.

The County failed to thoroughly investigate this case. In addition, if, as Jacquart said, Vanne had spread confidential information prior to June 14th, the County should have investigated that allegation made by Jacquart in her statement to the County.

The Union urged that it did not have a reason to call the Grievant or any witnesses because the County's case was based entirely on uncorroborated hearsay and pursuant to PEACHTREE DOORS, 91 LA 585 (YAROWSKY, 1988) the County cannot make its case by the Grievant's failure to testify where the Grievant has a right not to testify. In addition, in PUBLISHER'S ASSOCIATION OF NEW YORK CITY, 43 LA 400, 404-405 (ALTIERI, 1964), where the Employer failed to make a prima facie case, the Arbitrator held that he would not make an adverse inference against the Grievant who failed to testify in such a case. Finally, in SOUTHERN BELL TELEPHONE AND TELEGRAPH CO., 25 LA 270, 273 (MCCOY, 1955), the Arbitrator held that inferences as to evidentiary facts cannot extend to ultimate conclusions of guilt or innocence and the failure to deny or refute incredible evidence does not change that evidence from incredible to credible.

The Grievant, the Union noted, fully cooperated in the County's investigation and answered all the Employer's questions under oath. It was not until the arbitration hearing that the County threatened to prosecute the Grievant which made it impossible for the Grievant to testify. In addition, the County failed to subpoena the Grievant. In any event, the parties agreed not to argue whether the Grievant could be compelled to take the stand (Tr. 105-107) but agreed to argue whether a negative inference could be drawn therefrom. In the circumstances of this case, the Union urged that no such negative inference should be drawn.

In summary, the Union asserted that the County failed to meets its burden of proof; that no conspiracy was proven by the County; and that no valid exceptions to the hearsay rule should operate in this case. The County was not foreclosed from calling Mott or from conducting a more thorough investigation. If Jacquart and D.O. had other evidence that Vanne had leaked information from the County Child Support Agency, the County should have investigated this allegation. In any event, Jacquart and D.O.'s testimony is suspect on the basis of the assertions made by them. It is not the Union's responsibility to prove that they lied in order to discount their testimony. The County threatened to prosecute the Grievant and the County failed to produce credible evidence herein that the Union needed to rebut. This is a case in which the Employer has failed to present a prima facie case, not one in which the Employer was prevented from presenting its case. Therefore, the grievance should be sustained and a make-whole remedy should be ordered for Vanne.

## DISCUSSION

The County has argued that Carrie Mott's statements to Holly Jacquart regarding what Beth Vanne allegedly told her concerning D.O.'s paternity suit against K.H. constitute "statements of a co-conspirator" and are therefore not hearsay under Chapter 908, Stats., and that Mott's statements should therefore constitute evidence of the truth of the matter asserted therein. In any event, the County argued that the Union should have called Mott to the stand herein; that it was not the County's responsibility to do so and that therefore, the Arbitrator should draw a negative inference against Vanne for her refusal to testify and the Union's failure to call Mott. The County contended, in the alternative, that Jacquart's and Blaha's

statements regarding what Mott said fall under a "catch all" exception to the hearsay rule as statements "having comparable circumstantial guarantees of trustworthiness." Sec. 908.03(24), Stats. In the Arbitrator's view, these arguments constitute mere "red herrings" in this case. The appropriate inquiry in this case (as the County argued in its reply brief) must begin with a detailed analysis of the evidence the County had before it when it decided to discharge Beth Vanne for a breach of confidentiality regarding D.O.'s paternity suit against K.H. It is from this inquiry that an initial determination can be made whether the County had just cause to terminate Vanne on the basis of the allegations against her.

As an initial matter, I note that the County proffered no evidence to show that Vanne had previously been disciplined by the County for any misconduct. Thus, I have no alternative but to treat Vanne as having a clean work record. During its investigation, the County took transcribed sworn statements from D.O., Blaha, Jacquart, Vanne and Mott (made a part of this record). These statements reveal that Mott denied under oath making the statements to Jacquart and Blaha attributed to her concerning what Vanne allegedly told her about D.O.'s paternity suit against K.H. Vanne also denied under oath revealing any confidential information to Mott. Jacquart and Blaha's sworn statements to the County revealed that Blaha overheard a conversation between Mott and Jacquart on the morning of June 14th at the UniMart (where Blaha and Jacquart worked) wherein Mott told Jacquart that Beth Vanne told Mott that D.O. had started a paternity action against K.H. (Blaha's son and Jacquart's boyfriend) seeking to have K.H. named as the father of D.O.'s baby. During its investigation, the County also called Mott's employer to inquire whether she was working on the morning of June 14th and could not have had a conversation with Jacquart, as Mott claimed. Mott's employer informed the County over the telephone that she was not working on the morning of June 14th and later sent the County a copy of Mott's time card covering June 14th. 14/

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***14/ The County received this timecard after it made its July 6th decision to fire Vanne. The card was therefore rejected by the Arbitrator as it was not considered by the County in reaching the termination decision.***

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On the basis of the above-described evidence, the County discharged Vanne on July 6, 2000. The County did not interview Julie Dietrich, Child Support Secretary, or Jill Mertens, Social Worker on D.O.'s case during its investigation. The County did not attempt to acquire a copy of the videotape of the register area at the UniMart for June 14th. The County did not submit a copy of D.O.'s notarized affidavit which triggered the filing of the paternity suite against K.H.

In a discharge case such as this one, it is the employer's burden to prove to the arbitrator's satisfaction, that the employer had just cause to discharge the employee in all the circumstances. In order to accomplish this, the employer must submit evidence to prove that the employee actually committed the misconduct with which he/she has been charged. In cases

where the employer has presented evidence from competent, credible witnesses who were present when the grievant engaged in the misconduct and who observed it, and the grievant has refused to testify, no negative inference against the grievant is necessary or appropriate as there is direct unrefuted evidence provided by the other witnesses to prove just cause for the discipline. However, the instant case is not such a case.

The County has argued that a negative inference should be drawn against Vanne because she refused to testify herein. However, the County failed to place any direct evidence into this record to show that Vanne, in fact, had a conversation with Mott in which Vanne revealed confidential Child Support Agency information to Mott. The County also offered no evidence to show that Vanne had actually known of D.O.'s case against K.H. Rather, the County submitted evidence that Mott told Jacquart that she (Mott) had received confidential information from Vanne. In these circumstances, and given the fact that the County had prior sworn statements from both Mott and Vanne in which Vanne denied giving Mott any confidential information and Mott denied revealing such information to Jacquart, a negative inference cannot fairly be drawn against Vanne, as the County has urged.

In addition, I note that in the instant case the County threatened to prosecute Vanne on felony charges for revealing confidential Child Support Agency information and then requested that the Arbitrator draw a negative against Vanne for her refusal to testify. 15/ Vanne agreed to and gave a prior sworn and transcribed statement to the County (submitted herein) during the County's investigation. During her statement, Vanne appeared to fully answer the questions put to her and the County had every opportunity to ask Vanne any questions it wished. Neither the Union nor Vanne raised any objections to any of the County's questions of Vanne during her statement. (The Union was not allowed to put any questions to Vanne or otherwise participate in Vanne's statement before the County.) Thus, in all of these circumstances, to draw a negative inference against Vanne for her refusal to testify herein would be patently unfair.

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***15/ In its initial brief, the County asserted it could have granted Vanne immunity from prosecution had she been forced to testify herein. The County never made an offer of immunity to Vanne at the instant hearing, assuming it could have done so, so the County's immunity argument must fail.***

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In my view, the County has failed to prove, by any standard, that Vanne leaked confidential information regarding D.O.'s paternity suit against K.H., as alleged. There is a suspicion, based on Blaha and Jacquart's testimony, that Vanne breached confidentiality based upon the evidence the County had as of July 6, 2000, but a suspicion, even of such serious misconduct, is insufficient evidence upon which to discharge an employee with a clean work

record. Even assuming Blaha and Jacquart are credited regarding what they asserted Mott said, this evidence does not prove that Vanne, in fact, revealed confidential information to Mott.

In addition, there was unrefuted evidence submitted at the instant hearing to show that D.O. had no recollection who received her affidavit and who notarized it at the Child Support Agency, although D.O. stated that she had gone to school with Vanne and knew her. Certainly if Vanne had received and notarized D.O.'s affidavit against K.H., one could reasonably conclude that the County would have put this evidence into the record to bolster its case. 16/ The County did not do this. The County's failure to place D.O.'s affidavit in this record, a document over which the County had control, raises a negative inference that this evidence, if submitted, would not have supported the County's case against Vanne.

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***16/ Mertens stated that anyone at the Child Support Agency could have taken D.O.'s affidavit and notarized it in the case against K.H., as it is the normal practice of agency employees to cover the front desk if the receptionist (Vanne) is not present.***

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Furthermore, the record shows that no one could be sure who opened the file in D.O.'s paternity suit against K.H. and that the file could have in fact been opened either by Vanne or Dietrich. Indeed, there was no evidence in the record to show that Vanne ever had any contact with D.O. or with K.H.'s file. Social Worker Mertens also stated that the Child Support Agency regularly shares information with other agencies such as Job Center, Department of Social Services, Corporation Counsel, and Clerk of Courts offices and that D.O. had been referred to the Child Support Agency by the Job Center. Mertens further stated that Dietrich generally works with her in drafting and typing paternity cases.

In these circumstances, it is significant that the County failed to investigate Julie Dietrich's knowledge of the facts (e.g. the opening of the K.H. file, and the acceptance and notarization of D.O.'s affidavit in the K.H. case) prior to discharging Vanne and that the County failed to call Dietrich herein. Thus, a negative inference can fairly be drawn against the County that this evidence, if produced, would not have supported the County's case.

A great deal of evidence was submitted in this case and objected to on the grounds of hearsay. As the parties are aware, hearsay evidence is often presented at arbitration hearings and is later weighed by the Arbitrator in the final analysis to determine the significance of that evidence. In the instant case, we have not only the hearsay testimony at the hearing of Jacquart and Blaha but also the prior sworn statements (also technically hearsay) before the County of Blaha, Jacquart, Vanne, D.O., and Mott, all of whom were fully questioned by the County at its request. In these circumstances, it was not incumbent upon the Union to call Mott. Clearly, given the County's failure to prove that Vanne had, in fact, leaked confidential

Child Support Agency information to Mott, the Union could stand upon its position that the County had failed to make a prima facie case of just cause and rest its case without calling Mott or Vanne.

The County has asserted that Vanne and Mott were involved in a conspiracy to violate state law by revealing confidential Child Support Agency information to the public. As such, the County urged that Blaha and Jacquart's hearsay testimony regarding what Mott told them should be allowed into the record as an exception to the hearsay rule for statements made by a co-conspirator under Chapter 908, Stats. The County cited STATE V. DORCEY, 103 WIS.2D 152 (1981) to buttress its argument that a conspiracy existed between Mott and Vanne to reveal confidential Child Support Agency information.

That case held that a criminal conspiracy must be proved independently of the hearsay evidence being sought to be placed in the record against the defendant. If a conspiracy is so established, including when the conspiracy began and ended, the hearsay statements of an unavailable co-conspirator are admissible against the defendant co-conspirator even if those statements are not made in the presence of the defendant. The Court cited and relied on STATE V. ROBERTS, 448 U.S. 56 (1980) which as an initial matter, required that the prosecution (the party wishing to prove a conspiracy) must either produce or demonstrate the unavailability of the declarant whose statements the prosecution wishes to use against the defendant co-conspirator.

In the instant case, the County never attempted to produce or to demonstrate it had attempted to produce Mott and it never demonstrated Mott's unavailability. Therefore, the County failed to prove an initial justification (required by ROBERTS) for the factual use of Mott's (the declarant) statement against Vanne. 17/ The County therefore failed to prove up a conspiracy and that theory must be rejected as a basis for finding that Vanne, in fact, revealed confidential information to Mott. 18/ The County argued herein that the Arbitrator should find a conspiracy because no evidence was submitted that a conspiracy did not exist. This argument carries no persuasive force based upon STATE V. DORCEY, SUPRA and cases cited therein, and the facts of this case.

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***17/ If the declarant has been shown to be unavailable under ROBERTS, SUPRA, only then is an inquiry made whether the proffered hearsay statements otherwise show "indicia of reliability" or trustworthiness so that they can fairly be admitted against the defendant. As the County failed to prove that Mott was unavailable and it failed to show it had attempted to produce Mott, this second portion of the ROBERTS test does not come into play in this case.***

***18/ I am not satisfied, given all of the facts found herein, that Blaha and Jacquart's testimony in this case contains sufficient "comparable circumstantial guarantees of trustworthiness" under Chapter 908, Stats., to warrant a finding that based thereon, Mott's statements to Jacquart and Blaha should stand for the truth of the matter asserted therein.***

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The charges in this case, were they proved against Vanne, would be serious indeed. As I have found that the County failed to demonstrate that Vanne, in fact, engaged in any misconduct, based upon the allegations made against her, the grievance must be sustained. 19/ Therefore. I issue the following

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***19/ Jacquart alleged that Vanne had previously been rumored to have revealed confidential Child Support Agency information in both her prior sworn statement to the County and in her testimony herein. No evidence was proffered by the County to support these allegations and from this record it appears the County never investigated Jacquart's assertions. These allegations have therefore been disregarded herein as being without any foundation.***

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## **AWARD** 20/

The County did not have just cause to discharge Grievant Beth Vanne. The County shall therefore immediately offer Beth Vanne reinstatement to her former position or a position substantially similar thereto in the Child Support Agency and it shall make Beth Vanne whole from the date of her discharge forward in both wages and benefits.

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***20/ I shall retain jurisdiction, regarding the remedy only, for a period of 60 calendar days after the date of this Award.***

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Dated at Oshkosh, Wisconsin, this 23rd day of November, 2001.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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