BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

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

and

WAUPACA COUNTY

Case 120
No. 59513
MA-11316

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Mark F. Yokom**, appearing on behalf of the County.

ARBITRATION AWARD

The Waupaca County Professional and Non-Professional Employees Union, Local 2771, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Waupaca County, hereinafter referred to as the County or the Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the grievance of Rosemary Knapp, hereinafter referred to as the Grievant, regarding the imposition of a three day suspension. The undersigned was appointed by the Commission as the Arbitrator and held a hearing into the matter in Waupaca, Wisconsin, on July 6, 2001, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post-hearing briefs and reply briefs by October 23, 2001.

ISSUE

The parties were unable to stipulate to the issue presented in the case and left it to the Arbitrator to frame the issue in the award.

The Union would state the issue as follows:

Did the employer violate the Collective Bargaining Agreement by suspending Rosemary Knapp for refusing to transport three juvenile clients from the City of Racine to Waupaca County under circumstances offered by the employer? If so, what is the proper remedy?

The County would state the issue as follows:

Did the County violate Article 2, Section 2.01 (B) and (D) of the Labor Agreement when it gave a three (3) day disciplinary suspension to the Grievant for her continued refusal to transport children from Racine to the Waupaca Area on or about August 18, 2000? If so, what is the appropriate remedy?

The Arbitrator frames the issue as follows:

Did the County violate the terms of the Collective Bargaining Agreement when it suspended the Grievant for three (3) days following her refusal to transport three juveniles under non-secure custody from Racine to Waupaca? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

. . .

ARTICLE 2 – MANAGEMENT RIGHTS

2.01. . .

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

. . .

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

. . .

F) To maintain the efficiency of operations;

. . .

2.02 It is further agreed by the Employer that the management rights shall be exercised reasonably.

. . .

ARTICLE 8 – DISCIPLINARY PROCEDURE

8.01 The following disciplinary procedure is intended as a legitimate management device to inform the employee of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

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

8.03 Suspensions shall not be for less than two (2) days, but for serious offense or repeated violations, suspensions may be more severe. No suspension shall exceed thirty (30) calendar days.

8.04 Notice of discharge or suspension shall be given to the employee personally and written memorandum stating the cause thereof filed in the personnel office and a copy sent to the Union.

BACKGROUND

At all times relevant to this grievance, the Grievant, Rosemary Knapp, was employed by the County as a "Social Worker I." She had held this position since July of 1995. Her working job title was "Intensive In-Home Worker I" and she was employed under the following job description:

Classification: Social Worker I	Working Title: Intensive In-Home Worker I
Department: Health and Human Services	Grade Number: 8
Division: Children and Families	Union: Professional 2771
Date: June, 1995	Location: Waupaca Courthouse

Position Summary:

This position provides direct services to assist children and families to remain together in the community. The services provided take place primarily in the

family home, school, community where the family lives, and other natural settings. This position works closely with another team member jointly to provide services. The team will involve other professionals, family members, and other resources to assist in that service provision. Position performs a variety of complex professional assessments, referral and advice/education work, and support/consultation with family and professionals, respectively.

Supervision Received:

Works under supervision of Juvenile Court/Child Protective Services Manager.

Supervision Exercised:

None.

Essential Duties:

Act as team leader to provide guidance and assistance to other in-home worker.

Provides individual advice/education to adolescents, parents, siblings, as needed for success, of established goals.

Evaluates children and families through the use of assessment tools for assistance in treatment plan development.

Communicates with case manager and other professionals, as needed, to inform of progress as outlined an expected.

May work closely with various school districts and others involved, including community agencies, to address the behavior, performance, progress, attendance, etc.

As a team or individually, deals specifically with the priority issues for goals by providing parenting skills, self-esteem building, AODA issues, sexuality, peer relationships, emotional issues, and other family concerned planning.

Attends staffings and other meetings to provide information on progress of the child and family members.

Develops other resource needs, such as mentors or volunteers to assist with specific individual issues for continuation of community involve-ment. [sic] Transports clients to specific appointments and meetings, as needed, to carry out the plan.

Documents all records in accordance with Agency and State reporting requirement.

Assessment and development of specific treatment goals in written measurable terms for the child and/or family members.

Peripheral Duties:

May be involved with emergency on-call, as required.
May provide group AODA education programs.
Maintains confidentiality policy as required by Agency standards.
May serve as a member of an employer on other committees, as assigned.
Perform other duties as assigned.
Provides 24-hour crisis intervention and emergency services as required.

Minimum Qualifications:

Education:

Bachelor's degree in human services field and requires social work licensure.

Experience:

Prefer one to two years of AODA experience and/or family-based experience.

Necessary Knowledge, Skills, and Abilities:

Knowledge:

The Worker should have the knowledge of human services resources and problems affecting children and families.

Skills

Skills in analyzing children and family needs and directing a treatment plan specifically outlining objectives, goals, and other services.

Written and oral communication skills required.

Abilities:

Ability to work in the home under very difficult conditions with children and families. Homes may be in very disarray and substandard living conditions.

Special Requirements:

The position needs to work primarily hours when children and families are most available for in-home services. Transportation is required for self and clients to appointments and services.

Tools and Equipment used:

Dictaphone, cassette tape recorder, telephone, computer terminal, FAX machine, calculator, copy machine, car seat, camera, video equipment, other general office equipment.

Physical Demands:

While performing the duties of this Job, employee is frequently required to sit, talk, and hear for extended periods of time. Employee is occasionally required to walk, and frequently required to use hands to manipulate telephone, computer terminal, copy machine, and other office equipment

Employee is required to use dictaphone. Employee is required to enter and observe home environments; must be able to lift children of various ages and weights; must be able to have close and distance vision to observe children and their surroundings.

Work Environment:

This position works primarily in the community and, in many cases, directly in the child's and family's home. Position will follow-up and have office space, at times, at schools, different community locations, etc. the primary office may be used at 10-15% of the time.

The work environment characteristics described here are representative of those an employee encounter while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

Selection Guidelines:

Formal application with resume, rating of education and experience, oral interview and reference check.

The duties listed above are intended only as illustrations of the various types of types of work that may be performed. The omission of specific statements duties does not exclude them from the position if the work is similar, related, or a logical assignment to the position.

> The job description does not constitute an employment agreement between the employer and employee and is subject to change by the employer as the need of the employer and requirements of the job change.
>
> . . .

The job description required that the Grievant have transportation "for self and clients to appointments and services." The Grievant was frequently called upon to transport her clients, children and adults, to various places in the pursuit of her duties and to use her personal vehicle to do so.

On or about August 17, 2000, three of the Grievant's minor clients, part of a family which had been serviced by the County and for whom the Grievant had acted as the in-home case worker or social worker, ran away from their father's home in Waupaca where they had been placed pursuant to court order after having been removed from the custody of their mother. The children were located in Racine at their mother's home that evening and taken into "non-secure" custody by the authorities in Racine. The status of "non-secure" custody means that the children were removed from the custody of their parents and placed under the custody of the court and subsequently handed over to an agency responsible for their care. The record does not reflect precisely how long they were on their own prior to being taken into custody but does reflect that it was a very short period of time, probably less than a few hours. At the time of this occurrence, the children were 16 (boy), 15 (girl) and 10 (girl) years of age.

On Friday, August 18, 2000, the day following the children's flight to Racine, the manager of the Children and Families Division for Waupaca County's Department of Health and Human Services (by whom the Grievant was employed), Alan Stauffer, received information of the run-away children and was informed of their non-secure custodial status in a shelter care facility in Racine. Mr. Stauffer spoke with staff of the shelter care facility and with one of the older children and determined that they were amenable to returning to Waupaca provided that they would be placed into foster care and not returned to their father's home. Stauffer agreed to this condition and with that assurance the children agreed to return. Stauffer relayed this information to the Grievant and told her that the children were expecting her to come and pick them up.

Because the Grievant had been the children's social worker and in-home case worker, knew the children better than anyone else in the Department and had developed a positive relationship with them, she was, in Stauffer's mind, the logical person to provide transport for them from Racine to Waupaca. Stauffer discussed this with the Grievant's immediate supervisor, Karen Buckarma, who agreed that she was the best choice for transport under the circumstances. Following this conference, Buckarma called the Grievant and notified her that she (Buckarma) wanted the Grievant to transport the children to Waupaca. The Grievant

balked, saying that she was having trouble with her car, that she did not like driving in a "large city," and she mentioned an issue concerning her "ethics." Upon further inquiry, the Grievant voiced concern about safety and her fears that the children might "jump out of the car" (Buckarma's words). The Grievant did not mention the custodial status of the children to Bucharma as a concern.

After discussing the Grievant's concerns, Buckarma again asked her to take the transport and she continued to refuse to do so. Buckarma then notified Dr. Fico, the coordinator of the Children and Families Division at the Department of Health and Human Services, of the Grievant's refusal to take the transport. Dr. Fico's role is to oversee services to children and families including family court, juvenile court, child protection, outpatient treatment, alcohol and drug and services to the chronically mentally ill. Dr. Fico holds a Ph.D. in clinical psychology and had supervisory authority over all employees in the Division, including the Grievant.

Dr. Fico spoke with the Grievant and asked her to transport the children "on several separate occasions" during which the Grievant expressed several "reservations" about the transport. Dr. Fico attempted to satisfy her reservations. She complained that her car "didn't work very well" and he suggested that she take it in for repairs and ask for a loaner because she needs reliable transportation in her work. She complained that she did not like driving in cities and that she didn't know where the facility holding the children was located. Dr. Fico made sure she had directions. She complained that she had a "therapeutic relationship" with the children and she believed that transporting them from Racine would adversely effect that relationship. Although Dr. Fico did not agree with her assessment in that regard, he discussed the situation with colleagues to validate his impressions and advised her of this. Finally, she complained that she did not want to drive to Racine alone. Dr. Fico asked Alan Stauffer to arrange for a person to go with her, which he did. The Grievant did not mention any custodial status issues to Dr. Fico during these conversations. Following his attempts to alleviate each of the Grievant's concerns, including offering to have a volunteer go along with her to help out, Dr. Fico again asked her to transport the children and she refused and invited him to ". . . do what you have to do. If you have to fire me, you have to fire me." (The words of Dr. Fico.)

Alan Stauffer transported the children from Racine on the following Monday and testified that the trip went well, that the children were pleasant and that it was fun to have them in the car.

Prior to August 21, 2000, Dennis C. Dornfeld, the Director of Waupaca County's Health and Human Services, conducted an initial investigation into the matter. He talked with Karen Buckarma, Alan Stauffer and Dr. Fico and concluded that there was enough information to place the Grievant on administrative leave pending further investigation into her alleged insubordinate conduct. The Grievant was notified of this development on Monday, August 21, 2000, by letter. This letter also advised her that a meeting was scheduled for Wednesday,

August 23, 2000, to review the relevant information concerning her refusal to take the transport and that she should arranged for a Union representative to be present on her behalf.

Present at this meeting were Dornfeld, Karen Buckarma, Alan Stauffer, Dr. Fico, the Grievant and her Union representative, Carla Hales. Following an explanation of the allegations against her and the factual basis for them, the Grievant was given an opportunity to explain her actions. She gave Dornfeld particular reasons in defense of her refusal to take the transport: her car would not be able to make the trip; it would not be ethical for her to transport these children; and she was unsure of the location in Racine where she was to collect the children. She was asked whether, given the circumstances, she would make the same decision in the future. She stated that she would, i.e. that she would refuse to take the transport. She was also given the opportunity to speak to the level of discipline which she would regard as appropriate and she deferred to management as the arbiters of such a decision. Management determined, as a result of this meeting and as a result of the investigation conducted by Dornfeld prior to the meeting, that the Grievant was guilty of insubordination. They discussed the issue of discipline in the absence of the Grievant and came to a consensus of a three-day suspension without pay. This discipline was reviewed with the Grievant upon her return to the meeting and she was notified of it in writing on the same day.

POSITIONS OF THE PARTIES

The Union

The Union argues that the Grievant was justified in refusing to follow management's orders to transport the children for a number of reasons. It maintains that no transportation policy was made available to the Grievant. Consequently, says the Union, she was unaware of the standards which her employer wished for her to apply to a transport situation. In particular, she was not told what to do if a child decided "to exit the vehicle" nor was she told what to do in the event a child were to become disruptive in the vehicle. The Union argues that prior to August 18, 2000, the date of this incident, the decision to transport, and the circumstances under which a transport would take place, was left up to the individual. The decision to have someone else accompany the transporter was made by the transporter based upon his or her level of comfort.

The Union argues that the Grievant was not informed or trained to evaluate the adequacy of the arrangements for the custody of the minor children. It says that she was not familiar with the law regarding custody and that she had never been asked to transport children who had run away and had not been trained as a court services or child protective worker. As such, she was unable to assess whether or not the children were "properly in custody" and she "would not know which forms to look for."

The Union also argues that an assessment of the outpatient treatment services in 1997 which referenced "unclear goals and roles" supports its argument that the Employer failed to properly inform the Grievant of its expectations of her regarding transports and suggests that she was "caught up in the middle of changes which conflicted with her understanding of professional ethics" and her "role in the agency." It argues that, as a professional, the Grievant should have been accorded a higher degree of deference regarding her desires concerning the transport but that the Employer "demonstrated a marked lack of trust and reliance on Knapp's assessment of her clients and intendant [sic] risks of this transport."

The Union says that, considering the children, the transportation arrangement was unsafe because of the their possible mental state; the risk of their running away; the fact that she would have been driving on unfamiliar roads (because she had never been to Racine) "while meeting the emotional needs of the children;" and because she "did not know the court services duties." The Union cites the fact that the Grievant decided not to take the youngest child in her car for an end-of-therapy celebration because of the child's attention deficit problems and because "she doesn't follow directions very well" as evidence of a prior circumstance which justifies her trepidity in the instant case.

The Union further argues that the Grievant's relationship with the children was of a therapeutic nature and that to have placed herself in a position of being the person who had to provide "structure" would have undermined that relationship. Besides, argues the Union, she had never been told that "giving 'time out' or restraining children" was a part of her job. Her role, according to the Union, was to "get the clients to talk about issues" as opposed to having them respond to her "behavioral controls." Because the role of disciplinarian was one she may possibly have had to play during the transport, she felt that this created the potential of a dual relationship and, as such, would conflict with one of the American Counseling Association's ethical standards, to wit:

> **A.6. Dual Relationships**
>
> a. *Avoid When Possible.*
>
> Counselors are aware of their influential positions with respect to clients, and they avoid exploiting the trust and dependency of clients. Counselors make every effort to avoid dual relationships with clients that could impair professional judgment or increase the risk of harm to clients. (Examples of such relationships include, but are not limited to, familial, social, financial, business, or close personal relationships with clients.) When a dual relationship cannot be avoided, counselors take appropriate professional precautions, such as informed consent, consultation, supervision, and documentation, to ensure that judgment is not impaired and no exploitation occurs.
>
> . . .
>
> (Union Exhibit 4, American Counseling Association Code of Ethics.)

The Grievant believed that the children would not want to return to Waupaca and to their father's home because they had planned the runaway. If she were the one to bring them back, she reasoned, they might see her as the authority figure carrying out the court's rules and this might negatively impact upon their therapeutic relationship.

The Grievant was also concerned about the driving arrangements. A volunteer to accompany her on the transport was offered by the employer. Initially, according to the Union, a court services worker was offered but that changed to a "volunteer." The Grievant understood this to mean someone other than a court services worker or "someone trained in working with kids" and this was not acceptable to her. Her understanding was that a court services worker would do the driving and she would "be there" for the children emotionally.

The Union also asserts that the Grievant's automobile was in such condition so as to render the trip to and from Racine unsafe. According to the Grievant, a day or two before this incident she was informed that the battery in the car was leaking and "might cause a fire." She advised Dr. Fico of her concern in this regard. Since the vehicle was still under warranty and she had purchased it from a dealer in Appleton, she wanted to take it to the dealer for repairs, otherwise she would have to pay for it herself. The Grievant lived in Oshkosh at the time.

Finally, the Union argues that the Employer subjected the Grievant to "double jeopardy" because management suspended the Grievant for a period of three days. The Union posits that this amounts to a one day suspension for each of the incidents of alleged insubordination, i.e. one-day for the Grievant's refusal to take the transport to Buckarma, one for Stauffer and the third for Dr. Fico. The Union argues that if insubordination is found to exist a one day suspension is justifiable, but three days is two days too much.

In its final comments, the Union refers to the "obey now - grieve later" doctrine and of an exception to that general rule, namely, where obeying now would involve an unusual or abnormal safety or health hazard. The Union maintains that it is this exception which should excuse the actions of the Grievant in this matter.

The County

The County argues that the Grievant, as an experienced social worker with the County, was responsible, among other things, for transporting clients as needed. The County points out that the Grievant admitted that she had transported clients in her personal vehicle on numerous occasions.

The three children here were siblings in a family serviced by the County, specifically by the Grievant. She performed the service of in-home case worker for the family and, as such, says the County, was the best candidate to transport them from Racine to Waupaca. All of her supervisors agreed but when she was asked to transport the children she refused citing concerns for her own safety and for the safety of the children due to their potentially violent

dispositions and because they might be upset being forced to return to Waupaca. The County argues that this concern was unwarranted because the children had no history of violent behavior, were willing to return voluntarily and because the Grievant's supervisors offered to send a volunteer along with her to help with the children. The County asserts that the Grievant's fears for the safety of the children due to the potential of them jumping out of the car were unrealistic because the door lock and power window controls were under her exclusive control. As for the Grievant's assertion that she was concerned about the safety of driving and talking to the children at the same time, the County says that the Grievant admitted often driving while talking on her cell phone, and it maintains that this is the same thing.

The County argues that the Grievant's expression of concern about the alleged battery leak and the risk of fire was untrustworthy because she had driven the car on a trip to upstate New York two weeks before and because when she did have the car inspected, she was informed that this was not a problem.

The Grievant's excuse of not knowing how to get to the facility to pick up the children is suspect, argues the County, because she was given explicit directions and because she had managed to find her way to upstate New York and back a couple of weeks before.

Regarding her allegation that this transport would somehow interfere with her therapeutic relationship with the children, the County takes the position that she was not a therapist but a social worker. Additionally, the County points out that the code of ethics section upon which the Grievant relies states that dual relationships should be avoided "when possible" and that the Grievant herself acknowledged that this section does not create an absolute prohibition. The County also argues that the Grievant's assertion that her lack of knowledge relating to the paperwork associated with the pick up would constitute an ethical violation is overstated because she could have sought advice and help in that regard. The best argument against the Grievant's ethics code violation excuse, according to the County, is the fact that she was no longer professionally involved with two of the three children. The third one, the oldest, was receiving services from the County on a voluntary basis. Therefore, says the County, there could have been no conflict of interest because the Grievant was not performing services for the family. The County says she attempted to create a conflict of interest where none existed in order to justify her refusal to take the transport.

The County argues that its request of the Grievant to transport these children was reasonable and that the Grievant's refusal on three occasions to comply constituted insubordination. It argues that the Grievant knew that her refusal could lead to disciplinary action and that the Collective Bargaining Agreement clearly provides the County with the authority to impose such action.

Further, the County argues that the discipline imposed in this case, a three-day suspension, was appropriate given the fact that the actions of the Grievant constituted gross insubordination and that the investigation conducted by the County revealed that the Grievant's excuses for not complying with the order fell far short of the recognized exceptions to the

"obey now – grieve later" rule. Also, in considering the discipline to be imposed, management took into consideration all of the facts and circumstances surrounding the incident and came to a consensus of opinion regarding the discipline. This effort, says the County, renders the disciplinary measure reasonable. Citing several cases which relate to the "obey now – grieve later" rule, the County reminds the Arbitrator that without such a rule the ". . . work place would become a 'chaotic debating society' between management and employees, endangering the efficiency of the agency." U.S. ARMY INDUSTRIAL OPERATIONS COMMAND, 106 LA 148, 156 (KOHN, 1995). It also cites AMERICAN CYANAMID, 74 LA 15 (FRIEDMAN, 1980) for the proposition that the strength of Grievant's conviction that the assignment was improper is not a valid argument justifying insubordination.

Reply Briefs

The Union

The Union argues that the Grievant was told that she was the secondary therapist on the case involving these children, although her duties would include social worker duties as well. She provided one-to-one counseling on a weekly basis. This was not case management, says the Union, but activity which gave the Grievant more insight into the potential of the children to "act out." It was this insight, according to the Union, which the Grievant relied upon to assess the children's potential for acting out during the transport.

The Union argues that while the Grievant had transported children to appointments and meetings in the past, this was different because of the children's history of running, hyperactivity, drug use, gang affiliation and delinquency. The Union seems to argue that this history supports the Grievant's assertion that she would have placed herself in danger if she had transported the children.

The Union argues that the Grievant was never told that the children were willing to come back to Waupaca and because she was "not given complete information" she could not incorporate this information into her decision making process.

The Union points to the sequence of events as being important. It argues that the first person to receive the call from Racine about transporting the children was Mary Anich and she had assured the Grievant that a protective services worker would drive her to pick up the children. The fact that the County's brief identifies Stauffer as the first person to receive the call is, in the mind of the Union, an "error of omission" and adversely reflects on the credibility of the County's argument.

The Union refers to Dr. Fico's testimony regarding other psychological professionals with whom he consulted about the transport and about the Grievant as being the most appropriate person to go as being hearsay and "useless" and that it should not be given any weight.

The Union says that there is no evidence in the record indicating that the Grievant was ever told that the children would come back voluntarily and that there were no concerns of violence or for the safety of the Grievant. Thus, she could not have considered this piece of information in her decision making process.

The Union accuses the County of ignoring the testimony about the automobile safety concerns of the Grievant and argues that she was justified in her concern regarding the battery problem and the potential for fire.

The Union mentions the custody intake issue and argues that the Grievant was not properly trained to evaluate the necessary paperwork.

Finally, the Union says that even though two of the three children were no longer "clients" of the Grievant, a trusting relationship still continued to exist and that this fact supports the Grievant's argument that she was faced with an ethical dilemma by assuming an authoritarian role.

The County

The County argues that the only issue which could have excused the Grievant's behavior in this case was the issue of safety. It takes the position that all of the Union's arguments and excuses, aside from the safety issue, are red herrings, do not carry argumentative weight and do not trump the "obey now – grieve later" rule.

The County points out that the Grievant understood that there may be consequences to her actions and argues that this knowledge proves that she knew her actions were inappropriate.

In so many words, the County argues that each and every position set forth by the Union to justify the actions of the Grievant, with the exception of the safety issue, cannot be used as an excuse and do not provide sufficient justification to forgive insubordination.

With regard to the safety issues, the County argues that the Union has failed to carry the day. In response to the Grievant's argument that she was unsure of the mental states of the children and, consequently, could not predict how they might behave in the car, the County argues that Mr. Stauffer had informed her that the children had been told that she was going to pick them up and that they were satisfied with that and would return voluntarily. Additionally, the Grievant had exclusive control of the door locks and window controls and could have prevented the children from attempting to jump from the car. Regarding the Grievant's testimony that if she had to talk to the children while driving this could be distracting to her, the County refers to her testimony that she had used cell phones while driving in the past and that she had transported children while talking to them in her car in the past without incident and that she did not feel it was unsafe.

Finally, the County addresses the length of the discipline and the Union's argument that a three-day suspension constitutes "double jeopardy," i.e. a one-day suspension for each of the three times the Grievant refused the transport. The County says that she was given a three-day suspension for one incident of insubordination and the committee as a whole determined that to be an appropriate punishment for such a serious offense.

DISCUSSION

It is well-established in labor and employment law that an employee has a duty to follow the orders of the employer and to carry out his or her work assignments. This is so even if the employee is convinced that an order stands in violation of the collective bargaining agreement. In such a case, the grievance procedure is the proper path to relief. This is known as the "obey now – grieve later" doctrine. (See SOUTHERN IND. GAS & ELEC. CO., 88 LA 132 (FRANKE, 1986). It is also well-established ". . . that an employee who refuses to perform his (or her) assigned duties is subject to disciplinary action by his (her) employer. If, however, the work assigned to him (her) would expose him (her) to a significant risk of injury, he (she) is justified in refusing to perform it unless the work and its inherent hazard are a part of his (her) regular job." (MCLUNG-LOGAN EQUIPMENT CO., INC., 71 LA 513, 515 (WAHL, 1978). The exposure to an unusual or abnormal safety or health hazard will excuse the employee's refusal to obey an order if the employee "is sincere in his (or her) belief of danger" and "makes a 'reasonable' appraisal of the potential hazards" even if "later on, in fact, it should be established that no hazard existed." (A.M. CASTLE CO., 41 LA 666, 671 (SEMBOWER, 1963); CF. DODGE MFG. CORP., 49 LA 429, 430-31 (EPSTIEN, 1967). This analysis is sometimes referred to as the "reasonable person" approach. It constitutes the prevailing view among arbitrators, and is, in the view of this Arbitrator, the best approach.

The salient issues presented here, notwithstanding the Union's arguments relating to ethical dilemmas, difficulties associated with navigation, lack of training in child custody laws, and failure of the employer to provide transportation policies, all of which will be addressed below, are: 1) whether the Grievant reasonably believed that the condition of her vehicle was so unsafe so as to place herself and the children whom she had been called upon to transport in unusual or abnormal danger of injury, and, 2) whether she reasonably believed that the emotional status of the children was such that it presented an unusual or abnormal danger of injury.

When the Grievant availed herself of the privilege of refusing to carry out the assignment of transporting these children, as opposed to accepting the assignment and seeking redress through the grievance procedure, she accepted the burden of establishing the sufficiency of her refusal. The employer, of course, has the burden of demonstrating the commission of the act warranting disciplinary measures. Here, there is no dispute between the parties in this regard. Both parties agree that the Grievant refused to carry out the transport order, and both agree that such an act constitutes insubordination if not otherwise excused, so it then falls upon the Union to establish the sufficiency of the explanation offered in excuse. This, the Union has failed to do.

The Grievant testified that she had been told that the battery in her van was leaking and that it could cause a fire. This was the excuse she used to refuse the transport on the grounds that her vehicle was unsafe. The Grievant lived in Oshkosh and worked in Waupaca and drove the van in this condition to and from work for an undetermined period of time. She testified that she did not recall specifically when she was advised of the battery leak but it was prior to the Friday when she refused the transport. She also testified that she took her van to the dealer from whom she purchased it so she could get the work done under warranty. She did not have it repaired until, at the earliest, the following Monday. She testified that she did not want to have it fixed by someone else because it was under warranty and if someone else fixed it she would have to pay for the repairs. Giving her the benefit of the doubt as to when she was notified of the problem and when she took the vehicle in to have it checked, she drove it for a period of at least four days in this 'dangerous' condition. As it turned out, she was advised by the dealer that there was no fire hazard at all. The undersigned does not find this part of the Grievant's excuse to be credible. If the van was safe for her to drive for at least four days, it was safe to drive to Racine and back.

The second part of the Grievant's safety excuse for refusing the transport is equally incredible. She testified that her concern was centered around the emotional status of the children and that her fear was that they would need emotional and therapeutic support on the return trip. If she was forced to drive and to give such support at the same time, she reasoned that this could adversely affect her ability to drive safely and place them all in danger. Along the same vein, she also expressed concern about the children attempting to jump out of the car doors or windows or even that they may try to attack her physically. None of these professed concerns make the case when viewed in light of the evidence. She had been informed by Stauffer that the children were agreeable to coming back to Waupaca and to coming back with her. Her supervisors had told her that they saw no reason for concern after having talked to the children. She was free to contact the children and speak with them herself, but failed to do so. This would have been an obvious step to take if the Grievant had truly been interested in making a reasonable assessment of the danger, a required element of her excuse. The Grievant's van was equipped with driver controlled window and door locks which would have eliminated the risk of one of the children attempting to jump out of the car and the employer offered to send a volunteer along with her to help. The volunteer could have done the driving while the Grievant tended to the emotional and therapeutic needs of the children but she refused this option as well.

As for the Grievant's concern that she may be unable to find the pick up point in Racine due to her unfamiliarity with the area, the employer satisfied this concern by offering explicit directions to the location. In any event, this concern is without merit. The undersigned notes that the Grievant was somehow able to drive to upstate New York and return just weeks before this incident.

The Union's attempt to justify the Grievant's refusal to obey her employer's reasonable work assignment based upon an ethical dilemma is misguided. The Arbitrator believes that the section of the American Counseling Association Code of Ethics, relied upon by the Union,

refers to relationships other than the "dual relationship" referred to by the Grievant. She referred to her relationship with the children as a counselor being impinged by the role she thought she might have to play as a disciplinarian as she brought these children back to Waupaca. The Code of Ethics refers to "Dual Relationships" as being those which "could impair professional judgment or increase the risk of harm to clients" and sets forth examples such as "familial, social, financial, business, or close personal relationships." These types of relationships lend themselves to the potential exploitation of persons over which one has significant influence, such as a counselor has over a patient, and it is the potential of exploitation the Code seeks to avoid. Simply driving these children back home after they have run away would not, in my view, create such a potential for exploitation or work to impair the professional judgment of the Grievant. That having been said, if we give the Union the benefit of the doubt once again, and agree that such a dual relationship would have been created in this instance, the argument still fails to make the case in two respects. First, the Code only requires that counselors seek to avoid these relationships when possible and when such a relationship cannot be avoided the Code gives counselors guidance: "When a dual relationship cannot be avoided, counselors take appropriate professional precautions, such as informed consent, consultation, supervision, and documentation, to ensure that judgment is not impaired and no exploitation occurs." (American Counseling Association Code of Ethics, Sec. A.6.a.) Hence, she could have consulted with the children and explained her concerns to them, documented her consultation and used her professional judgment to ensure that she did not exploit them in any way. Second, the remote potential for the formation of a dual relationship cannot excuse the Grievant from complying with the "obey now - grieve later" doctrine because it does not present an unusual or abnormal safety or health hazard.

The Union's argument that the Grievant's lack of training in child custody laws and her lack of knowledge about the forms to be used should excuse her actions is also without merit. One of the Grievant's supervisors, Stauffer, had such knowledge and training and informed the Grievant that the custody issues were in order. If the Grievant was concerned about forms or procedures she was only a phone call away from supervisory assistance. If that was, in her mind, not adequate, she could have relied upon the grievance procedure after she had completed her work assignment.

The Union argued that because the employer had failed to provide a policy on transportation to the Grievant this should excuse her insubordination. Once again, if the Grievant felt that the employer's failure in this regard constituted a violation of the Collective Bargaining Agreement, she should have sought redress through the grievance procedure provided for in the contract. Even if the employer had a duty to provide some sort of written policy in this regard and failed to perform that duty, which I do not consider in this award and do not decide here, this would not alter the Grievant's duty to obey now and grieve later. In any event, providing transport to clients in her personal vehicle was a "special requirement" of her job and she had done so on numerous occasions in the past with these children and with others. She was an experienced social worker with the County and, in the assessment of her supervisors, the proper party to conduct the transport. Under these circumstances it is impossible to say that this work assignment was in any way unreasonable.

Double jeopardy in the employment context means "that once discipline has been imposed and accepted it cannot be increased." GENERAL SERVICES ADMINISTRATION, 75 LA 1158, 1162 (LUBIC, 1980). The Employer here did not increase the discipline imposed for the Grievant's act of insubordination. The evidence shows that the committee which decided upon the three-day suspension actually considered a more stringent penalty, a five-day suspension, before settling on the three days.

The question really is whether the Grievant was accorded due process. I find that she was. The County conducted a full and fair investigation before imposing discipline; gave the Grievant ample opportunity to respond to the allegations with the aid of her representative; and gave her timely notice of the discipline to be employed. The County has met its burden of proving that it had a factual basis for the discipline. A three-day suspension for the refusal of an employee to carry out a reasonable work assignment is not excessive. As Arbitrator Alleyne correctly observed: "Insubordination in the work place is not a matter to be taken lightly. Discharge is certainly an arguably appropriate response, depending upon circumstances, given that the accomplishment of managerial objectives is fundamentally contingent upon willing employee responses to management's validly-issued commands." DANAHER TOOL GROUP, 109 LA 497, 499 (ALLEYNE, 1997).

In light of the above, it is my

AWARD

The County did not violate the terms of the Collective Bargaining Agreement when it suspended the Grievant for three (3) days following her refusal to transport three juveniles under non-secure custody from Racine to Waupaca.

Dated at Wausau, Wisconsin, this 4th day of January, 2002.

Steve Morrison /s/

Steve Morrison, Arbitrator

SM/ans
6319.doc