BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, COUNCIL 40

and

VILAS COUNTY

Case 71
No. 60751
MA-11711

(Gengle Discipline Grievance)

Appearances:

Mr. Phil Salamone, Representative, 711 Wall Street, Schofield, Wisconsin, appearing on behalf of Vilas County Courthouse Employees, Local 474-A, AFSCME, AFL-CIO.

Prentice & Phillips, by **Attorney John Prentice**, Suite 405, 1110 North Old World Third Street, Milwaukee, Wisconsin, appearing on behalf of Vilas County.

ARBITRATION AWARD

AFSCME, Wisconsin Council hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Vilas County, hereinafter "County," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on April 30, 2002, in Eagle River, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on July 2, 2002. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

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 at hearing that there were no procedural issues in dispute and the matter was properly before the Arbitrator. The parties stipulated that the substantive issue is:

> Did the Employer have just cause to discipline the Grievant on October 30, 2001? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II – MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights repose in it, subject to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

. . .

B. To establish reasonable work rules and schedules of work, in accordance with the terms of this Agreement;

. . .

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

. . .

ARTICLE VII – GRIEVANCE PROCEDURE

A. Definition of Grievance: Any employee or group of employees in the Vilas County Courthouse unit who has a dispute regarding the interpretation or application of the provisions of this Agreement shall have the grievance processed in the following manner.

. . .

E. Arbitration Hearing: The arbitrator selected or appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union which shall be final and binding upon the parties.

. . .

ARTICLE XXIV – MISCELLANEOUS PROVISIONS

A. Conduct: The Union and the Committee consider themselves mutually responsible to improve the public service through the creation of improved employee morale and efficiency. In this connection, the parties shall encourage the employees to conduct themselves in a workmanlike manner on the job.

. . .

BACKGROUND AND FACTS

The Grievant, Connie Gengle (hereinafter referred to as either "Gengle" or "Grievant"), is employed as a Benefit Specialist with the County's Commission on Aging. Gengle has held this position since August 14, 2001, although she was employed by the County prior to 2001. Gengle's responsibilities as a Benefit Specialist include assisting elderly citizen clients of the County to increase their incomes, file Homestead Credit tax forms, assist in probate matters and refer the clients to legal services where appropriate. The Grievant has an unblemished employment history. 1/

1/ The Grievant was disciplined in 2000. The discipline was grieved resulting in the discipline being expunged from her personnel file.

On or about August 14, 2001, the Grievant received a letter from local Attorney John "Jack" L. O'Brien (hereinafter "O'Brien") which read as follows:

. . .

RE: Estate of _____

Dear Ms. Gengle:

While I was out of the office last week, my Probate Paralegal, Barbara Wood, advises [sic] me that you spoke with her about the above estate. _____'s son, _____, was named as the Personal Representative in his father's Last Will and Testament. We expect to have Domiciliary Letters [sic] will be issued to him shortly. _____ has retained me to probate the estate. I would appreciate knowing what you perceive to be your role in this matter. Is there a chance that you consider _____ to be incompetent?

In order for us to gather the information on the assets, it is important that we receive mail coming to the decedent's address. We do not want to take a chance on any checks being cashed prior to our knowing whether or not the same is an asset of the estate.

Please let me hear from you.

. . .

The Greivant did not respond to O'Brien's letter.

On or about September 21, 2001, O'Brien sent a letter to the Chairman of the County Board. The letter read as follows:

. . .

Dear Mr. Ahlborn:

I am writing to you as Chairman of the County Board, with the intent of making a formal complaint against a County employee, Connie Gengel [sic], with the Commission on Aging. I have never written a letter like this before but I have never before experienced conduct as that exhibited by Ms. Gengel [sic].

I was retained to handle a probate of an individual who passed away here in Eagle River. I was contacted by his son who is not from Eagle River. The decedent is survived by his spouse. The son was appointed personal representative of the estate.

In the course of beginning the probate I learned that Ms. Gengel [sic] had directed all correspondence to the surviving spouse be forwarded to her. From my dealings with the spouse, who is elderly, she appeared somewhat forgetful. With this in mind I wrote to Ms. Gengel [sic] advising her that I would like the mail forwarded to this office so we could properly handle the probate, inquiring as to what role she would be playing in the probate and whether she had an opinion as to the competency of the surviving spouse in view of what appeared to be obvious forgetfulness. A copy of the letter, with the names blacked out, is enclosed. I feel the letter was totally appropriate. My concern was to accomplish the probate properly and to assure that the surviving spouse was properly protected.

Not having received a reply for several weeks I asked by [sic] paralegal secretary, Barbara Wood, to contact Ms. Gengel [sic] which she did. She was told by Ms. Gengel [sic], in a very indignant voice, that she had no intention of answering the letter.

A short time later Ms. Gengel [sic] came into my office in a very belligerent state. Her first comment was that whereas this office had previously represented her or her son (I don't recall which she said) we would no longer be doing so because of the letter I had written. She was obviously very agitated. I reviewed the letter with her and, again seeing nothing wrong with it, asked her what she found offensive. She told me I had no right to interfere with her job on the Commission for Aging, that I had no right to inquire as to the surviving spouse's competence and that any of her dealings with her clients were confidential. As a matter of fact, they are not legally confidential but I certainly respect that position. She was highly indignant that I would have dared to make such an inquiry. I tried to explain to her I was only trying to accomplish the probate properly. I welcomed her cooperation in asking what role she would be playing. Again, this was apparently highly insulting to her. During the course of the conversation she accused me a number of times of being unprofessional and unethical.

In the years I have been in Eagle River I have at all times tried to conduct myself in an ethical and professional manner. I am very jealous of my reputation for integrity. I have known you for a long time, Gene, and I am sure you are aware of this. I was highly offended by Ms. Gengel's [sic] accusations of unprofessionalism and unethical conduct. Toward the end of the conversation Ms. Gengel [sic] became very hostile before she left the office.

The next day I received a check from an insurance company for the surviving spouse. I told my secretary to contact her and make [sic] that there was someone with her when we gave her the check to assure it went into the bank. A while later I received a phone call from the bank saying that the surviving spouse was there with several other people. My paralegal went to the bank with the check and saw the surviving spouse with several other ladies. She asked one of the ladies if she was Connie Gengel [sic]. This lady replied, indignantly, "I don't have to tell you my name." She then said "Well, are you Connie Gengel [sic]?" Again, she received the indignant reply, "I don't have to give you my name, Barbara." She then showed her the check and it was deposited. Again, this was a very confrontational meeting with absolutely no reason.

As I stated before, I have never experienced this kind of conduct, whether from a courthouse employee, or otherwise. It was totally uncalled for. Further, her conduct toward my paralegal was unwarranted and offensive. My concern is to properly probate this estate, and to assure that the surviving spouse is protected. I have never had difficulty speaking with other courthouse personnel, whether social worker or otherwise, when there is some concern as

to an individual. I've always worked with other people very closely to assure that people are protected. Why I received this uncalled for response from Ms. Gengel [sic] is bewildering at best.

I would appreciate [sic] if you would review the copy of the enclosed letter which was sent to Ms. Gengel [sic] and which she took offense to. I am sure you will see there is nothing in that letter which should have been offensive to her. I would appreciate [sic] if you would take whatever action regarding this incident which you deem appropriate, whether referring it to the Personnel Committee, or otherwise. If you would like to discuss this before doing so, please don't hesitate to give me a call.

. . .

Diane Bluthardt, County Director, Commission on Aging, conducted an investigation into the issues raised in O'Brien's letter of complaint per the direction of the County Personnel Committee. Bluthardt interviewed O'Brien and the Grievant. On October 30, 2001, she issued the following memorandum to the Grievant:

. . .

Re: Written Warning

On October 16, 2001 the Personnel Committee directed me to investigate a formal complaint against you which was filed by Mr. Jack O'Brien.

According to his letter dated September 21, 2001, Mr. O'Brien was offended by your conduct on several different occasions. He gave the following reasons for his complaint:

1.) You refused to respond to correspondence from his office;
2.) During a visit to his office you repeatedly accused him of being unprofessional and unethical; and
3.) You acted in a confrontational manner to his secretary, which he thought was unwarranted.

On October 22, 2001 you were given an opportunity to respond to the complaint and to give your side of the story. Present at this meeting between you and me were your union representative Linda Small and Corporation Counsel Martha Milanowski.

> I interviewed Mr. O'Brien prior to our meeting to determine if he still wanted to pursue the complaint and to determine whether or not his complaint had merit.
>
> Based on my interviews, I am issuing this written warning due to your failure to respond to correspondence received by you that is in the normal course of your job duties and because of your interactions with Mr. O'Brien in his office. Such conduct reflects poorly on the Commission on Aging and the County. Also, you must send a proper letter of apology on Commission on Aging letterhead to Mr. O'Brien by November 6, 2001, and I must review this letter prior to it being sent. A copy of this letter of apology along with this written warning will be placed in your personnel file.
>
> This written warning is warranted given that this is the second time you have failed to respond to a written request you have received that is in the normal course of your duties. You previously refused to respond to my written memo of June 29, 2001.

On November 12, 2001, the Grievant filed the pending grievance alleging that Article II, Section D of the labor agreement had been violated. The grievance further questioned "the reason for not accepting the letter of apology given." The County denied the grievance at all steps which places the grievance properly before this Arbitrator.

POSITIONS OF THE PARTIES

The Union

The Union argues that the discipline imposed on the Grievant fails to satisfy the just cause requirement of the parties' collective bargaining agreement. The Union asserts that the infractions identified in the disciplinary letter are neither substantiated nor are they instances of misconduct subject to discipline by the County.

With regard to the allegation that the Grievant "refused to respond to correspondence from Attorney O'Brien's office," the Union asserts that the Grievant did not respond because she was told not to by her Attorney back-up. The Union asserts that the Grievant is essentially a legal assistant to the Coalition of Wisconisn Aging Groups (CWAG) Attorney and was obligated to follow her direction. The Union points out that the Elderly Benefit Specialist Program Developer supported the Grievant's action. The Union questions how it is a disciplinable offense for an employee to do what she is legally and ethically obligated to do.

The Union denies that the Grievant accused O'Brien of being "unprofessional and unethical." The Union asserts that the Grievant did not go to the law office to converse with

O'Brien, but rather went on her personal time to deal with a personal matter. The Union points out that the County bears the burden of proof and they have not provided sufficient evidence to prove that the Grievant accused O'Brien in any manner.

The Union next asserts that even if the Grievant accused O'Brien of being "unethical and unprofessional," that it is an accurate identification of his character and behavior. The Union argues that if O'Brien was attempting to solicit confidential information from the Grievant, which he, as an attorney knows to be confidential, then his continued attempts to extract that information are, in fact, unprofessional and unethical behavior.

With regard to the County's assertion that the Grievant acted in a confrontational manner to O'Brien's secretary, the union asserts that the County's reliance on O'Brien's opinion in evaluating the Grievant's conduct reveals that it is actually O'Brien who is "calling the shots." The Union argues that the County did not determine that the Grievant's behavior was confrontational and thus, asserts that discipline is inappropriate since an outside entity does not have authority to determine what is to be considered a disciplinary offense of a public employee.

The Union argues that the true motivation for O'Brien's complaint surfaced at hearing when he commented "that he had never been treated so badly by a woman." The Union argues that O'Brien was offended when faced with a woman who failed to succumb to his power and position. The Union argues that O'Brien's decision to send his complaint to the County Board Chair, rather than contact the Grievant's supervisor of the Personnel Committee chair was an exercise of power and influence.

Looking next to the level of discipline imposed, the Union asserts that even if the Grievant was guilty of misconduct as the County contends, the County failed to follow the principles of progressive discipline. The Union points out that the County work rules and past practice require that the County first issue an oral reprimand. The Union argues that the County's decision to impose a written warning, given that the Grievant has no prior disciplinary record, is excessive and cannot be upheld. The Union challenges the County's representation that the Grievant has a disciplinary record. The Union points out that the uncontroverted testimony at hearing is that the Grievant previously was disciplined, but that that discipline had been expunged from her file.

For all of the reasons cited, the Union believes the Grievance should be sustained.

The County

The County asserts that the Grievant was disciplined consistent with Article XI, Section D of the labor agreement. The County notes that just cause is not defined in the labor agreement and advocates the definition advanced by Arbitrator McLaughlin's standard in BROWN COUNTY, CASE 655, NO. 60134, MA-11535 (MCLAUGHLIN, 3/19/02).

The County argues that it has a disciplinary interest in conduct that undermines the public confidence. The County argues that the Wisconsin Supreme Court recognized this interest and found it to be just cause for discipline. The County argues that the Grievant's conduct was so egregious as to warrant discipline. The County asserts that inasmuch as O'Brien is not a "shrinking violet" and he indicated he "had never been treated by anyone . . . as badly as he was treated by the Grievant," there is no question that the Grievant's conduct was outrageous. The County asserts that O'Brien's veracity cannot be questioned since he is a respected member of the community.

The County argues that it is irrelevant that some of the behavior for which the Grievant was disciplined occurred during non-work time. The County asserts that it has the right to discipline employees when their off-duty conduct is "beneath the standard of acceptable personal conduct." The County argues that the Grievant's "lack of self-control, complete disregard for common courtesy and total disrespect for a member of the legal community" is an affront to this standard. The County asserts that the County "cannot operate efficiently if its employees take license to berate members of the public and then shield themselves from the consequences on the basis that they did so on their own time."

The County characterizes the Grievant's justification for her behavior, maintenance of client-confidentiality, as a red herring. The County asserts it was a known fact that the Grievant was working with the surviving spouse. The County argues that it was entirely possible for the Grievant to respond to O'Brien without breaching confidentiality and the Grievant's justification for her failure to respond as required to maintain client confidentiality is a desperate attempt to throw a smokescreen over her conduct.

The County next argues that the discipline imposed on the Grievant was designed to prevent reoccurrence and to restore O'Brien's confidence in county government. The County asserts that a written warning was appropriate. The County argues that its employee handbook provides examples of unacceptable conduct and the Grievant's conduct violated three of the work rules. The County argues that it had just cause, at minimum, to issue a reprimand and given that it was the second time the Grievant had neglected her job duties, the written reprimand was appropriate.

The County questions the veracity of the Grievant, first with regard to the alleged advice given by the legal back-up, but more significantly as she describes the confrontation with O'Brien. The County questions the Grievant's motives when arriving at O'Brien's law office and further, asserts that the Grievant explanation is not plausible. The County argues that the Grievant went to O'Brien's office with the intent to "scold" him. The County explains that the discipline imposed on the Grievant "had less to do with the Grievant's failure to contact Mr. O'Brien, misconduct though it was, than it had to do with the Grievant's belligerent and hostile behavior during the confrontation in Mr. O'Brien's office." (County reply brief, p. 7)

The County challenges the Union's assertion that the Grievant was attempting to avoid "ex parte" conversation since discussions between the Grievant and O'Brien do not meet the definition of an ex parte conversation.

The County disputes that O'Brien was "unprincipled in addition to being unnecessarily punitive." The County argues that there is nothing in the record to establish that O'Brien acted in any manner other than as a gentleman and professional and further, even if O'Brien's conduct was less than exemplary, it is not an excuse for the Grievant's response.

The County concludes that it had just cause to discipline the Grievant and thus argues that the discipline was appropriate and the grievance should be dismissed.

DISCUSSION

The issue presented to this Arbitrator is whether the County had just cause to impose a written warning on the Grievant for what it deemed to be misconduct violations. The Union asserts that the Grievant did not engage in the conduct for which she was disciplined and that the discipline was excessive.

Just cause is the contractually guaranteed standard for discipline for this Grievant. See Article XI, Section D. Just cause is not a defined term in this labor agreement nor is it a defined concept in labor management. Rather, there are varying schools of thought on how to evaluate whether an employment action meets the just cause standard. The County advocates the standard enunciated by Arbitrator McLaughlin in BROWN COUNTY, SUPRA, which I accept. "First, the employer must establish conduct by the Grievant in which it has a disciplinary interest. Second, the employer must establish that the discipline imposed reasonably reflects its interest. This does not state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements to be addressed, relying on the parties' arguments to flesh out that outline." ID.

In addressing the first element, the County argues that its interest in this case is to gain the public confidence by having employees who are responsive and courteous to the public and further, that this interest has been upheld by Wisconsin Supreme Court as a just cause for discipline. See SAFRANSKY V. STATE PERSONNEL BOARD, 62 WIS.2D 464, 474-475, 215 N.W.2D 379, 384 (1974). I agree that this is an enforceable interest. Having found that the County has a legitimate disciplinary interest in the Grievant's conduct, it is necessary to determine whether the Grievant engaged in the conduct for which she was disciplined.

The County memorandum entitled "Written Warning" states the basis for the discipline as:

> . . . due to your [the Grievant's] failure to respond to correspondence received by you that is in the normal course of your job duties and because of your interactions with Mr. O'Brien in his office. Such conduct reflects poorly on the Commission on Aging and the County . . .

The first area of conduct cited in the discipline was her failure to respond to a letter from O'Brien. 2/ This letter was dated August 14, 2001, and was directed to the Grievant at the Commission on Aging. The letter initially informed the Grievant that O'Brien had been retained by the son of the decedent and then inquired of the Grievant her perception of her role in probate of an estate and whether the Grievant considered the surviving spouse of the decedent "to be incompetent." The Grievant testified that she did not respond to the letter because she was told not to by Attorney Therese Perez who provides legal assistance to the Grievant through the Commission on Aging Benefit Specialist program. A review of the Program Policies and Procedures for the Wisconsin Legal Assistance/Benefit Specialist Program (Program Policies, Joint Exhibit 11) indicates that although the Benefit Specialist position is a County position, the supervision of the position is shared by the County and the legal assistance provider. Further, in the "Responsibilities of County Aging Units" chapter, it states "supervision regarding all client-related, substantive legal/advocacy work and case supervision of the individual benefit specialist shall be the sole responsibility of the legal assistance provider." Thus, if Perez directed the Grievant as the Grievant testified, the Grievant's actions were appropriate.

2/ The letter sent to Gengle dated August 14, 2001 inquiring as to what Gengle's role would be in the probate of the estate and as to whether she believed the decedent's spouse (Gengle's client) was competent was dictated by Barbara Wood, O'Brien's paralegal.

The Grievant was the only one to testify to the content of her conversation with Perez. There is no question that the Grievant's testimony is self-serving. Having said that, this Arbitrator is obligated to evaluate the credibility of the Grievant and consider same when determining the probative value of her testimony. Glenn Silverberg, Elderly Benefit Specialist Program Director, Bureau of Aging and Long Term Care Resources, offered his opinion that the Grievant, "in refusing to discuss or provide information about your client's situation without prior consent by the client, you acted in a manner consistent with the confidentiality requirements that apply to your job" and further Silverberg testified that the Grievant's refusal to release information was consistent with the program policies and procedures. Chapter X, Sub-section F of the Program Policies states that the Benefit specialist "shall respect the right of clients to have all information about them and their cases kept confidential, including any information that would identify them" and "shall not be required to reveal confidential client information to any other county employee or official." (Joint Exhibit 11, p. 29) Given this, it

is reasonable to conclude that the Grievant was instructed by Perez to not respond to the questions posed by O'Brien in his letter of September 11, 2001. The question remaining is whether the Grievant was instructed by Perez to not respond at all to O'Brien's letter.

The Grievant was asked no less than three times during the hearing what direction she was given by Perez regarding the letter. All three occasions generated similar responses: she was "not to contact Mr. O'Brien," she was told "do not respond to O'Brien" and she was told "not to contact him in any way." Interestingly, the third time the Grievant testified that she asked Perez for permission to telephone O'Brien and let him know she would not be responding to his letter and her request was denied. I am skeptical of the Grievant's testimony. It wasn't until the Grievant was recalled to testify that she clarified that Perez's direction to not respond was two-fold: (1) the Grievant could not respond to O'Brien's questions; and (2) the Grievant could not communicate to O'Brien that she would not be responding to his letter. Had the direction from Perez been two-fold as described above, it seems logical to this Arbitrator that the Grievant would have testified to both components at every opportunity since that testimony would vindicate the Grievant on the "failure to respond" component of the discipline. I further find that the reason the Grievant testified that Perez gave her (i.e. "you need to protect the client's confidentiality") could have been effectuated by a letter to O'Brien indicating that she had received his letter, but would not be responding. I therefore find that the Grievant's testimony that she was directed by Perez to not respond to the questions contained in O'Brien's letter credible and the Grievant's testimony that she was directed by Perez to not respond and/or inform O'Brien that she would not be responding to his letter incredible.

Having found that the Grievant failed to respond to O'Brien, which is the first conduct infraction cited in the disciplinary memorandum issued to the Grievant, it is necessary to next determine whether the Grievant engaged in second conduct infraction for which she was disciplined.

The second infraction cited by the County to the disciplinary memorandum is "because of your interactions with Mr. O'Brien in his office." The record testimony establishes that there was only one instance in which the Grievant was in O'Brien's office. This exchange occurred in the privacy of O'Brien's private law office during the Grievant's lunch break. It is generally accepted that an employer cannot discipline an employee for off-duty conduct unless there is a nexus between the conduct and the employers interests that "legitimatizes the employer's decision to take disciplinary action." Discipline and Discharge In Arbitration, Brand, 1998 p. 304. This nexus has been liberally construed in the public sector stemming from a recognition that the government employer has an obligation to protects its reputation and mission, citing a public trust rationale. ID. at 312. This issue was well summarized by Arbitrator Edes in U.S. INTERNAL REVENUE SERVICE, 77 LA 19 (EDES, 1981) at 21-22:

> . . . the applicable standard to be applied in judging the conduct of employees in public service takes into realistic account the fallible nature of the human condition which results, with substantial frequency, in conduct which is less

> than exemplary by commandment of both moral and legal codes. It recognizes, quite properly, that, however much an employer may be wont to enforce such codes and condemn their transgression, *he is entitled to do so only to the degree that there is a direct and demonstrable relationship between the illicit conduct and the performance of the employee's job or the job of others*. The consequences of all other conduct is to be left for correction or punishment by civil and moral authority existing for that purpose. Such limitations have long been recognized in respect both to private and public employees. (emphasis added) Particular conduct may, of course, be of very substantial embarrassment to an employer. It is not unworthy of an employer to hope that all of his employees conduct themselves in a manner which, like Caesar's wife, is above suspicion. Failing the realization of such goal, *he can only exercise his authority in respect to conduct which affects the work of his employees and, accordingly, the efficiency of his enterprise*. (emphasis added)
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> . . .

The question then is what nexus exists between the colloquy between the Grievant and O'Brien and the Grievant's job? The County argues that the Grievant's conduct was "rude, hostile, belligerent and disrespectful" which "compromised her ability to perform duties as an employee of the County" (County brief p. 10 and reply brief p. 12). The memorandum of discipline issued to the Grievant cited "such conduct reflects poorly on the Commission on Aging and the County . . ." as the reason for the discipline. The County is arguing a public trust violation. While it would otherwise be necessary to determine the veracity of each of the two protagonists, there is no demonstrable connection between the alleged misconduct of the Grievant and the County's legitimate business interest sufficient to permit the County to impose discipline on the Grievant.

There is no question that the Grievant and O'Brien engaged in a heated exchange in O'Brien's private law office during the Grievant's lunch break. The Grievant arrived at the law office and requested to speak with O'Brien. O'Brien agreed to speak with the Grievant and they did so in his office. There is no evidence to indicate anyone other than the Grievant and O'Brien heard the conversation. Although O'Brien is a member of the public, he is also a lawyer engaged in the practice of law and member of a law firm that at the time of the conversation was providing legal services to the Grievant. Similarly, the Grievant at the time of the conversation was a client of the law firm, in addition to being a County employee. This was a conversation held in the privacy of a business office by two individuals engaged in a business relationship. Although it is clear that O'Brien was offended by the verbal exchange, the public was not harmed. There is no evidence in the record to establish that the County's image was harmed, and therefore there is no reason to discipline the Grievant.

Having found that a nexus does not exist between the conduct for which the Grievant was disciplined and the County's interest, I find that just cause does not exist as to the second conduct violation cited by the County in the Grievant's disciplinary memorandum. It is therefore necessary to next address whether the level of discipline imposed on the Grievant reasonably reflects the County's proven disciplinary interest.

The disciplinary memorandum issued to the Grievant identifies two areas of conduct violations for which the Grievant was disciplined. As has been previously discussed, the Grievant failed to respond to O'Brien's letter and the County's disciplinary interest was valid and proven. The County was unable to prove a disciplinary interest in the second area of conduct violation. Thus, the question remaining is whether a written warning is the appropriate level of discipline for the Grievant's failure to respond to O'Brien's letter. 3/

3/ The County asserts that it proceeded to a written reprimand because it was the second time the Grievant violated the same work rule, but there is no evidence in the record to substantiate this claim, this assertion conflicts with severity the County has indicated accompanies the Grievant's "interactions" with O'Brien, and the Grievant's disciplinary memorandum fails to even refer to work rule violations.

In this case, the Grievant had a clean disciplinary record and she was disciplined for two conduct violations. 4/ The record evidence does not substantiate that the County had a disciplinary interest in the second cited conduct violation. The County admits in its reply brief that "the discipline administered had less to do with the Grievant's failure to contact Mr. O'Brien, misconduct though it was, than it had to do with the Grievant's belligerent and hostile behavior during the confrontation in Mr. O'Brien's office." (County reply brief p. 7) Although this Arbitrator recognizes the view that an "arbitrator should not substitute his judgment for that of management," given this admission, the seriousness of the proven offense, the evidence and the above discussion, I find the written reprimand imposed on the Grievant to be too severe a level of discipline in these circumstances.

4/ In its post hearing brief, the County purports to advance an argument that the Grievant has a disciplinary record, specifically that she was disciplined in 1994. This was not offered into evidence and therefore was not considered..

AWARD

1. The Employer had just cause to discipline the Grievant on October 30, 2001 for "failure to respond to correspondence received by you that is in the normal course of your job duties."

2. The Employer did not have just cause to discipline the Grievant on October 30, 2001 "because of your interactions with Mr. O'Brien in his office."

3. The appropriate remedy is to reduce the written reprimand to an oral reprimand in accordance with this award.

Dated in Wausau, Wisconsin, this 4th day of October, 2002.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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