BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ADAMS COUNTY COURTHOUSE EMPLOYEES' UNION, LOCAL 1168, AFSCME, AFL-CIO

and

ADAMS COUNTY

Case 99
No. 60969
MA-11767

(TB Grievance)

Appearances:

William Moberly, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903

Davis & Kuelthau, S.C., Davis & Kuelthau, S.C., Attorneys at Law, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613 by **Mark F. Yokom**, for the municipal employer.

ARBITRATION AWARD

Adams County Courthouse Employees' Union Local 1168, AFSCME, AFL-CIO and the County of Adams are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline and discharge. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Friendship, Wisconsin, on July 15, 2003; a stenographic transcript was provided to the parties by July 25. A supplemental proceeding was held on October 27, 2003, with a transcript being available on November 3. The parties filed written arguments and replies, the last being received January 6, 2004.

ISSUE

The Union frames the issue as:

Did the County of Adams violate the just cause provision of the labor agreement when it terminated Tammy B's employment for off-duty conduct? If so, what is the appropriate remedy?

The County frames the issue as:

Did the County violate Article 2, Section 2.10, of the Collective Bargaining Agreement when it discharged the grievant on November 14, 2001? If so, what is the appropriate remedy?

I adopt the issue as framed by the County.

RELEVANT CONTRACTUAL PROVISIONS

Article 2 – Probation and Seniority

. . .

2.10 The Employer shall not suspend, discharge, or otherwise discipline any employee without just cause…

. . .

Article 3 – Grievance Procedure

. . .

3.04 …The arbitrator, in arriving at his/her final decision, shall be limited to those issues involving the interpretation and application of the provisions of this Agreement…

. . .

Article 19 – Management Rights

19.01 It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the County in all its various aspects, including but not limited to the following: the right to direct working forces; to plan, direct and control all operations and services of the County; to determine the method, means, organization, and number of personnel of which such operations and services are to be conducted; to assign and transfer employees, to schedule working hours and assign overtime; to determine whether goods or services are to be made or purchased; to hire, promote, demote, suspend, discipline, discharge for just cause, or lay off employees; to make and enforce reasonable work rules and regulations; and to change or eliminate existing methods, equipment, service, or facilities.

BACKGROUND

The grievant, TB, worked as a Family Based Service Aide with the child welfare unit of the Adams County Department of Health and Social Services from November 1996 to her termination in November 2001. This grievance challenges her termination on the grounds that it was absent just cause, as required by the collective bargaining agreement.

Working under the supervision of a county social worker, the family services aide provides direct services which seek to teach appropriate parenting skills and facilitate positive family interaction. The position description lists the four top responsibilities as:

1. To promote the safety, health and well-being of both children and parents;
2. To promote emotionally supportive and other supportive services to children and families;
3. To teach appropriate parenting techniques;
4. To keep the case manager and/or supervisor informed of changes that affected the client.

The position's specific tasks include help in menu preparation, shopping and cooking; instruction and assistance in personal hygiene; housecleaning tips; advocacy of a drug-free lifestyle, and moderation in alcohol and tobacco. The family services aide is part of the same payroll classification (Group 1, Class 6) as a nutrition site director, benefit specialist, public

health technician, foster care specialist, case worker for developmental disabilities and janitor. The classification is the lowest-paid in its group; only four of the entire unit's remaining 18 classifications are paid less.

TB was a very good family services aide. Her first employee evaluation, in 1997, rated her average in three areas and "above average" in nine, with her supervisor commenting that "she has worked well with clients, she had enthusiasm, perseverance and good 'people skills' and is willing to accept a challenge." Her 1998 evaluation included 11 scores of "above average" and one "outstanding." In both 1999 and 2000 her supervisor rated her as "above average" in nine areas and "outstanding" in three (reliability, understanding and following instruction, and cooperation).

A very good family services aide, TB, 31, had rough family situations, starting with her alcoholic mother. TB has endured several abuse relationships, including a first husband her broke her nose. In 1997 she married LB, 35, an alcoholic member of the Savage Nomads Motorcycle Club with a drug problem and two felony convictions. In August 2001, while they were living in western Adams County with with TB's six children, ages 7-15 (including one handicapped daughter), LB was diagnosed with cancer. 1/

1/ Unless otherwise specified, all dates herein are 2001.

On November 2, Adams County deputy and investigator Todd Laudert got a tip from a woman (later revealed to be BB, LB's sponsor at Alcoholics Anonymous) who said that LB was a close friend of her daughter's, and that she had "obtained some kind of illicit drug" from him which had kept her up "for the past two to three days." BB – whose daughter (herein called "CB") had been a client of TB's before she turned 18 that February and passed out of the county's care -- also told Laudert that LB was in the process of preparing another batch of drugs out back in the garage.

On November 5, Laudert and Special Agent Jay Smith of the Division of Narcotics Enforcement of the state justice department searched the B's dumpster, where they found 288 empty packages of antihistamine tablets, known to them as indicia of methamphetamine production. They also found empty packaging for a riflescope cover and rifle cartridge holder along with three gun deer hunting licenses and tags (including one from 2000 for LB). (Er. 1)

Later that day, Laudert ascertained that LB had been convicted in 1985 (at age 19) of felony robbery and was under a current judicial protection order/injunction, and that TB had

been convicted in 1991 (at age 18) of felony welfare fraud. 2/ On November 6, Laudert further learned that LB had also been convicted in 1997 of the felony of being a felon in possession of firearms.

2/ She testified she failed to report a small amount of income she received while on public assistance.

On November 7, Laudert and Smith executed a search warrant, and discovered a methamphetamine laboratory in the property's detached garage, about 100-150 feet away from the house. They also seized a Browning B.A.R. .30-06 caliber World War II military rifle; a glass marijuana bong in the bedroom entertainment center; a ceremonial sword attached to the side of the entertainment center; a Winchester Model 94 level action rifle; a Stevens Model 62 .22 caliber rifle; a marijuana pipe; a Ruger .44 Magnum carbine; and an excessive amount of Sudafed tablets and ephedrine pills generally used in the manufacture of methamphetamines. Smith also found marijuana, cocaine and a brass pipe in LB's pockets. LB was arrested for manufacturing methamphetamine and possession of narcotics and drug paraphernalia while TB was arrested for possession of drug paraphernalia and being in possession of a firearm as a convicted felon.

TB was released on bail on November 8, 2001, and placed on paid leave pay pending a further investigation into the matter. On November 13, 2001, the County's legal counsel conducted a 90-minute investigative interview, at which time TB denied any knowledge that her husband was involved in manufacturing methamphetamine or that he was consuming any narcotics, but admitted to owning and possessing several of the firearms seized during the search. She further related that her husband had been acting strangely for several months, including associating with unsavory characters, being secretive about phone calls, forcing her to sleep on the living room couch, and forbidding her and her six children from going outside except to travel to work or school. TB also said that on one occasion she did venture outside the home and smelled the very strong and unique odor of sulfuric acid. TB attributed her husband's change in behavior to his recent cancer diagnosis. (Er. 8)

That same day, Director of Human and Social Services Richard Holt wrote a 2.5 page, single-spaced Investigative Report, which included the following Conclusions and Recommendations:

> (TB) was not forthright in her disclosures of her past felony conviction of welfare fraud. In addition, it does not appear that (TB) was forthright by suggesting a pardon occurred, which has been denied by the Governor's office. As a past felon, (TB) inappropriately maintained guns in her residence and maintained guns in interaction with a minor child within that residence. Under

the duty of teaching and enforcing appropriate parenting, this activity was totally inappropriate based upon the prior felony conviction.

In addition, overwhelming evidence suggests that significant illegal activity was occurring as (sic) this residence which involved the production, use and possession of illegal controlled substances and drug paraphernalia. While (TB) denies any knowledge or use, the evidence is simply too overwhelming in that it suggest that (TB) either knew or should have known of the inappropriate activity at a residence involving six minor children. Although (TB) indicates that she suspected inappropriate activity was occurring, she took no affirmative action over a period of several months while this activity occurred. Her failure to act again was in direct contradiction to her specific position functions of reducing potential child abuse and neglect, teaching correct parenting skills and facilitating positive family interaction. Such action and inaction did not promote the safety, health and well being of both children and parents at this residence.

A significant trust factor has been violated by (TB). Therefore, it is the Director's decision to terminate her employment with the Department. (Er. 5)

On November 14, Holt sent TB the following letter terminating her employment: Upon our full investigation concerning the incidents of November 7, 2001, including the information you have provided to us, we have determined to terminate your employment with the Adams County Department of Health and Social Services effective, November 14, 2001.

Our investigation shows that sufficient evidence exists that an illegal methamphetamine laboratory was discovered at the residence owned by you and your husband. Many instruments necessary for producing this illegal controlled substance were found at your premises. In addition, various other drug paraphernalia was also discovered, as well as cocaine and marijuana. In fact, drugs from your residence were sold to a child of one of your clients.

In addition, our investigation determined, and you admitted, that two guns belonging to you as well as two guns belonging to your son were also found on premises. As a past convicted felon, it is not appropriate for you to maintain guns. While you had indicated to us that you had been pardoned for this past felony, the Governor's Office for the State of Wisconsin denies that any pardon has ever been granted to you.

> As you acknowledged, your position with the Department requires your assistance to families and children in need. This assistance includes directing families and children to appropriate resources regarding drug and alcohol problems. The amount of drug paraphernalia, drugs and the fact that an illegal drug producing operation was discovered on your premises, while at the same time housing six children, is inconsistent with the necessary goals of this Department in developing appropriate family relationships and other services.
>
> Staff simply cannot be involved in or passively condone the use, production or distribution of illegal substances. In addition, the Department cannot condone the possession and use of weapons when such use and possession is prohibited by law. (Jt. 4)

The same day Holt sent TB the notice of her employment termination, a newspaper article entitled "Four Arrested in Meth Lab Bust," appeared on the front page of the Friendship *Reporter*, a Adams County newspaper. The article, which featured the booking photographs of TB, LB, and her husband's two associates, was 20 paragraphs long; paragraphs 13 and 14, found in the continuation of the article on page 11, stated as follows:

> Also arrested last week was (B's) wife, (TB), 31. She was convicted in 1991 in Jefferson County on a felony welfare fraud charge, for failure to report income. (TB) is employed as a Family-Based Services Aide for the Adams County Department of Social Services.
>
> She has been placed on Administrative Leave with pay. (TB) has not been charged yet, but Adams County District Attorney Mark Thibodeau anticipates filing drug paraphernalia possession and felon in possession of a firearm charges. She has been released on a $1,150 signature bond with conditions that she remain in her home. She will make her initial appearance in court at 1 p.m. on Monday, Dec. 3.
>
> These two paragraphs constituted the only references in the article to TB. (Er. 6)

On November 27, Adams County District Attorney Mark Thibodeau filed a two-count complaint against TB, charging her violating the statute which prohibits persons convicted of a felony in Wisconsin from intentionally possessing a firearm (a felony) and possession of drug paraphernalia (a misdemeanor). The felony charge was subsequently dropped, and on April 28, 2003, TB pled "no contest" to possession of drug paraphernalia, disorderly conduct and obstructing an officer, all misdemeanors. She was fined $712 and had her drivers license suspended for six months. (Er. 2)

Subsequent to her termination, TB filed for unemployment compensation benefits, which she was awarded on November 21. The County appealed that decision to the Labor and Industry Review Commission, which on July 25, 2002 reversed the award of benefits and ordered TB to repay the Unemployment Reserve Fund the $6,138 she had received. The Commission held that:

> The employee engaged in and condoned activities that were a direct contradiction to the responsibilities she held with the employer. The commission does not credit the employee's testimony that she was not aware that there was drug paraphernalia an a methamphetamine lab on her property. The employee allowed herself and her minor children to remain in an abusive environment in which illegal activity was clearly being conducted. The commission likewise does not credit the employee's claim that she received or believed she had received a pardon. The employee lied to the employer when she claimed to have received a pardon. The employer had a right to expect that the employee's off-duty behavior would comport with the responsibilities of her position with the employer. Finally, the employer had a right to honest responses from the employee. The employee was dishonest when she claimed to have received a pardon.

On October 31, 2002, Adams County Circuit Judge Duane H. Polivka dismissed TB's *pro se* complaint seeking reversal of the LIRC decision, on the grounds that it was filed three days late and was not accompanied by the statutorily required summons. (Er. 7a, c)

Further facts are as set forth below.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> The employer has been unable to substantiate any of the three standards for discharging an employee for off-duty conduct, in that her behavior did not harm the County's reputation, did not render her unable to perform her work, and did not lead to the refusal of other employees to work with her.
>
> The testimony of the director of the department shows that the department already had a bad reputation within the community independent of any matter concerning the grievant, and that he decided to terminate the grievant prior to his evaluating the impact of her arrest on the department. Moreover, two of the

grievant's former clients testified that they knew of her arrest and would like to continue working with her, further evidence that the arrest had no effect on the department's reputation or otherwise impaired her ability to perform her job.

The County has also engaged in disparate treatment, in that several County employees who had been arrested and/or convicted on charges directly related to their job duties were treated more favorably than the grievant.

Contrary to the termination letter, the evidence falls fall short of establishing the County's claim that the grievant was involved in or passively condoned the production, use and distribution of illegal drugs. As the department director learned prior to his decision to terminate the grievant, police investigators determined that the grievant was not involved in the operation of the drug lab.

Because the grievant's job is not impacted by her arrest for possession of a firearm, and because the firearm charge was dropped, there is insufficient nexus with her employment for the County to rely on the presence of hunting rifles as a basis for discharging the grievant.

By terminating the grievant for allegedly being involved in or passively condoning the illegal drug activity, and for the firearms, the County has improperly held the grievant to a higher standard than the state holds the licensed social workers who supervise her.

Because the County did not have just cause to terminate the grievant, she should be reinstated to her previous position with full back pay and all rights and benefits she would have enjoyed had she not been unjustly terminated.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The clear and unambiguous language of the collective bargaining agreement vests in management the authority to discipline employees for just cause; because TB's actions were wholly inconsistent with her job duties and responsibilities, her discharge was warranted.

The grievant's home environment, connected with her intentional failure to disclose her prior felony conviction, her arrest and conviction for possessing drug paraphernalia, disorderly conduct and obstructing an officer are all contrary to her job duties and responsibilities and are in direct conflict with the

County's reasonable expectations. Her conduct amounts to a deliberate violation of the standards the County had a right to expect from her, in that possessing drugs and paraphernalia, operating a methamphetamine lab, and possessing firearms and sword in a house with six minor children grossly violates her job requirement for assisting families in need, protecting children and providing resources to avoid drug and alcohol situations.

TB is clearly guilty of the misconduct alleged, in that there is no question that there was a methamphetamine lab in her garage; she plead guilty to possession of drug paraphernalia, disorderly conduct and obstructing an officer; weapons were on the premises, and she did not seek any help for her own family even though her job would have required her to do so if someone other than herself were involved.

Because it would have been impossible for TB to maintain any level of credibility with any clients after not following what should have been her own advice, the discharge is reasonable.

There is ample nexus between TB's conduct and her employment, in that the local newspaper published a front-page article (with mug shot) identifying her and her place of employment. The department director also testified there was much adverse publicity about the arrest, which reflected negatively on his department.

Because it is primarily the function of management to decide what penalty will be imposed when employee conduct merits discipline, the arbitrator should not substitute personal judgment for that of management because he does not agree. All an arbitrator should do is determine whether the employer acted in good faith, after a proper and fair investigation, and in a manner that was not arbitrary, capricious or discriminatory. Only when management has abused its discretion may an arbitrator disturb the discipline management has imposed.

The fact that TB has been convicted of felony welfare fraud in and of itself taints her testimony, especially since she failed to disclose this fact when she was hired. Moreover, TB's testimony has changed over time in an attempt to garner more sympathy.

Because the clear and unambiguous language of the labor agreement vests in management the authority to discipline for just cause, the grievant's conduct was wholly inconsistent with her job duties and responsibilities, the severity of her

misconduct was commensurate with the decision to terminate, and the arbitrator should not substitute his judgment for that of the employer, the grievance should be denied.

In response, the Union posits further as follows:

The County's reliance on TB's prior felony conviction as the cornerstone of its argument crumbles in light of the fact that the County never asked, either via its application or at the interview conducted by the department head, anything about her arrest or conviction record. Moreover, the findings of the Labor and Industry Review Commission, issued months after the termination, could not be considered by the department director in his decision, and are also contrary to TB's uncontroverted testimony.

The County also errs in attacking TB's credibility on two critical and emotionally charged issues, namely her conviction at age 18 of welfare fraud and her experiences as a battered woman. Inconsistencies regarding the details of abuse are symptomatic of victims of domestic violence, and should not be callously used as a justification for her termination.

In its response, the County posits further as follows:

Contrary to the Union's argument, TB was not treated differently than any other similarly situated employees, in that none of the employes it cites worked in her department or had any type of counseling or public contact. For those who were closest to TB's position, disciplinary action was either being contemplated or had been initiated by the County when the employees chose to resign in lieu of termination. There has been no disparity of treatment.

TB's home environment, connected with her intentional failure to disclose her prior felony conviction, and her arrest and conviction for possession of drug paraphernalia, disorderly conduct and obstructing an officer are all contrary to her job duties and responsibilities and are in direct conflict with the County's reasonable expectations.

Although TB maintains she knew nothing of the methamphetamine lab, common sense and her own husband contradict that.

TB's actions also grossly violate her job requirements to promote the safety and well-being of children and parents, and that she teach appropriate parenting

techniques. Allowing herself and her children to be in an environment where they are essentially under house arrest and verbally abused and physically threatened on a daily basis hardly conforms to the advice she is supposed to provide to clients.

Moreover, TB admitted that she brought clients to her residence, one of whom bought methamphetamine from the lab at TB's residence. Although she claims ignorance, obviously her clients knew there were drugs available.

As the Labor and Industry Review Commission determined, TB engaged in and condoned activities that were a direct contradiction to the responsibilities she held with the employer. She is clearly guilty of the alleged misconduct.

Since the arbitrator is not permitted to substitute his own judgment for that of the County in personnel matters, and cannot second-guess disciplinary decisions by the employer, the grievance should be denied.

DISCUSSION

This case examines whether the County can summarily fire a social services support worker whose personal life – a home with six young children living amidst drugs, guns and potential abuse – involves activities which are both illegal and directly contrary to her particular job description.

It is well-settled that off-duty and/or off-premises misconduct may expose an employee to discipline, with the degree of that exposure being dependent upon the nexus between the misconduct and the nature of the employment. As the respected arbitrators Marvin Hill and Mark Kahn summarized in an influential presentation, the nexus may be evaluated in four major categories: (a), damage to the employer's business or reputation or both; (b), the employee's unavailability due to incarceration; (c) impact of the employee's reinstatement on colleagues (due to their refusal to work with the off-duty offender or their potential exposure to danger from the offender), and (d) unsuitability for continued employment in the light of the misconduct. *Arbitration 1986: Current and Expanding Roles,* Proceedings of the 39th Annual Meeting of the National Academy of Arbitrators, 121-154 (BNA Books, 1987).

Clearly, reasons (b) and (c) are not applicable in this case. TB was not incarcerated, and was fully available for continued duty following her prompt release on bail. She was not convicted until her "no contest" plea on April 28, 2003, almost 18 months after her November 14, 2001 termination. Upon her conviction, her sentence included forfeitures, fines

and suspension of her driver's license. She faced up to 19 days in jail only if she failed to pay her forfeiture and fine in full, and would have enjoyed Huber privileges.

Nor was there any evidence or argument as to TB's co-workers refusing to work alongside her, for any reason. Thus, the only two justifications the County could have for firing TB are damage to its reputation, or her unsuitability for continued employment in light of her off-duty conduct.

These are reasonable justifications. By becoming known for employing a family services aide connected to a meth lab and illegal guns, the County suffered a loss to its reputation. And due to her arrest and convictions for drug paraphernalia and other charges, TB's ability to perform as a family based service aide has been impaired.

The County's theory is good. It remains to be seen if there's evidence to match.

Before undertaking that evaluation, I must address a broader challenge from the County, concerning the range of my role as arbitrator. The County argues forcefully that arbitrators have no authority to substitute their "personal judgment for that of management" in setting the level of discipline, and that all I should do is determine whether the County acted in good faith after a fair investigation. Unless the discipline is arbitrary, discriminatory, unfair or capricious, the County argues, my role is "not to dispense" my "own brand of justice," but rather to uphold the County's decision to terminate.

I disagree. I believe that evaluating the level of discipline imposed is an essential element in determining whether just cause exists. And I believe the weight of arbitral authority supports my position. As arbitrator Hill wrote in *The Common Law of the Workplace: The Views of Arbitrators*, "In the absence of a contractually specified penalty or clear limitation on arbitral discretion, both arbitrators and courts agree that the arbitrator may reduce the penalty imposed by management." (emphasis added). (BNA Books, 1998, p. 349).

As the U. S. Supreme Court held in the seminal decision elucidating arbitral authority, arbitrators are "to bring (their) informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies." STEELWORKERS V. ENTERPRISE WHEEL & CAR CO., 363 U.S. 593, 597 (1960). In light of the County's argument, it is especially noteworthy that in this decision the high court gave its approval to the arbitrator's reduction of discipline from a discharge to a 10-day suspension.

While the collective bargaining agreement may expressly limit the arbitrator's authority to modify penalties, arbitrators generally consider that any such restrictions on their authority must be clearly and unequivocally stated. *How Arbitration Works* (6th Ed., BNA Books,

p. 957). Here, of course, there is nothing in the collective bargaining agreement which remotely provides for such a limitation.

Accordingly, I do not accept that my authority is as severely constrained as the County contends. My responsibility is to determine whether the County had just cause to terminate TB – a determination which of necessity requires me to evaluate and possibly adjust the level of discipline in light of all relevant factors.

Before analyzing the County's actions, it is useful to set forth the facts as I understand them to have existed as of the date of termination, November 14, 2001.

As of that date, TB had not been charged with any crime. She had been arrested and released on bail, but would not be charged with the felony gun and paraphernalia misdemeanor until almost two weeks later (and not convicted of the various misdemeanors until April 2003).

As of that date, there was no evidence TB had anything to do with the operation of the methamphetamine lab, which was in the garage under the complete control of LB, who so aggressively kept TB away that the County doesn't even claim any direct involvement in the lab by TB. As Adams County Sheriff's investigator Todd Laudert testified, "We … found out that (TB) was not cooking methamphetamine with her husband … and the other people that were involved in it." Nor has there ever been any claim that TB herself did drugs, or that any of the drug paraphernalia was for her use. As department director Richard Holt testified, "I never said she was using drugs." (Tr. 52)

As of that date, the County could not accuse TB of lying about her 1991 conviction, because it had never asked. But it could reasonably conclude that TB had intentionally not divulged information about the conviction until this incident.

As of that date, the County could reasonably conclude that TB wasn't being truthful about the putative pardon, which she should have known she hadn't received.

As of that date, the County could reasonably conclude that TB should have known that her husband was involved in the operation of a drug lab in their garage – but not necessarily whether TB knew that LB was also smoking pot and taking cocaine.

Finally, as of that date, the County could reasonably conclude that TB was probably guilty of the felony charge of being a felon in possession of a firearm.

The County cites two cases defining the nexus between drug misconduct and job disqualification. In MELROSE-MINDORO SCHOOL DISTRICT (Crowley, 6/24/98, NO. 5692), a

Commission arbitrator found that just cause existed for the discharge of a 20-year veteran Junior High science teacher arrested for possessing small amount of marijuana and trace amounts of cocaine at home. The arbitrator wrote he was

> persuaded that the grievant's possession and use of illegal drugs has been shown to have adversely affected his ability to teach in the District. **Teachers not only teach what they know but teach by example.** The District prohibits illegal drugs on its premises and is a drug-free school and has a program to address and prevent the use of illegal drugs. The grievant's possession of marijuana and cocaine and his admission of the use of illegal drugs is an example contrary to the message the District is trying to instill in its students. Clearly, there is a sufficient nexus with the District's efforts to have students understand and appreciate the dangers of illegal drug usage and the grievant's conduct. (**emphasis** added)

Similarly, in WEST MONONA COMMUNITY SCHOOL DISTRICT, 93 LA 414 (HILL, 1989), the arbitrator found that the District had properly discharged a guidance counselor/coach who was convicted of vehicular homicide for causing fatal accident while driving under influence of alcohol and cocaine.

I question the County's reliance on these two cases involving school professionals, for I find them different as to the facts and the legal standard.

As to the facts, there's simply no comparison between TB's passive acceptance of LB's drug activity and a drug-related vehicular homicide conviction or multiple possession rap. While TB was of course responsible for the illegal guns, she was but a bystander for the drug-related offenses; the teachers in the cases cited by the County, however, were the ones who actually did the drugs and committed the crimes.

A further distinction is that teachers are a constant presence for a large number of children over an extended period of time; the family services aide has a limited, temporary relationship with a few individuals.

As to the legal standard, it is well-settled that, in meting out discipline, employers may take into account that teachers serve as role models. As the U.S. Supreme Court has said:

> Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.

> Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy. AMBACH V. NORWICK, 441 U.S. 68, 78-79, 99 S.Ct. 1589, 1595-96, 70 L. Ed.2D 49 (1979)

The high expectation for teachers has even been held to affect their support staff. In WESTLAKE CITY SCHOOL DISTRICT, 94 LA 373 (Graham, 1990), a secretary who had had routine contact with students was very publicly convicted of grand theft. Specifically citing state law requiring teachers to surrender their license upon a felony conviction as demonstrating public expectation of high conduct by all school personnel who deal with students, the arbitrator sustained her discharge.

But while I reject the notion that teachers and family aides are comparable positions, there is one very important way in which they are alike -- each is an instructional position. Allowing for the differences between school professional and county non-professional, teachers and aides both educate, inform and inspire. One focuses on mathematical theorems, the other on a family budget; one lectures on psychology, the other deals with families at risk. A teacher's suspect scholarship or scandalous behavior may truly impair their performance, thus authorizing discipline. A family services aide's illegal activity and scandalous family could do likewise.

TB's life is relevant to her job because her job involves showing people how to live properly. If a family services aide is living poorly and improperly, it makes it far more difficult for them to get their clients to live right. Unlike clerk typists or cooks or benefit specialists, the family services aide's family is so relevant it's even in the position title.

It is likely no other position in this bargaining unit has as much role-model responsibility as does this one. But because the job itself consists of being a role model, the family aide must be a role model at home, as well.

I now address the County's two main arguments – its loss of reputation by virtue of TB's misconduct, and TB's inability to continue to perform her duties.

Loss of Reputation

Discipline is due when off-duty misconduct causes serious and lasting harm to the employer's reputation. If TB's misconduct were so notorious and so highly publicized that it entered general public consciousness and engendered general condemnation, the County would

prevail. To show that standard is met, the County offers evidence both documentary and testimonial.

The County asserts in its brief that HSS Director Holt "testified that there had already been *significant community publicity about the situation*" at the time he terminated TB on November 14 (Tr. 15) (*emphasis* added). I don't think that's the case. The testimony which the County cites in support of this statement is Holt's account of being at the local VFW club the evening of TB's arrest and hearing "rumors" from some fellow patrons, which he discussed – very briefly -- with the arresting officer two or three days later. One night of barroom rumors and a quick and unremembered conversation just don't constitute "significant community publicity." Nor was the standard met by Holt's generalized references to "a concern within the community" about TB being "involved with a meth lab." Again, even with the relatively small community of Adams County, this testimony does not establish that the TB affair had reached a level of general notoriety -- especially since TB was not, in fact, "involved in a meth lab."

To further show broad public awareness of the matter, the County explicitly relies on the article in the Friendship ***Reporter***. (Er. 6) 3/ That reliance is misplaced.

3/ The County brief describes the newspaper article as including "the mug shot of (TB) and her three co-conspirators..." (emphasis added) As counsel well knows, "co-conspirator" has a specific meaning in criminal law; inasmuch as TB was never charged or even accused of participation in the methamphetamine lab operation, it is both inaccurate and inflammatory to refer to the three who were engaged in that highly illegal activity as her "co-conspirators."

First, the newspaper article was not published until November 14 – the day *after* Holt decided to terminate TB. While arguably the County could cite media publicity subsequent to the termination as *vindicating* its decision, arbitrators generally frown upon employers citing after-occurring evidence to *justify* discipline – which, of course, is what the County has essentially done. Holt acknowledged at hearing the impossibility of relying on the newspaper article, testifying that the decision to terminate TB "was not based on that," and had "nothing to do with that." (Tr. 56)

Further, a close review of the ***Reporter*** article establishes the contrary to what the County claims – that there *wasn't* high community publicity that would damage the County's reputation. Granted, the story is front-page and above-the-fold, as any report of a raid on a methamphetamine lab would be. However, while there is an unflattering picture of TB on the front page, with her name noted under her picture, there is absolutely *no* reference to her county employment until the 13th paragraph of a 20 paragraph story, found on page 11. And

even then, there are only two short paragraphs in which TB is even mentioned. Had the article begun, "An Adams County social services employee and her husband were arrested last week for allegedly running a methamphetamine lab in their New Chester garage…" the County could rightfully contend heightened community awareness and likely outrage, but that is not the story that was published. Even allowing for its introduction after the fact, the article, a straightforward and unsensationalized account of the arrests, does not support the County's assertion about intense publicity and heavy damage to the County's reputation.

There *was,* however, a highly publicized arrest of a county employee, in which the coverage explicitly focused on her county position. But that was a different employee, and, contrary to the County's treatment of TB, one who was treated with great leniency.

When MG, the County's Emergency Government Coordinator, was arrested in October 2002 for felony insurance fraud, the matter was prominently reported on the front page of the Adams County *Times,* the official paper of the city of Adams. Whereas TB was not identified as a county employee until the 13th paragraph, found on page 11, MG's County position is clearly the primary focus of the *Times* account. Under the headline, "Emergency Government Coordinator / is charged with felony insurance fraud," the story begins, "Adams County Emergency Government Coordinator (MG) was charged … with felony insurance fraud." The second paragraph adds that her husband also faced "felony counts of arson and insurance fraud." Thus, MG's scandal was much more publicly and directly tied to the County than was TB's. Yet the County had not disciplined MG as of the date of hearing, nine months after MG's arrest.

The County contends that the experience of the Emergency Government Coordinator is irrelevant because the position is not involved in family counseling or support. While the specifics of their respective jobs are relevant in the second prong of my analysis, below, they are less so when considering the County's separate reputation rationale. MG, a member the same bargaining unit as TB, was arrested with far greater publicity than TB was; the County's treatment of MG certainly sheds some light on the question of whether the County had just cause to terminate TB due to loss of reputation.

The position of Emergency Government Coordinator – which by definition exists to deal with emergencies – has always needed the public's confidence. When disaster or crisis strike, the public has to trust that those leading the response know what they're doing and are doing the right thing. And in this age of terror, the position has assumed even greater responsibility and power than ever before; now it's not just tornadoes and ice storms, but anthrax and explosions. Also, as a manager the position could have financial control over certain accounts. The requirement for integrity, accountability and a lawful life is certainly no less for the Emergency Government Coordinator than for a family services aide. Yet the

County took no action against MG for nine months following her arrest, right up to the date of hearing.

MG's highly publicized arrest for alleged misconduct damaged the County's reputation at least as much as did TB's less publicized arrest. The County's failure to discipline MG at all within nine months after she was charged with felony insurance fraud involving a suspected arson greatly weakens its claim that it needed to fire TB within a week to protect its reputation.

Finally, I am deeply troubled that the County relies on an unproven and uncharged allegation in seeking to prove damage to its reputation. As noted above, TB was arrested on November 7, but not criminally charged until November 28, 2001 and not convicted until April 28, 2003; given TB's presumption of innocence, therefore, as of November 13, 2001, nothing had happened to substantially damage the County's reputation. Absent extraordinary circumstances, the mere arrest of an employee simply cannot, by itself, harm the employer's reputation so substantially that it provides just cause for termination *on that basis*. Whatever such extraordinary circumstances there might be, if any, they are certainly nowhere near present here.

This is not to say that the County failed to conduct a thorough investigation of the underlying facts by the time it acted; it did. By November 13, Holt had reviewed the file relating to TB's arrest and spoken briefly to the arresting officer, and conducted a 90-minute investigative interview with TB, assisted by able and experienced legal counsel. But while the County *could* rely on the results of its internal investigation to evaluate whether TB was no longer suitable for her particular assignment (see below), it *cannot* rely on a purely private investigation to establish loss of public reputation.

Accordingly, for all these reasons – the lack of widespread community outcry, the absence of pre-termination media coverage inflaming the "methamphetamine lab/county employee" link, the disparate treatment provided MG, and the presumption of innocence that TB enjoyed -- I conclude that the County's concern for its reputation did not provide just cause for its termination of TB on November 14, 2001.

Impairment of Ability

I turn now to the remaining reason why TB's discharge could be with just cause – that her personal misconduct was so inherently contrary to the responsibilities of a Family Based Services Aide that she could no longer perform her job.

Working under the supervision and direction of a social worker, TB's duties include helping with and instructing on a broad array of family and parenting skills, such as menu preparation and shopping, personal grooming and hygiene, job training, and so on. With a majority of her client families suffering from alcohol and other drug abuse, TB is expected to advocate and counsel against such activity, including distributing appropriate literature and making counseling referrals.

TB's professional life thus included helping people to fight the precise acts she at least passively condoned in her personal life. When one's personal life is a direct and public refutation of the position's mission, there is at least an implicit conflict that creates the nexus needed for discipline. That several of these acts were also criminal increases their importance.

TB further allowed her personal and professional lives to mingle directly, when she provided family services to "CB," the then-minor daughter of the woman, BB, who served as LB's support for Alcoholics Anonymous and Narcotics Anonymous. Within a year of turning 18 and leaving TB's care, CB would smoke meth with LB and trigger the bust which lead to TB's discharge and ultimately to this grievance. The record does not indicate when the relationship between LB and BB began, or whether the county was aware of it when CB was TB's client.

TB's personal conduct was specifically related to her particular duties as a family services aide to a sufficient extent that the necessary nexus exists to sustain serious discipline. The questions remains how much -- did TB's personal failure to protect her own children's health, safety and well-being mean complete employment disqualification so that she couldn't work to help others facing that same situation?

In the termination letter of November 14, Holt identified four specific conflicts between TB's life and her job: the existence of the meth lab "at the residence owned by you and your husband," the presence of drug paraphernalia at her premises, that "drugs from your residence were sold to a child of one of your clients," and that she owned illegal guns. Holt summarized as follows:

> Staff simply cannot be involved in or passively condone the use, production or distribution of illegal substances. In addition, the Department cannot condone the possession and use of weapons when such use and possession is prohibited by law.

At hearing, Holt clarified that the drug sale "had been made to an ex-client of ours," rather than to a client's child, reflecting the fact that the services are provided to the minor, not the adult parent, and that this particular child was now an adult.

The County in its brief added four new theories where it sees grounds for discharge, to wit: her "home environment," her failure to report the nature of her home environment to authorities, her "intentional failure to disclose her prior felony conviction," and her "ultimate conviction" for possession of drug paraphernalia, disorderly conduct and obstruction.

The employer thus offers no fewer than eight separate reasons why it says TB was no longer able to perform as a family-based service aide, which I must address in turn.

Failure To Disclose Welfare Fraud Felony

Although department director Holt didn't even mention TB's failure to disclose her 1991 welfare fraud conviction as grounds in the termination letter, the County now considers this aspect so important that it is the focus of the first sentence in its statement of facts. (Brief, p. 2) The County later asserts that TB's entire testimony is tainted due to her conviction and her failure to disclose this fact during her job interview. The County further makes explicit that it considered TB's "intentional failure to disclose her prior felony conviction" as an integral element in its decision to terminate her. (Br., p. 11)

None of these claims is persuasive, in that there is no necessary nexus between TB's conviction in 1991 and her job as a family based services aide a decade later.

The County's reliance on the conviction – which TB testified without rebuttal occurred when she was 18, and failed to disclose a two hours' wages she earned while she was receiving public assistance -- is wholly misplaced, and contrary to the testimony of its primary witness, department director Holt. As the Union correctly notes, at no time during her initial job interview with the County did anyone ever ask TB about her arrest or conviction record; nor was the information ever requested on any of the County's application material. The County didn't ask, so it just wasn't a lie for TB to fail to volunteer the information. TB certainly was not acting with the spirit of full disclosure, and could even be accused of concealing something, but she wasn't lying.

Moreover, as Holt testified, the welfare fraud conviction itself "probably would not have affected her hiring," and TB "would not have been disqualified because of it." (Tr 34). Indeed, TB's exemplary record from 1997 to the late fall of 2001 shows hiring her was the correct decision.

Accordingly, I conclude that neither the 1991 conviction itself nor TB's failure to disclose the conviction in 1996 provides just cause for her discharge in 2001. This is not to say the 1991 conviction is entirely irrelevant; the ramifications of the conviction (namely, TB's inability to legally possess firearms, and her questionable assertions about the supposed pardon)

are indeed quite significant. But the conviction itself, and TB's failure to disclose at the time of her hire, provide no support for the County's decision to terminate.

Felony Gun Possession

Sec. 941.29(1)(a) and (2)(a), Wis. Stats., makes it illegal for a felon to possess a firearm. Whatever I think about the 1991 prosecution, TB's felony conviction is a matter of record, as is evidence -- communication from the appropriate state officials -- that TB has not been pardoned. (Er.1, Er.3) I do not find credible TB's testimony, either in the investigative interview or before me, that she had a pardon but had lost the paperwork.

The County has adequately documented that it was aware of these facts shortly after TB's November 7, 2001 arrest for illegal possession of several rifles, and by November 13 could reasonably conclude there was probable cause to believe TB was guilty of being a felon in possession of a firearm -- a class C felony, providing for up to 10 years imprisonment and $10,000 fine.

This is a serious charge. But severity of charge cannot create nexus where none otherwise exists. And absent a nexus between TB's job and the gun charge, there can be no discipline.

There is such a nexus, in that an explicit part of the family aide's job is advocating safe and lawful behavior, and TB's possession of several firearms was neither. Unlike almost the entire rest of the unit, the position of family services aide has affirmative responsibilities counseling clients to be law-abiding and responsible. However well-meant (taking her son deer hunting) and well-protected (trigger and case locks) the hunting rifles were, TB had to have known it was illegal and unsafe for her to possess them in her home. Moreover, by attempting to attribute ownership of two of the rifles to a son who was not old enough to possess firearms legally, TB wrongfully involved a child in her criminal enterprise.

The County is correct the several rifles did pose a potential threat to the safety of the children. To be sure, the guns had trigger locks and were kept in locked cases under TB's control; as long as the rifles stay under TB's control, they would pose no danger. But I have no assurance that they will always remain so.

Caution would be called for under any circumstances – but concern is especially appropriate in this situation. It is exceptionally unwise to bring guns into any abusive relationship, or have them around drug-dealing strangers. The County is right to be concerned that the guns might some day be used inappropriately.

Since that responsibility of promoting the safety and well-being of children and families is part of the job of the family services aide, such potentially dangerous behavior in a house with six minor children does make TB properly subject to discipline.

At the time of termination, although TB had only been arrested and not formally charged, the County knew that there was probable cause to believe she was guilty of the felony of being a felon in possession of a firearm, and that this matter would shortly become public. Because this constitutes illegal and unsafe actions in direct violation of her specific job duties, this condition provided the county with just cause to discipline TB. 4/

4/ Of course, the state ultimately dismissed the felony gun charges in exchange for T's guilty plea to three misdemeanors, for which she was fined $712.

The Methamphetamine Lab

As noted above, there is neither evidence nor serious allegation that TB had any involvement in the operation of the methamphetamine lab; law enforcement officials concluded as much. Whether or not TB did have or should have had constructive knowledge of the methamphetamine lab, the County can't hang its existence on her. TB had nothing to do with LB renting out the garage, which was under his exclusive and restricted control, for a methamphetamine lab.

Accordingly, LB's use of the garage under his complete and exclusive control for a meth lab does not give the County just cause to terminate TB.

Presence Of Drug Paraphernalia/TB's Subsequent Misdemeanor Convictions

Holt's termination letter and the County's brief each give a different take on the matter of LB's drug paraphernalia. Neither provides just cause for discharge.

As is discussed more fully below, TB was not responsible for LB's drug paraphernalia, had no ability to prevent its presence in the house, and may not even have been aware of its use. There is nothing in the criminal complaint or the sworn testimony of the arresting officer to even suggest that TB actually possess any drug paraphernalia, in any but the marital property sense. Its presence therefore does not provide just cause for her discharge.

The County also asserts that TB's conviction for drug paraphernalia, disorderly conduct and resisting arrest -- part of the plea bargain by which the felony gun charge was dropped – justifies her discharge. However, those convictions did not occur until April 28, 2003, some

18 months after the termination. Absent extraordinary circumstances not here present, I do not accept after-occurring evidence to justify discipline. As it has been said, an employer "may only rely on those facts as they existed or as they were known at the time of the termination. So-called after-acquired evidence cannot be used to bootstrap the basis for an earlier termination decision." SAFEWAY INC., 105 LA 718, 722 (Goldberg, 1995). Accordingly, the County cannot cite TB's conviction as providing just cause for her discharge.

Drug Sale To Ex-Client

The County's most serious charge concerns drug activity between LB and "CB," the daughter of a very close friend of his who was once a client of hers. Here again, the County has legitimate cause to claim a nexus that could cost TB her job; depending on the nature and the timing of certain events, this charge alone could justify discharge.

For example, I would sustain the discharge on evidence that TB passively condoned CB's drug use with LB while she was a department client, or that TB in any way facilitated their coming together even afterwards. Whether such evidence exists, of course, remains to be seen.

From a notice perspective, it is to the County's credit that it has cited this situation as justification from the outset of the investigation. In his investigative report of November 13, Holt wrote that "drugs from this residence were sold to the daughter of a client of (TB's)." Similarly, in the termination letter the following day, he wrote that "drugs from your residence were sold to a child of one of your clients." (Employer 5, Joint 4)

But there are three problems with these two statements.

First, as Holt acknowledged at hearing, they are technically not true, in that it is the minor child, not the parent, who receives these county services, up to the age of 18.

Second, to the extent the statements describe a straight commercial transaction, they are not supported by the record. Holt could not identify the person who purportedly sold CB drugs, nor provide any other details of the alleged transaction. The criminal complaint (Er. 3) reports BB's confidential tip that CB "obtained" the methamphetamine from LB, again without commercial details. The record establishes only that CB smoked meth with LB; it does not establish that CB or anybody else "sold" her drugs.

This is not to say I approve of whatever arrangement CB and LB had about the drugs; I think hard drugs like methamphetamines are dangerous, destructive and appropriate for aggressive enforcement. But in this arbitration as in law enforcement, the commercial/non-commercial nature of the arrangement is critical.

Because of the greater danger it engenders, commercial drug dealing gets a higher enforcement priority, and incurs greater public hostility, than possession for personal use. Saying that CB "did" drugs with LB sounds bad enough; saying that someone "sold" drugs to CB sounds even worse. But nobody sold drugs to CB – at least, not on this record.

Finally, and most critically, to the extent these statements imply an active client relationship with TB at the time of the drug activity, they are inaccurate and misleading. As Holt explained at hearing, the County discontinues services when the child turns 18, which TB testified CB did in February 2001. That is why Holt clarified that one of the reasons he recommended TB's discharge was that "a (drug) sale had been made to an ex-client of ours."

The key word in that declaration, of course, is "ex."

As stated, I would sustain the discharge upon evidence that TB condoned CB doing drugs with LB while she was the department's client, whether her own or not. But the evidence doesn't show that.

It doesn't show that CB had a drug relationship with LB while she was TB's client, or that TB even knew about it after the relationship began. In fact, the record doesn't show much about CB's drug activity at all, other than the one instance of smoking meth which occasioned her mother calling the police. Given the extent of CB's reaction (2-3 days without sleep according to her mother), there is no reason to believe there was any prior meth use by CB that had gone unnoticed. Nor is there any reason to believe CB smoked the meth in TB's house, or that TB was aware of the incident until after her arrest.

If CB's drug use with LB happened only after she stopped being a department client, and was without TB's knowledge, then there are no grounds for discipline. And TB's unrebutted testimony was that the methamphetamine lab operation began after LB was diagnosed with cancer in August 2001 – six months after CB turned 18. And even once the relationship began, TB testified credibly and convincingly, she was kept in the dark, both by CB and LB, and was devastated to hear from CB about it after the arrest

The possibility of an illicit drug relationship between CB and LB of which TB was unaware is consistent with the record evidence about their pre-existing relationship that existed outside of TB's casefile. "She was a good friend of my husband's because her mother and my husband were good friends as well," TB testified. (Tr. 73-74). Or as BB's initial confidential tip recounted, LB was "a close friend" of CB's. (Er. 1)

TB testified without rebuttal that the only drug activity between CB and LB she knew about – after the fact -- was the single time they smoked meth together, at a site unknown and

not her home. Holt acknowledged that he had no information directly implicating TB in CB's drug activity with LB, nor precisely who provided her with the drugs.

Any drug activity CB had with LB after she stopped being a client of TB's was outside TB's scope of employment, and cannot provide grounds for discipline – especially when the illicit activity was done without TB's knowledge and against her expressed desires.

That the young woman who triggered this crisis in her life was a former client of TB's is a sad irony, and one which shows that the County's efforts on her behalf were not entirely successful. However, once CB passed the age of 18, she ceased being a client of the County's; as of February 2001, her wrongful behavior was not for the County social services department to monitor.

Accordingly, the fact that a former client smoked methamphetamine on one occasion with TB's husband six months after turning 18 and leaving the County's jurisdiction, did not provide the County with just cause to discharge TB.

TB's Home Environment/Failure to Report

Finally, going beyond the specifics of Holt's termination letter, the County cites two interlocking elements of TB's home life as also providing just cause for her discharge – the household environment itself, and her failure to report the situation to proper authorities.

"Home environment," is a catch-all repackaging of the collected elements and allegations, incorporating three different criminal elements – TB's felonious possession of firearms, and LB's two drug offenses. The grievant's culpability in, and knowledge of, the illicit activity is key to considering the amount of discipline appropriate.

Answering the question, "what did the grievant know and when did she know it" is complicated by the significant inconsistencies between her investigative interview and her hearing testimony.

At the November 13, 2001 investigative interview, TB described a homelife of frequent, loud and profane verbal abuse and threats; at the July 2003 arbitration hearing, she testified that LB never physically or psychologically abused her. Based on her interview statement, it would have been very hard for TB to know just what was going on in the garage; based on her testimony at hearing, it wouldn't have been that hard at all.

I find it hard to reconcile the two accounts, noting only that the more recent and sworn testimony was the more moderate and restrained version.

I also find it hard to factor in the element of abuse in understanding TB's testimony. I know that she is the daughter of an alcoholic mother. I know that a former husband broke her nose, and many of her relationships have been abusive. I know that LB is an imposing man, a member of the Savage Nomads Motorcycle Club with a history of alcohol and drug abuse and his own felony gun conviction.

I know that these factors honestly affect TB's ability to testify truthfully about her relationship with LB. What I don't know is just how much. TB's sworn testimony was that the psychological and verbal abuse she talked about during the investigation didn't really happen, and that she had no concerns about safety, so that's the story I'll go with.

I agree with the County that TB's inconsistencies represent a critical misrepresentation on a key point. But I don't agree that this taints the rest of her testimony, because it involves the very matter – potential abuse – which causes the inconsistencies.

There were four separate crimes in TB's home environment, each with its own record about how much she really knew about what was going on.

Obviously, TB should have known that it was illegal for her to possess the firearms. She knew that she had been convicted of a felony, and she knew that she had not received a pardon. Her testimony that she believed she had been pardoned but had lost the paperwork in the bust is not credible, and thus very troubling. Further, she is held responsible for knowing the legal implications of her status as a felon, and for acting accordingly.

I believe she also knew about the meth lab – or was trying very hard *not* to. She knew something was up with the garage, which LB didn't want her around. Because the windows had been shot out by her kids with their BB guns, she could easily recognize the signature sulfur smell. She may not have known what drugs were being cooked, or for whom, or how much, or any other details, but TB would have to be resolutely looking the other way to not understand there was a drug lab in the garage.

TB acknowledged that the situation didn't look good, in this exchange with the County's attorney at the investigative interview:

> ***Mr. Macy:*** Based on the background that you have and the knowledge that you have, and you know your husband's background and you know he's acting really odd the last month or two prior to this going on, did you in any way suspect that there was probably something illegal going on?

TB: Just only when I smelled that stuff and he said it was none of my business or I was going to get my butt beat.

Finally, as to the third and fourth areas of illicit behavior, there is far less evidence that TB knew about LB's personal drug use. She resolutely maintains she didn't, ascribing LB's odd behavior that fall to the August cancer diagnosis; "My husband was already acting wiggy-waggy because he had cancer," she testified, noting that she was familiar with the psychological impact because she herself also had been diagnosed with cancer. (Tr. 97) While that explanation is certainly plausible, the Union must concede that TB was well-aware of LB's addictions and activities, and she was professionally familiar with the behavior of people taking hard drugs.

The question of whether or not TB knew drugs were in the house depends on whether or not LB did them in the house. If LB smoked pot or took cocaine in the house with any frequency, TB would soon have to know about it. If he kept his intake to outside the house, and exercised appropriate discretion over his stash, LB could successfully conceal his drug use from TB, at least for the period involved here.

The arresting officer's testimony was that LB's marijuana pipe and cocaine vial were on his person, in his pants pocket; there is no evidence TB had ever seen them before. And while she was aware there was a bong in the entertainment center, there is no evidence – such as resin residue or dirty water -- that the bong was something that was in use. Although the mere possession of the bong may have been made illegal, its presence does not, on its own, establish that LB was doing drugs. It is also very important that there is no evidence or even allegation that LB did drugs in front of the children – TB testified under oath that he didn't -- or even with their knowledge. (Tr. 107).

"My husband was clean as far as I knew," TB testified, adding that as the situation unfolded that fall she "talked to a couple of my co-workers and social services about it. And one of them asked me if I thought he was doing drugs and I said, I don't think so." Looking back, she said, "all I know is he lied to me."

Whatever her knowledge about the situation, its existence certainly was not her fault.

As of the summer of 2001, there is no evidence LB took or dealt drugs, or that his relationship with TB was in any way abusive. That August he was diagnosed with cancer. It then that LB began a downward spiral of depression and anger and drugs that led later that fall to his doing drugs and renting out his garage to some Indiana meth dealers.

Maybe LB was able to conceal his illicit activities. Maybe TB knew all about them, and lied. Or maybe TB just allowed her hopes for LB's rehabilitation to cloud her perception and keep her from recognizing the obvious signs of drug use. On the basis of this record, I have no grounds for believing any one of these scenarios.

Accordingly, the record establishes that TB did know she was possessing firearms illegally and that she knew or reasonably should have known there was an illegal drug lab in the garage. The record does not establish that TB knew or reasonably should have known about LB's personal drug use.

Although TB was in no way able to prevent LB's drug activity, and may not even have been aware of parts of it, its occurrence and exposure will hurt her at work. The County's imposition of discipline is therefore not unreasonable, because there is a connection between LB's drug activity and TB's job.

For despite my finding that there had not been sufficient community-wide awareness and outrage to justify discharge on the grounds of damage to the County's reputation, I do consider it a given that persons in the family services system – both fellow employees and clients – would shortly know of TB's situation.

The impact of her fellow employees knowing couldn't be positive. As part of their normal duties, family services aides deal with various other social service and law enforcement employees; it is inconceivable that any of her co-workers would consider her with greater respect, confidence and trust than before November, 2001, and the range of response for most would go from mild embarrassment to pity to ridicule to harsh judgment. I do not foresee other employees actually refusing to work with her, but I am confidant that TB's off-duty misconduct will, to some degree, impair her relationship with other social services and law enforcement personnel.

The extent to which this situation which damage TB's relationship with department social workers and other County employees remains unknown, however; the County offered no evidence in that regard. The only department employee to testify for the County was department director Holt, and he did not speak precisely to this point. A social worker did testify, but as a union witness and only on an unrelated point. Thus, while I can safely discern a nexus between TB's home environment and her relations with co-workers, the record evidence falls far short of sustaining discharge. Certainly, as of November 14, there was only Holt's conjecture; it may have been reasonable conjecture, but it was still only that, and that is not enough to support termination.

However bad the situation would be internally, the impact of a client knowing would be far worse. TB's clients include teenagers who are dealing with personal and family situations involving drugs, guns and abuse; they are often defensive, aggressive and adept at psychological games. I can well envision a future client being truculent or spiteful, and hurling TB's own experience back at her in a taunting, dismissive manner. The Union says her personal experience will give her increased credibility; among certain clients, I'm sure it will. But if difficulties arose between TB and a client due to TB's home environment, so too would the nexus to sustain discipline.

Again, though, there is no evidence in the record to support the County's conjecture that TB would have no credibility with clients following her arrest. However much I anticipate such a negative reaction, there was again no testimony supporting this conclusion other than from Holt, whose very decision it is that is under review.

In fact, there was record evidence directly to the contrary – the sworn testimony of two women whose families TB served as a county employee. Both testified they were fully aware of the circumstances of TB's arrest and that TB had been terminated; both testified they would be happy to have TB resume service as their caseworker. One further testified she trusted TB enough to have her serve as a babysitter. Clients of social service agencies are rarely eager to be identified as such, especially when those services are as personal as the ones TB provided; the fact that two of TB's clients would appear publicly, and testify under oath, makes their testimony especially credible and relevant. 5/

5/ Clients weren't the only ones pleased with TB's performance; as noted above, her annual evaluations ranged from good to excellent, with the last evaluations before this incident including nine ratings at "above average" and three as "outstanding."

Having established the level of TB's knowledge of the three areas of illegal activity underway at her home, and the likely negative impact of the criminal behavior on her work performance, the final question emerges – just what was she supposed to do?

What, if anything, was TB required to report, and to whom? Was TB expected to report LB to the police, and turn herself in as well? Was she required to start a file on her own family with social services? The County says yes to one or more of these burdens, stating that TB was "required by her job description and by law" to report her family circumstances to someone "of authority." (Br. 13)

The County thus appears to assert that TB was legally required to inform the police that her husband was doing drugs and running a drug lab in their garage, and that she was

possessing firearms feloniously. Despite the County's assertions, the record does not cite any statute that requires a wife to report her husband's illegal activities to law enforcement authorities, or that compels a person to notify the police of their own unlawful behavior. Moreover, I question how TB could have been required to inform on LB, given spousal privilege. Such duties may well exist, but not in this record.

TB's job description does clearly require that she report to the lead social workers such circumstances affecting her clients and their families; had she encountered precisely this situation affecting a client family and not reported the matter in full to the social worker, she would have been properly subject to discipline.

But on its face, TB's job description does not require her to report to the department the circumstances of non-clients. Other than statutory reporting duties regarding suspected child abuse (not applicable here), I know of no rule or statute requiring a family services aide to file a department report on third parties. Certainly, no such requirement is in the record, other than the county's own assertion.

But the County notes that these children were not just *any* non-client third parties – these were *her* children. Once TB realized that LB was running a drug lab in the garage, and maybe knew about the pot and coke, too, was she required to tell someone at work?

As a successful family services aide, TB knew about drugs, and she knew what parental using and dealing did to children; by November 2001, her efforts at denial notwithstanding, TB must have known that LB was using and dealing drugs, and what that was doing to her own family.

There are three reasons why TB had a duty to report her home situation to the department. The first is that her children were at risk; a home with four rifles and a sword where a potentially abusive alcoholic drug addict is dealing and using hard narcotics is a home in dire need of help from the social services department. But TB failed to recognize the very troubling nature of her own situation, or else she recognized it and failed to act; either way, this would reasonably cause the department to lose confidence in her ability to help *clients* identify and deal with similar situations. It would also likely cause TB's clients to question her counsel as well.

Also, awareness of the situation might have led the department to review TB's caseload, and reassign clients with active drug issues.

Finally, TB should have realized the very great potential (which was in fact actualized) for this matter to become public, which could cause embarrassment to the department. While I

have already found that the evidence does not support discharge on the purely prospective damage to the County's reputation, that is a separate question from TB's duty to inform the department so it could seek to minimize the impact.

It is understandable that TB chose to essentially ignore the problem in hopes that it would go away. She would have been concerned about possible criminal prosecution of herself and/or her husband; she might have worried about possible department intervention that could jeopardize her custody of her children; and she may have feared disciplinary action. And, as noted above, as the victim of domestic abuse (certainly in the past, possibly currently as well), TB was hampered in her ability to take action against LB. These considerations, however, go toward possible mitigation of the discipline rather than elimination of the responsibility.

A further factor in assessing the proper level of discipline is the County's response – or more accurately, its lack of response – once it learned about the situation at the B household. The County knew about the situation as of mid-November 2001, yet as of July 2003 it had taken no steps on its own to open a casefile for TB's children, offer assistance or counseling, or to otherwise provide services. Just as TB had a duty to the department, the Department had a duty to TB to do something more with the information than use it solely for disciplinary purposes.

I agree with the County that TB showed disregard for its interest when she didn't report her husband's illegal drug activity. And I agree that it had the "right to expect" her to do so. Even though TB's children were not her clients, the specific job duties of the family based services aide makes relevant at work the way her children lived at home, and make necessary that she report such circumstances as were present in the late fall of 2001.

Accordingly, after eliminating allegations untrue ("involved with the meth lab") and irrelevant ("subsequent convictions") or both ("drug sale to ex-client,") I find the County had sufficient nexus and record on November 14, 2001 to discipline TB for the following off-duty misconduct:

1. That TB was a felon in possession of firearms;

2. That TB failed to inform the department of the presence of illegal firearms and an illegal drug lab at her home.

Having determined that TB was appropriately subject to discipline, I must now consider the appropriate level.

For several reasons, I do not believe the facts justify immediate termination.

First, there is a need for proportionality between the job duty and the punishment. While advocating a safe and drug-free lifestyle is an important part of the job of a family based services aide, it is far from the position's primary responsibility. If TB had significant, specifically enumerated duties regarding drugs – for example, if she were the designated department liaison to the county's D.A.R.E. (Drug Abuse Resistance Education) program -- her awareness and acceptance of the meth lab would alone provide sufficient nexus for discharge. But as that responsibility is only a fraction of her job duties, so too the nexus is only a fraction of that required for that penalty.

TB's employee record is a further factor, and it rebounds to her favor. As noted, she has enjoyed increasingly positive evaluations, with her latest ratings consisting solely of "above average" and "outstanding." Given the highly personal nature of the position, it is also important that her former clients speak very highly of her as well.

In evaluating the appropriate level of discipline for this misconduct, it is appropriate to review other examples of off-duty misconduct by the County's employees, and the County's response. As the Union notes, in addition to Emergency Government coordinator MG, there have recently been several county employees involved in serious, often highly publicized off-duty misconduct, all of whom were given far more lenient treatment than that accorded TB, such as:

- Undersheriff KB, criminally charged with multiple felonies and misdemeanors directly related to his work (beating a prisoner in his custody); placed on paid suspension for several months before voluntarily resigning;

- BC, a Disabilities Aide with the same county department that employed TB, arrested on May 15, 2002 for allegedly stealing money from the County Youth Commission; he remained at work without any disciplinary action until he pled guilty on April 28, 2003, when he was sentenced to 60 days in jail and placed on a paid leave of absence during his incarceration. BC resigned his position on July 1, 2003, and the County agreed not to challenge his unemployment compensation;

- EA, a cook employed in the County's department of aging, charged with theft for stealing meat from her work site. The County maintained EA on paid leave for approximately one week, when she resigned with an agreement the County would not challenge her unemployment compensation.

- TC, a mental health specialist for the community programs who admitted to abusing alcohol while on the job. Following a short suspension, he was returned to work under a year-long "last-chance" agreement, which he successfully completed.

The County seeks to minimize the impact of this litany by citing the differences in assignment or employment status. The shocking episode of the undersheriff, it posits, is irrelevant because the County had no disciplinary authority over KB; the incident involving BC shows no disparity, it suggests, because had BC not resigned, the County would have acted to terminate him; it suggests the incident involving MG simply has no bearing because the emergency government position did not provide counseling or otherwise work with children; and finally, contrary to the Union's assertion, it argues the incident involving EA is in fact similar to TB's, in that her termination would have been sought had she not voluntarily resigned.

These rejoinders miss the fundamental fact of significantly disparate treatment.

I will grant the County most of its point regarding undersheriff KB. The sheriff has unique constitutional status and statutory power in the operation of the department, and the process by which an undersheriff can be disciplined is not in the record. Accordingly, while KB's conduct shocks the conscience, and his treatment by the sheriff and county seems unduly lenient, there are too many substantive things I don't know about KB's situation to let me draw much of a lesson therefrom.

I do, however, draw meaning from the other three instances, in a manner helpful to the grievant. While they all have somewhat less of a nexus between off-duty misconduct and their jobs than does TB, they received treatment which was so much more lenient so as to appear invidiously discriminatory.

I have already addressed the experience of MG in the context of the County's claim regarding reputation, but it is worth recalling briefly for this part of the analysis as well. Her nexus was only moderate, but her alleged crime serious, and her discipline – as far as this record is concerned – non-existent.

There is a somewhat closer nexus between BC's off-duty embezzlement from the Youth Commission and his duties as a Disabilities Aide. Working with some of the most defenseless and dependent persons in our society, this client-services position provides personal care and may have knowledge of and access to the client's assets. The requirement for probity and honesty for this position – which is placed in the same payroll classification as the family based services aide -- is certainly no less than that for TB's. Yet the County, which fired TB within

six days, retained BC at work for over a year after he was charged with stealing from the Youth Commission. And BC wasn't only convicted – unlike TB, he was also sentenced to jail, and without Huber privileges, for two months. Yet still the County did not act adversely, instead placing BC on paid leave during his incarceration. Finally, 14 months after his arrest, BC resigned – but only after the County agreed not to challenge his unemployment compensation (in contrast, of course, to its decidedly aggressive position against TB's UC claim). I do not criticize the County for its treatment of BC; I simply note how disparate the County's treatment of BC was from its treatment of TB.

An even closer and more evident nexus developed when EA was arrested for allegedly stealing meat from her own Aging Commission worksite. By relying on her job-based access to advance her criminal scheme, EA made the nexus much closer than if she had stolen meat from a grocery store. The consequences of her dishonesty could include public scandal and elderly clients going hungry, yet here again the County acted more leniently toward EA. While it is true that EA, like TB, was separated from the workforce very quickly, the County's consideration of their respective unemployment compensation claims differed completely. Where the County opposed UC for TB (and successfully challenged her benefit on appeal), the County has here again waived challenge to the resigned employee's unemployment compensation.

Finally, although it did not involve allegations of criminal acts, the circumstances surrounding TC – a mental health specialist abusing alcohol while on duty -- certainly implicate job-related misconduct. Yet following a brief suspension, TC was returned to work under a "last-chance" agreement that was in force for only one year.

The record thus shows no fewer than 3 members of this bargaining unit who either remained at work or were put on paid leave after they had been charged with felonies and/or convicted of misdemeanors. For its part, the County did not offer any evidence of any other employees who were summarily fired as was TB, or one whose unemployment compensation it fought.

The County treated TB differently than the other unit members. While I offer no opinion on the County's lenient practices toward the other employees, that is the backdrop against which its treatment of TB must be seen.

The County's only recorded disciplinary experience relating to violence was the KB situation, which offers no guidance due to KB's status as undersheriff. So when I consider the degree to which the presence of the rifles pose a safety risk, I look outside, at the highest standard for off-duty conduct -- law enforcement officers -- and note the number of law enforcement personnel who have remained employed despite actual off-duty misconduct

involving violence. In particular, arbitrators have sustained grievances and overturned the discharge of:

- a police officer convicted of criminal sexual conduct with a teenage babysitter. CITY OF ST. PAUL, MINN., 101 LA 264 (Neigh, 1993);

- a deputy sheriff who physically assaulted and threatened his wife. ORANGE COUNTY, 90 LA 117 (Brisco, 1987);

- a police officer who physically abused his girlfriend and damaged her home upon finding her in bed with another man. MUSKEGON HEIGHTS POLICE DEPT., 88 LA 675 (Girolama, 1987).

The degree of danger and violence which TB presented pales before these examples, which also feature the unique nexus analysis pertaining to law enforcement employees. If these instances don't provide just cause for discharge due to the potential or presence of violence, then neither does TB's.

In the earlier discussion, I rejected the county's claim that TB's 2003 conviction for misdemeanor possession of drug paraphernalia provided just cause for her termination. This matter may, however, be relevant in considering the appropriate remedy. As one author observed, "post discipline conduct may affect the remedy if the arbitrator finds there was not just cause for discharge." *The Common Law of the Workplace: The Views of Arbitrators*, Sec. 6.11 (St. Antoine, ed., BNA Books, 1998).

TB's conviction impacts her situation in several ways. First, by returning the matter to the media and Internet databases, it substantially increases the likelihood of greater public awareness; this results in heightened risk to the County's reputation and a greater likelihood that staff and clients will learn of TB's troubles with the anticipated negative impact on her ability to perform her duties. And because the renewed and permanent publicity would be about TB's conviction and not just her arrest, that risk could be substantial. 6/

6/ Ironically, although the conviction carries with it the implication the allegations were true, I don't believe that TB actually committed these crimes. TB testified convincingly and movingly that she was personally very opposed to drugs, and the County offered no evidence to the contrary. There is nothing in the record to indicate that TB possessed any of the drug paraphernalia, in any way other than joint marital property. The evidence convinces me that the misdemeanor paraphernalia charge was based on the marital property status of a marijuana bong found in an entertainment console in the B's bedroom. Indeed, reading the criminal complaint sworn to by investigator Laudert in conjunction with his testimony, I wonder whether this charge would even have been brought initially had TB not been

present at the time of the search. Since it was, given TB's reasonable fear of being convicted on the felony gun charge, a plea (with modest fine and no time) to the paraphernalia count was clearly called for.

But on this record, is that risk substantial enough to warrant summary discharge? A review of other cases involving drug-related off-duty misconduct shows several instances in which far more serious criminal offenses have also been found insufficient to provide lack just cause for termination. For example, arbitrators have sustained the grievance and overturned the discharge of:

- a state trooper convicted of drunk driving following highly publicized off-duty accident. STATE OF OHIO, 94 LA 533 (Sharpe, 1990);

- a U.S. Customs Service inspector who purchased marijuana while off-duty (discharge reduced to a two-month suspension). U.S. CUSTOMS SERVICE, 90 LA 656 (Jedel, 1987);

- a corrections officer arrested for off-duty possession of marijuana. U.S. PENITENTIARY, 96 LA 126 (Hendrix, 1990);

- a corrections officer who lied about details of theft of his service revolver to cover up sexual relationship with fugitive. HAMILTON COUNTY SHERIFF'S DEPARTMENT, 99 LA 6. (Duff, 1992);

- a 10-year deputy arrested for soliciting prostitution. Broward County Sheriff's Office, 115 LA 708 (Richard, 2001);

- a police officer who drove drunk, beat a woman, and was convicted of the misdemeanor of providing alcohol to a minor. CITY OF ROGERS CITY, 110 LA 92 (Daniel, 1997);

- a police officer convicted of criminal assault for striking teenage son of girlfriend. CITY OF CLEVELAND, 108 LA 912 (Skulina, 1997);

- a police officer who used his office to perpetuate an insurance fraud. CITY OF STAMFORD, 97 LA 261, (Pittocco, 1991);

If just cause did not exist to discharge these law enforcement officers for these documented criminal offenses, I am hard-pressed to find that it existed to discharge TB for her plea bargain to misdemeanor possession of drug paraphernalia.

I therefore find that on November 14, 2001 the county had just cause to discipline TB for her illegal possession of firearms and her failure to inform the department about the presence of illegal guns in her house and a drug lab in her garage, but did not have just cause for TB's termination. I further find that TB's April 2003 conviction for misdemeanor possession of drug paraphernalia provides just cause to affect the remedy for the county's violation of the collective bargaining agreement.

I am aware that I have reached a different conclusion than did the Labor and Industry Review Commissioners who overturned their hearing examiner on the issue of witness credibility, reversed the award of benefits and ordered TB to repay the Unemployment Reserve Fund the $6,138 she had received. Having reached my own determinations as to the facts based on the record put in before me, and with my own responsibilities to interpret the collective bargaining agreement rather than apply the laws pertaining to unemployment compensation, I do not feel constrained by what LIRC did in an associated, but distinct, proceeding.

Accordingly, on the basis of the record evidence, the collective bargaining agreement and the arguments of the parties, it is my

AWARD

1. The County did not have just cause to terminate TB on November 14, 2001.

2. As remedy, the County shall reinstate TB to her position as Family Based Services Aide, making her whole for wages and benefits lost due to her improper discharge, minus nine months wages and benefits, and further offset by wages and benefits TB received during the period from November 14, 2001 to her reinstatement which she would not have earned but for her termination.

3. To resolve any disputes that may arise over the application of the foregoing remedy, I shall retain jurisdiction until at least August 1, 2004, unless the parties jointly relieve me prior to that date.

Dated at Madison, Wisconsin, this 23rd day of June, 2004.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

SDL/gjc
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