

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**DOUGLAS COUNTY**

and

**LOCAL 2375, AFSCME, AFL-CIO**

Case 291

No. 68205

MA-14155

(Gurno Grievance)

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**Appearances:**

**Mr. James Mattson**, 8480 East Bayfield Road, Poplar, Wisconsin, appearing on behalf of Local 2375, AFSCME, AFL-CIO.

**Mr. Ric Felker**, Corporation Counsel, Douglas County, Douglas County Courthouse, 1313 Belknap Street, Superior, Wisconsin, appearing on behalf of Douglas County.

**ARBITRATION AWARD**

Local 2375, AFSCME, AFL-CIO hereinafter "Union" and Douglas County, hereinafter "County," requested that the Wisconsin Employment Relations Commission assign an Arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot was assigned the case on August 8, 2008. The hearing was held before the undersigned on November 25, 2008 in Superior, Wisconsin. The hearing was not transcribed. The parties offered oral arguments at the conclusion of the hearing whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

Did Douglas County violate the collective bargaining agreement when the Grievant was given a letter of reprimand on June 10, 2008? If so, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE**

ARTICLE 2

MANAGEMENT RIGHTS

The county board possesses the sole right to operate the county and all management rights repose in it unless otherwise limited in the collective bargaining agreement or applicable Federal or State law.

A. To direct all operations of the Department;

...

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

...

ARTICLE 6.

GRIEVANCE PROCEDURE

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Role of the Arbitrator: The Arbitrator shall not add to, subtract from, or vary the terms of this Agreement. All decisions must be rendered in accordance with the language of this Agreement. The decision of the Arbitrator shall be final and binding upon the parties.

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ARTICLE 10.

DISCIPLINARY PROCEDURES

Section 1. An employee may be disciplined for violation of reasonable rules of conduct established and distributed by the Employer. Said disciplinary action of the Employer shall be subject to the grievance procedure.

Section 2. Employees may be disciplined or discharge for just cause only.

Section 3. Abuse of sick leave may be subject to disciplinary action.

Section 4. Any employee's disciplinary notices will not be used as part of a progressive discipline process if no subsequent discipline occurs within one (1) year. Disciplinary actions are filed in the employee's personnel file maintained by the Human Resources Department.

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### **BACKGROUND AND FACTS**

The Grievant, Marcia Gurno, is a full-time Social Worker in Child Protection for the County Department of Health and Human Services. The Grievant has held employment with the County for greater than 22 years, albeit with a break in service. The Grievant is the local Union president and has held that position since 1999. The Grievant had no recent discipline, although she was disciplined in 1996 for a time deadline infraction.

The Grievant's supervisor is Brita Rekve. Rekve was hired in by the County in June 2007 to the position of Intake and Assessment Supervisor for the County Health and Human Services Department. Rekve has direct responsibility over the unit of employees that provide child protection services to the County. The Grievant and Rekve have a history of work-related disagreements. The disagreements began soon after Rekve's hire and escalated in May 2008 when the Grievant questioned the case screening process, case reassignments and ultimately, Rekve's management decisions and authority.

Each morning, the Intake and Assessment Unit meet at 8 a.m. to confer and screen new cases. There are usually between seven and nine staff members present who discuss new cases and offer input to determine whether the County will: 1) open the case and investigate; 2) open the case for review; or 3) not open the case. The meetings generally last between 30 and 45 minutes. At the end of each meeting, the group has a practice of "playing" a trivia game from a desk calendar. The total time for the game ranges, but on average, it takes between 10 and 30 seconds. Occasionally, the meeting would resume after the game.

On June 10 after the case discussion portion of the meeting, the Grievant got up from her chair and prepared to leave the room. Rekve asked the Grievant to stay to at the meeting, told the Grievant that she did not have to play the game, but that "our meeting is not over." The Grievant left the room and did not respond to Rekve's final statement.

When the meeting was complete, Rekve met up with the Grievant in the hallway and said to her, "come with me to Steve's office, we need to talk." Rekve was referring to Steve Siebers, Deputy Director, County Health and Human Services Department and Rekve's supervisor. The Grievant responded that she had a meeting to prepare for and continued her work at the photo copy machine. Rekve continued stating, "Please come with me." Rekve then turned and walked toward Siebers' office, believing that the Grievant was following her to Sieber's office. The Grievant did not accompany Rekve to Sieber's office.

When Rekve arrived at Siebers' office, she informed him of what had just transpired. Based on Rekve's description of events, Siebers directed Rekve to issue the Grievant a disciplinary sanction. Siebers recommended that Rekve send the Grievant home, but his recommendation was overturned by Patricia Sheehan, Director, Department of Health and Human Services.

On June 10, 2008, Rekve issued the Grievant the following letter:

RE: Letter of Reprimand

At our screening meeting today you got up to leave when I reached for the trivia game. I informed you our meeting was not over. You said you did not want to play the game. I responded you did not have to but you did need to stay until the meeting was over. You left the meeting despite my directive for you to stay.

I met you in the hallway after the meeting was over. There was no one else present. I asked you to come to Steve's office with me to talk. You said you had a meeting to prepare for. I directed you to come with me. You chose not to.

Both actions are unprofessional and insubordinate therefore, this letter will be filed in your personnel file. Any further acts of unprofessional behavior or insubordination on your part will result in further discipline.

Please be advised the department would like to offer you the opportunity of a meeting with myself, the Deputy Director and union representative to discuss this letter of reprimand.

...

The Union filed a grievance on June 11, 2008 alleging that the Grievant's letter of reprimand was a retaliatory action and in violation of Article 10 of the collective bargaining agreement. The County denied the grievance at all steps placing it properly before the arbitrator.

Additional facts, as relevant, are contained in the DISCUSSION section below.

#### DISCUSSION

The Grievant was disciplined for insubordination. The Union challenges the discipline on the basis that it lacked just cause.

Articles 2 and 10 of the parties' collective bargaining agreement provide the County with the express right to discipline the Grievant, provided there was just cause to impose the discipline. The methodology of a just cause analysis looks first to whether the employee engaged in the behavior for which he was disciplined and second, whether the discipline imposed reasonably reflects the employer's proven disciplinary interest.

Insubordination is the refusal by an employee to obey an order given by the employee's supervisor. Criteria to establish insubordination include: 1) the person giving the order had authority to do so; 2) the order was work related; 3) the order was clear and was understood by the employee; 4) the consequences of disobedience were known to the employee; and 5) the employee had sufficient time to comply. Bornstein, Gosline, Greenbaum, *Labor and Employment Arbitration*, 2D. Ed, 2002 (Matthew Bender & Co. Inc.) 16.04[1].

The Grievant's discipline was issued on June 10, 2008, after two episodes with her supervisor, Brita Rekve. The County asserts that the Grievant was insubordinate when she: 1) got up and left the meeting prior to the playing of the trivia game; and 2) did not follow Rekve to Siebers' office. I will address each incident separately.

I start with the trivia game incident. Rekve is the Grievant's supervisor and therefore, she had the authority to give the Grievant a directive.

Moving to the directive to stay for the trivia game, the County has a practice of ending the daily screening meeting with a short trivia game. The County views the trivia game as a mechanism to "lighten the mood" after a meeting that has been described as "heart-breaking." The Grievant testified that did not find the game to be a good use of her time and that she had determined earlier in the year that she was no longer going to participate in social activities. The Grievant's opinion of whether the trivia game is a good use of her time is irrelevant. Employee wellness and stress reduction are legitimate concerns and the County's decision to expend time addressing these concerns at the end of the screening meeting is appropriate. The Grievant's attendance at the meeting for the trivia game was work-related.

When the Grievant stood to leave the meeting, Rekve recalled that she asked the Grievant to "please" stay and said she didn't need to play the game. The Grievant testified that she understood that Rekve wanted her to stay at the meeting, but that she did not think it was a directive. I concur. Rekve did not direct the Grievant to stay at the meeting, rather, she requested for the Grievant to stay at the meeting. A request is not an order and failure to comply with a request - one that gives the Grievant an option - does not constitute insubordination.

The Grievant had no way of knowing that her decision to leave the meeting would result in discipline. The Grievant had a history of leaving the daily meeting at the conclusion of the case discussion and at no time prior to June 10 did Rekve communicate to her that it was unacceptable to leave or a job expectation for her stay. The facts do not support a finding that

the Grievant was insubordinate when she left the screening meeting prior to the playing of the trivia game.

Moving to the second incident, the County disciplined the Grievant for failing to accompany Rekve to Siebers' office. The County's disciplinary memorandum indicates that Rekve first asked the Grievant to go with her to Siebers' office, that the Grievant replied that she had a meeting to prepare for and that Rekve then directed the Grievant to accompany her.

The Grievant testified that Rekve said to her, "I want you to come with me to Steve's office." Rekve testified that she said to the Grievant, "Come with me to Steve's office, we need to talk," and "Please come with me." Both the Grievant and Rekve agreed that the Grievant responded that she needed to prepare for a Drug Endangered Committee meeting, that Rekve departed toward Siebers' office, and that the Grievant did not follow.

The Grievant believed the intended purpose of the meeting was to "have it out," but she "didn't have time." The Grievant further explained that it was an "emotionally charged morning" and that she was concerned for her well-being given the hostility that she had been subjected to the prior week. The Grievant understood that she was expected to follow Rekve to Siebers' office and given her trepidation as to what would transpire, she made the decision to not follow her supervisor to Siebers' office. The Grievant therefore disobeyed a directive of her supervisor and was guilty of insubordination.

The Union argues that the Grievant's behavior must be evaluated in light of of the circumstances in the workplace at the time of the incident, taking notice of the County's failure to address the harassment issues. The County correctly points out that it is the employee's obligation to obey a lawful order of a supervisor. Such a position incorporates the "obey now and grieve later" rule, but that rule has exceptions. One such exception exists when compliance with the order will produce a harm that cannot be undone. *Id.* At 16.04[3], 16-18. As such, a brief review of the facts leading up to the discipline is necessary.

This record establishes that a conflict existed between County management and the Grievant long before June 10. Siebers testified that he knew prior to June 10 that the Grievant and Rekve had disagreements and explained that the Grievant was spreading an attitude of discontent through the department that diminished the Unit's productivity. Siebers concluded that the Grievant was disrespectful toward Rekve, had counseled her to confront the Grievant and explain appropriate and inappropriate behavior, and had even gone so far as to instruct Rekve to direct the Grievant to stay at screening meetings.

Against this backdrop, the Grievant filed a harassment complaint against Rekve on June 6 with Siebers. Siebers, after consulting with County Human Resources, dismissed the Grievant's complaint without any investigation and communicated to the Grievant that he would not meet with her unless Rekve was present. Sieber's response not only lacked professional judgment and courtesy, it also communicated to the Grievant that her concerns were not valid. The fact that a harassment complaint on its face does not allege a statutorily

protected basis for discrimination does not allow an employer to dismiss the complaint without further investigation. Complainants are not expected to be versed in the formulation of a *prima facie* complaint of discrimination. That is the reason employers have an affirmative obligation to investigate allegations of discrimination.

While it is true this record establishes that the Grievant and Rekve had an on-going dispute, what is more evident is the strained relationship between the Grievant and Siebers. Siebers testified that he knew that the situation was escalating and then the Grievant filed the harassment complaint. It was at this point that the County could have met with the Grievant to address her concerns and begin to mend the relationship between the Grievant and Rekve. Instead, the County proceeded to not only ignore the Grievant's attempts to address and resolve a bad situation, but it compounded the situation by directing Rekve to take control over the Grievant and further, to impose discipline the first chance that Rekve had available. The County chose the most inopportune time to decide to come down on the Grievant. Ultimately, the Grievant's apprehension to meet with Rekve and Seibers was not only reasonable given the circumstance, but justified.

#### AWARD

Yes, Douglas County violated the collective bargaining agreement when the Grievant was given a letter of reprimand on June 10, 2008.

The appropriate remedy is to remove the letter of reprimand from the Grievant's personnel file and expunge all references made thereto in any other files.

Dated at Rhinelander, Wisconsin, this 26th day of February, 2009.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator