BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

AFSCME LOCAL 990

Case 274
No. 68280
MA-14180

(30 Day Suspension and Termination of J.V.)

Appearances:

Ms. Lorette Pionke, Kenosha County Senior Assistant Corporation Counsel, 912 56th Street, Kenosha, Wisconsin 53141, appeared on behalf of the County

Mr. Nick Kasmer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8450 82nd Street, Pleasant Prairie, Wisconsin, 53158, appeared on behalf of the Union

ARBITRATION AWARD

On September 12, 2008 Kenosha County and Local 990, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission requesting that the Commission appoint William C. Houlihan, a member of its staff, to serve as the Arbitrator to hear and decide a grievance pending between the parties. A hearing was conducted on November 11, 2008, in Kenosha, Wisconsin. A transcript was taken and distributed by November 21, 2008. Post-hearing briefs and reply briefs were submitted and exchanged by February 24, 2009.

This Award addresses the 30 day suspension and subsequent termination of J.V.

BACKGROUND AND FACTS

JV, the grievant, was hired by the County in August or September, 2005, as a Social Worker. Mr. V. worked in the Court Services unit until the early fall of 2008. The following excerpt from his position description describes the type of work the grievant performed:

> NATURE OF WORK: This position provides ongoing supervision of delinquent youth, prepares assessments of youth on supervision and families in need of social services; makes recommendations regarding the range of services and level of supervision needed; maintains case records; plans and provides appropriate client services; prepares and presents necessary court documents. Direct supervision is provided by the Social Worker Supervisor. Duties may include some or all of the following: Accepts referrals for supervision and services from the court. Prepares assessments of youth on supervision and their families, determining through interviews, home visits, and collateral investigations the level of supervision and range of services needed and recommending the appropriate course of action. Supervises the compliance of delinquent youth and works with the family and provider agencies to ameliorate family problems and/or further delinquent behavior. Explains the scope of supervision and the division's services and discusses the clients rights and responsibilities in relation to supervision and participation with services. Represents the division and provides testimony in court hearings regarding delinquent youth.
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> . . .
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> QUALIFICATIONS: . . .Knowledge of the principles and practices of social work and professional/ethical requirements. . . . Knowledge of community social and economic problems and their impact on residents. Knowledge of causal factors underlying family behavior and community disorganization. . .

During his tenure in this position, there were no issues with the grievant's performance. He worked independently. His supervisors were not aware of any significant workplace issues. At the time the grievant was hired, the County ran a criminal background check, which produced nothing.

On, or about August 24, 2007, the County posted a job vacancy for a Social Worker position, located in the District Attorney's office, for a Victim/Witness Professional. The grievant applied for the position, and he was subjected to a law enforcement background check. This review was more comprehensive than was the prior criminal background check, and included a review of Civil Court records. The background review revealed that the grievant had been the subject of a Petition for a Restraining Order, filed by a former girlfriend in January, 2006 which alleged:

> Threatens to punch and hit me in my face. Threatens to damage my things such as household items, my vehicle, my clothing. He has mentioned that he would like to smother me with a pillow in my sleep. He threatens to file a restraining order against me, "make my life hell" and "make me pay" if I leave him. That includes calling and e-mailing my employer and other employees about my medical records and my past.

This petition was subsequently dismissed by stipulation of the parties, and the injunction was denied.

The background check also discovered a prior Petition for a Restraining Order, filed in June of 2004, by a second woman, who at the time was the grievant's girlfriend. This woman claimed to be in imminent danger of physical harm, and made the following allegations:

> For over 4 years I have been physically, mentally and emotionally abused. --- has been told repeatedly time after time not to call my house unless it has to do with our daughter ---. He constantly calls and if I hang up he calls right back. He's been told numerous times when he brings --- he must immediately leave my house. He does not feel he has to do this, and then looks around my house, reads my mail, goes in my fridge and cupboards. Searches my house for cigarettes and gets in my house and puts spyware on my computer. After being fed up with him not listen to my wishes, I told him I would call the cops (June 8th 2004 at 7:24 am). And he told me he would get me back if I did. So I dialed 411 to get the number of the RPD to find out who was in my jurisdiction, then he raced out the door and when he knocked to come in I again told him he had to leave --- here and leave. After another 5 mins. he left only because he was going to be late for work.
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> Two weeks ago on May 24th, 2004, my mom and I pulled up to my old house at . . . and my door was open and --- came out and had removed and read a legal notice that was posted on my door. He had no permission to even be in my house. He had gotten in through the basement door. I told him to leave, and of course he didn't until he felt he had to.
>
> This is just recent things. I've been traumatized for 4 years and have nightmares and can't sleep. I am so used to him spying on me that I constantly watch my back to make sure he's not hiding in bushes and such. Also he tries to run everyone's name I know on his work computer only accessed by child protection workers if he has a case to look up. I want to be left alone so I can live a normal life again.

The background check also revealed a stabbing incident in January, 2003 involving the grievant. The police investigated the incident, where the grievant was stabbed with a knife. Ultimately no charges were pursued, because both parties asked that the pending charges be dropped. The police report contains the following account of the event, as provided by the grievant:

> On 1/6/03 at about 1814 hours I responded to St. Luke's ER reference a domestic abuse situation. The victim, V, said his girlfriend C, stabbed him with a knife without his consent. V. was issued a vic./wit. card. V. said he went to C.'s apt. to give her some legal papers. V. said he was let in by C.'s son. V.

said C. was on her computer at the time. V. said C. has been communicating with someone on the internet and he is worried about it. Said they have a daughter together and he is worried about her safety because C. was giving personal information about herself over the internet. V. said he tried to look on the computer to see who C. was talking to but C. pulled the keyboard away from V. V. said he was only trying to move the mouse to check the computer but while he was doing so C. stabbed him in the right thigh with a kitchen knife. V. said he pushed C. away and told her he was calling police. V. said C. ripped the phone out of the wall. V. said he went and grabbed his daughter and left. V. took his daughter home then went to the hospital. V. received about a one inch cut to his right thigh as a result of the incident. V. received two stitches at St. Luke's.

The woman filed the following account of the event:

C. stated her and her baby's father V. had a fight earlier in the night (1600-1800 hrs.) C. stated V. came over to drop off their baby. C. stated V. became upset because she was online with a man friend. C. stated V. grabbed her by the neck and started choking her. C. stated she did not consent to being choked. C. stated she told V. to get out or she would call the police. C. stated V. went into the kitchen and grabbed a knife. C. stated V. repeatedly stabbed himself in the thigh area. C. stated "I'm gonna make it look like you did it." C. stated V. began yelling at her. C. stated she grabbed the phone to call the police and broke the phone. C. stated she grabbed another phone and broke that also. C. stated V. also broke the keyboard to her computer. C. stated she tried to get out of the apartment but V. dragged her back inside. C. stated about 20 or so minutes later V. left. C. did not phone the police at that time. C. stated that she had talked to V. on the phone she fixed. C. stated V. told her he had gone to the hospital and the police came. C. stated V. told her he would not press charges if she did not press charges. C. stated she later decided to phone the police to tell her side of the situation. C. also stated V. was holding (child). C. stated this is not the first time she had been abused by V. C. also stated her son --- and their daughter --- were present during the incident. I tried to speak with --- but he was unable to explain what happened. (--- is only 5). Victim rights form was issued.

Diane Yule is a Personnel Administrator with the County. Ms. Yule was a part of the staffing of the Victim/witness position. Ms. Yule became aware of the background reports and was concerned about the grievant's fitness to perform his then-current position as a Social Worker IV.

Yule's concern were shared by others in the County organization. Robert Reidl, County Director of Personnel Services, indicated that he understood the grievant to be responsible for the care and custody of young people in Kenosha County. He indicated that

some of those young people are victims of domestic violence. Upon hearing from Yule, Reidle convened a meeting which included John Jansen, who was the Department of Human Services Director and Ron Rogers, who was the lead supervisor at the Division of Children and Family Services.

Johnson testified that he had grave concerns over the information relating to the domestic violence incidents. He indicated that the information:

> "Certainly it calls into question their judgment, objectivity, their credibility with the courts and the other systems we touch, and also with the staff in our building...".

Mr. Rogers testified as to his concerns arising from the background documents. Mr. Rogers offered the following testimony:

A: . . .J.V. is in a very independent position as a social worker with the division in which he is required to make many independent judgments daily. He has a caseload of anywhere from 40 to 50 delinquent youth, and those delinquent youth are – frequently come from families where there is a great deal of violence. That's not infrequent at all. And often they could be headed by females of household, single parents where domestic violence is an issue as well as other problems that you find in society like drug abuse and things like that.

Q: So what was your concern?

A: Well, in his role, his main function is, you know, when you think of what he does, he isn't just supervising delinquent children, he is working with the families that those delinquent kids live in. We – the caseload are children. So he – his initial role is to assess the child, assess the parents, assess other family members, get a sense of the parents' parenting ability, but also their ability to solve problems and how they work in society and any – any significant issues that family may be experiencing. So those issues could be if he – he should be looking for signs of drug abuse; clearly for signs of violence in the home because he needs to be working on crisis plans with those families, and clearly any signs of domestic violence as well as any other number of problems.

Q: So how would this background with these two separate women affect his ability to make those assessments?

A: It could potentially cloud his judgment greatly. It could affect it in a number of areas. Clearly in his ability to assess if a problem is occurring, if he himself is perpetrating domestic violence on women, then he may have a very different standard of what is abusive behavior, what is allowable behavior in a relationship, what could cause a significant problem in a family. So his whole – his whole scale on how to decide if something is abusive or violent could be really inaccurate if he himself is abusing women or threatening them with bodily harm.

Q: So you're saying his judgment could be skewed?

A: Very poor judgment in that area. It would also be very hard for us to judge if his judgment was good or bad in his work because the work is very independent. He is meeting with those families in their homes without his supervisor being present. He is meeting with those kids in the community or at school, interviewing them one-on-one, and then he is reporting back to his supervisor what he has heard. He is writing up reports. He is staffing cases. But he's really the person presenting the information to the supervisor. So if his view of things is incorrect or not correct or off kilter, the supervisor would possibly not know that.

Q: So what -- do you have a background – Do you know about domestic violence?

A: Well, I am a licensed clinical social worker through the State of Wisconsin. I have a master's in educational psychology. Prior to getting into management, I used to do individual and family therapy for many years at St. Charles Youth and Family Services. I worked with both delinquent youth and their – their parents, mostly females, head of the household mothers. Frequently those families had a long history of violence in them, domestic violence and just violent behavior between family members. I worked with that group in Milwaukee city for about four years. I worked out in Waukesha County

doing in-home therapy and family therapy for another, oh, gosh, eight or nine, ten years.

Q: Is there – Is there a profile, so to speak, for somebody who is a domestic violence perpetrator?

A: Well, I don't – I'm not portraying myself as an expert in this area, but as a profile, what I am saying is that there are certain signs you tend to look for. There can be – for one thing, domestic violence is very frequently women are by far the majority of the victims in domestic violence. Some of the statistics you'll read is about 85 percent of the perpetrators are men, maybe 15 percent are women.

Q: Is it not uncommon for them to claim they are the victims?

A: The men?

Q: Yes, the men.

A: Yes, there is often --

MR. KASMER: I'm going to object. What is the relevance of this?

The objection was overruled.

THE WITNESS: It's not uncommon for the men who perpetrate domestic violence on women, on their girlfriends or spouses, to say that they – to portray the incident as they themselves being victimized. . . .

At the conclusion of this discussion Reidl determined that before he acted, he should secure an opinion from the County Corporation Counsel. That opinion concluded with the following:

> We do not believe this type of inquiry into the future to be an easy endeavor. We do not believe that every social worker who ever had an altercation with his or her spouse is in itself grounds for dismissal. However, given the nature of the threats that were alleged and the stabbing incident, the incidents described here are such that this employee's caseload can take him into situations not unlike what were so described in the above three incidents and where his judgment may be affected or clouded by his own prior experiences. . . a judgment, for example, to not recommend detention or to recommend that one

> parent over the other be given custody of a child, which could be in error and could result in injury.
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> Normally, the County is not liable for discretionary decisions but negligent retention of an employee who should not be making these discretionary decisions because of a predisposition to perhaps having some bias will expose the County to liability under a cause of action for negligent hiring or retention. Therefore, we believe that this inquiry should be pursued with professional expertise. Our recommendation is that in lieu of termination this individual should be given an opportunity for a professional pyschological evaluation to determine his suitability for continued employment and, depending on the evaluation, perhaps counseling or therapy. We believe this to be fair to the individual and to also fulfill the County's duty to exercise due care.

Based on the concerns of the managers and personnel officials, and the advice of Counsel, Reidl determined to refer the grievant for a fitness for duty/psychological evaluation. The County had directed a dozen of such assessments in the three year period immediately preceding this incident. All of the individuals referred were in bargaining units. None were in this bargaining unit.

A meeting was convened on September 28, 2007. At the meting Reidl gave the grievant the option of resigning his job, or submitting to a fitness for duty evaluation. The grievant considered his options, and indicated that he would take the fitness evaluation. He was scheduled to see Dr. Calvin Langmade on October 24, 2007. He did not attend that evaluation. He was scheduled for a second evaluation on October 31, 2007 and failed to attend that session. The grievant was warned that his failure to attend the evaluation session would result in discipline up to and including discharge.

At some point, the grievant submitted a letter, dated October 24, 2007 from a Racine Psychiatric Doctor, which indicated that the grievant "…is well known to me. He is mentally stable, not a danger to self or others and is able to perform the duties of his job as listed in the job description for Social Worker IV which I have read." The record does not indicate when the letter was provided to the County.

On November 16 the grievant was given a 30 day suspension for insubordination. As the 30 days were coming to a close, the grievant was advised that he would be eligible to return to work following completion of a return to work fitness for duty evaluation. When the grievant refused to participate in the evaluation he was terminated on January 21, 2008. The suspension and termination were grieved, and the grievance was processed through the grievance procedure, including to the County Administration Committee. That Committee held the matter in abeyance to permit the grievant to reconsider the decision not to submit to the fitness for duty evaluation. When the grievant again declined, his grievance was denied.

ISSUE

The parties stipulated the issues for decision as follows:

Did the County violate the collective bargaining agreement when it suspended Mr. V. for 30 days? If so, what is the appropriate remedy?

Did the County violate the collective bargaining agreement when it terminated Mr. V. ? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - RECOGNITION

. . .

Section 1.2. Management Rights. Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

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ARTICLE III – GRIEVANCE PROCEDURE

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Section 3.5. Work Rules and Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner.

POSITIONS OF THE PARTIES

It is the position of the County that the contract requires employees to comply with work rules. The grievant was directed to appear for a fitness for duty exam and refused to do so. His action was insubordination. He was given a 30-day suspension and again ordered to participate in the exam. He again refused to do so. The County had a practice of sending employees for such an exam.

The routine background check of the grievant caused management to question whether he was suitable for his then current position. The Corporation Counsel suggested the fitness for duty exam. It is the view of the County that it has a right by law to send an employee for a fitness for duty exam, arising out of its duty to assure the safety and treatment of its clientele. The County cites authority for the proposition that it has a duty of care in the hire and retention of employees. It could not disregard the information it received about the grievant. The behaviors described in the documents arising out of the restraining orders involve questionable behavior and are serious. The grievant works with vulnerable families.

The County believes the grievant had a duty to obey now and grieve later.

In its reply brief, the County stresses that the grievant had a duty to take steps to assure the County that he was fit to function fairly and to provide services equally. The County notes that the social worker actually provides services, assessments and evaluations using the same standards and models as the psychologist who was scheduled to see V. He refused to participate when his own biases became the issue.

The County draws a distinction between a fitness for duty exam and a psychiatric evaluation. The fitness for duty exam is described as more discreet and limited in scope.

The County claims that the letter from the grievant's psychiatrist was first served on the County at the Arbitration hearing.

It is the position of the Union that the employer may require a psychiatric evaluation only where a substantial basis in fact exists for concluding that, because of mental impairment, the employee might endanger others or that the employee cannot perform the duties of his employment. The Union attacks the psychological exam as a fishing expedition which carries a stigma. The Union cites arbitral authority for the premise that the employer must have some basis for the belief that there is a legitimate and substantial reason to order a psychological exam.

It is the view of the Union that the behaviors that would typically legitimize a psychological exam would be found in the employees workplace conduct. That is not the case here. It is the view of the Union that there has been no showing that the grievant might endanger others or that he could not perform his job. The order to submit to a psychological evaluation was unreasonable. Because of the stigma associated with a psychological evaluation

and the invasion of the grievant's medical privacy, the traditional obey now and grieve later doctrine is inapplicable.

It is the view of the Union that all incidents described involved off duty conduct. No one had ever complained about the grievant's work. Nothing in the grievant's employment record justified the psychiatric exam. It is the view of the Union that the "problem" to be addressed, the reaction of clients to the discovery of the incidents described, may never arise. It is possible no client would have ever discovered the court records.

If the problem was the client reaction to the court records, the psychiatric evaluation does not address the problem.

In its reply brief, the Union notes that nothing in the record establishes that the grievant ever did any of the things described in the court documents. It is the view of the Union that the documents stand as uncorroborated hearsay and should not be accepted as a reliable indication of fact. It is the view of the Union that the County has not demonstrated that the grievant would cause harm to anyone.

DISCUSSION

The County came across documents which contained allegations against the grievant which are shocking. They allege physical and mental abuse, coupled with violence allegedly perpetrated in front of children. Faced with these documents, the county determined to act. Given the nature of the work of the grievant, the decision to act is appropriate for all of the reasons reflected in the quoted testimony of Mr. Rogers.

I agree with the Union's contention that the documents represent uncorroborated hearsay. As such, they do not establish that the grievant committed the acts that are alleged. However, that is not their purpose in this proceeding. The county did not terminate the grievant because of the acts of domestic violence which are alleged to have occurred. What the County did was to insist on a fitness for duty evaluation. To the extent the Union argues this off work alleged conduct lacks sufficient nexus to the job to warrant inquiry, I disagree. The grievant was in charge of evaluating and assessing the needs of troubled families. His was the task of delivering social services to families in need. The conduct complained of in the court documents goes to the heart of the temperament and judgment required of the Social Worker.

The County met with the grievant, and confronted him with the results of the background check. He was offered the opportunity to resign or to submit to a fitness for duty exam. Under the circumstances, it is unclear what the alternatives were. The County could have ignored what it found. That seems not only unwise but potentially negligent. It could have acted and terminated or reassigned the grievant. Either action would have been based on hearsay evidence. What it did was to direct a fitness for duty evaluation. In so doing, the

County limited its actions to an inquiry as to whether or not the grievant was fit to perform the job he currently held. That is an area of legitimate County inquiry.

Two women had come forward with parallel allegations. Their complaints spanned a three year period, including a period of time when the grievant worked for the County as a Social Worker. With respect to at least one of the women, the County was confronted with a she said/he said situation. The exam served the limited purpose of measuring whether or not the grievant was currently fit for duty. Those complaints called that fitness into question.

The Union cites Arbitral authority relative to the employers right to require such an exam. I believe the essence of that authority is to the proposition that an employer can require such an exam where "... a substantial basis exists for concluding that an employee presents such a danger or by reason of mental impairment cannot properly perform his work...some cogent showing...must be made." STANDARD-KNAPP DIVISION, EMHART CORP., 50 LA 833. The substantial basis standard is repeated in JAMESTOWN TELEPHONE CORP., 61 LA 121 and MILWAUKEE METROPOLITAN SEWERAGE DISTRICT, Case 302, No. 59585. The Union does not contend that the County cannot require such a test, but rather that there is not a substantial basis for the test under these circumstances. As noted above, I disagree. The background documents raised concerns that went to the heart of the grievants job.

Under the circumstances, I believe it was appropriate to subject the grievant to a fitness for duty exam. The County has administered such exams to employees in the past, although it is true that none of the examples provided came from this bargaining unit. The grievant was not singled out to be given the exam.

There is a dispute as to how intrusive the exam was to be. The County used the term fitness for duty and distinguished that from a more comprehensive psychiatric exam. The Union made reference to a psychiatric exam, with the potential for a fishing expedition and the inherent intrusiveness into privacy. The terms are used almost interchangeably throughout the record. And so, the letter directing him to the first scheduled exam indicates that the exam is "...to evaluate your ability to perform the functions of your position..." The letter scheduling the second evaluation refers to a "...mental health evaluation..." and indicates that the Doctor will "...conduct a comprehensive and complete evaluation..." The letter which followed his 30 day suspension directed him to take a "fitness for duty evaluation".

Reidl testified that the parties discussed what the exam consisted of. There is nothing in the record that suggests that the grievant would have submitted to a relatively narrow fitness for duty exam, but balked at what he perceived to be a more intrusive psychiatric exam.

What followed was a repeated refusal to take a test that the County was justified in administering. The grievant was given no fewer than four opportunities to take the test. He refused each. Progressive discipline was administered. Under the circumstances, his behavior was insubordination.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 11th day of June, 2009.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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