
In the Matter of the Dispute Between

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES

and

**WISCONSIN CHILD CARE PROVIDERS TOGETHER, AMERICAN
FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCILS 40 AND 48, AFL-CIO**

Case 3
No. 69550
SA-75

Appearances:

Laurence S. Rodenstein, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-2900, appearing on behalf of Wisconsin Child Care Providers Together.

Nicole Bjork, Attorney, Department of Children and Families, 201 East Washington Avenue, Room G200, P.O. Box 8916, Madison, Wisconsin 53709-8916, appearing on behalf of the Wisconsin Department of Children and Families.

AWARD

The Department of Children and Families, Department of DCF, and Wisconsin Child Care Providers Together, American Federation of State, County and Municipal Employees, AFSCME Councils 40 and 48, AFL-CIO, AFSCME-CCPT or Union, are parties to an agreement that provides for a binding grievance mediation process to resolve grievances between the parties. The Union, with the concurrence of DCF, requested the Wisconsin Employment Relations Commission to appoint Commissioner Susan J.M. Bauman to serve as a third party neutral to resolve the instant dispute. A meeting was convened on March 25, 2010, in Madison, Wisconsin. At the meeting all parties had an opportunity to express their views and concerns. Thereafter, the parties agreed to the entry of a Consent Award which encompasses the suggestions of the parties as well as the Mediator. Unfortunately, however, the parties were unable to come to a complete agreement regarding the wording of said Consent Award. Accordingly, on May 24, 2010, the undersigned sent a message to the parties:

I will be drafting an award in accordance with our discussions before the end of the week. As we have been unable to agree on the language of a Consent Award, I will issue an award based, in large part, on the content of the settlement discussion. However, if the parties wish to go to hearing on this matter, and have the ability to present testimony and make argument, I will be happy to schedule a hearing. Please advise by no later than Wednesday of this week as to your desire to either have me issue an award or go to hearing.

Each party responded and advised that a hearing was not necessary as the parties had had ample opportunity to express their views and opinions as to the facts of the case and the language of the proposed Consent Award. Based on the aforesaid agreement of the parties, the undersigned issues the following award.

FACTS

The instant grievance arose from an incident that occurred at Friends, a family child care facility run by Patti Harvat, hereinafter Harvat or licensee, in Wauzeka, Wisconsin when a child suffered an injury as a result of falling off a changing table. On March 20, 2009, Harvat signed a License with Conditions Stipulation which reads as follows:

The Department of Children and Families (the Department) and Patti Harvat, the licensee, enter into this stipulation for continued licensure of Friends, located at 106 Rosemary Street, Wauzeka, WI,

The purpose of this agreement is to define appropriate action for the licensee based upon Chapter 48, Wis. Stats., and Wisconsin Administrative Code DCF 250, in order to protect and promote the health, safety and welfare of children being cared for in the family child care.

The Department has the authority, pursuant to Chapter 48, Wis. Stats., and DCF 250, Wis. Administrative Code, to license, inspect and regulate family child care to ensure compliance with the applicable rules and regulations.

The Department has concerns regarding children being diapered or clothes changed above floor level due to an injury sustained by a child on March 16, 2009.

Therefore, the Department and licensee mutually agree to settle the matter referenced above and further stipulate the conditions for licensure as follows:

1. That by executing of this agreement, the Department will continue a family child care license with conditions as specified herein to the licensee.
2. As per the verbal agreement between Nancy McVary, Licensing Specialist and the Licensee, Patti Harvat on March 17, 2009, all children who require diapering will be diapered on the floor.
3. The Licensee shall perform all children's diapering and/or changes of clothing on the floor. At no time will a child be placed on any table or structure that is above floor level to perform these tasks. The licensee shall designate an area on the floor dedicated to diapering children. All diapering requirements as per DCF 250 will be followed.
4. This stipulation is for all child care providers at this facility to include the Licensee, substitutes, emergency back-up persons, etc.

That this agreement is effective only if the licensee posts the stipulation with the licensee's license from the Department, in a location where parents can see it during the hours of operation.

That it is expressly agreed that in the event the licensee fails to comply with any of the terms of this stipulation, the Department may take appropriate enforcement actions under the provisions of DCF 250.11(8), Wis. Admin. Code and s. 48.715, Wis. Stats., including license denial or revocation, order or forfeiture to obtain compliance with this agreement.

That this stipulation is effective only if an executed copy is returned to the Department by the licensee within five days of the receipt of the stipulation by the licensee.

The licensee, for and in consideration of the terms of this stipulation, does hereby for herself and her heirs, personal representatives and assigns, fully and forever release and discharge the State of Wisconsin and the Department of Children and Families, its employees, successors and assigns, from any and all claims, damages, charges, grievances, actions, complaints, rights of action, both known and unknown, costs, loss of wages, expenses, compensation, attorneys fees, and any other relief, based on or growing out of the subject matter of the grievances, charges, complaints, appeals or actions withdrawn or dismissed pursuant to this document or any act or decision of the department occurring prior to the execution of this stipulation. The licensee agrees that this document is in full and final settlement of all her claims, both as to the question of liability on behalf of the department and its employees, and as to the nature and extent of any damages which may be or may have been allegedly suffered.

By letter dated April 2, 2009, Harvat was sent a Notice of Direct Forfeiture Assessment and Appeal Process whereby she was assessed a forfeiture of \$1,000.00 for allegedly failing to protect the health, safety, and welfare of a 7-month child on March 16, 2009. The Notice advised Harvat that she had ten (10) days from the date of the Notice to file an appeal with the Division of Hearings and Appeals, Department of Administration.

Harvat did not file an appeal and made arrangements to pay the forfeiture in five (5) payments of \$200.00 each, which forfeiture has been paid in full.

On October 14, 2009, AFSCME-CCPT filed a grievance on behalf of Harvat alleging that the Department violated Article 3 Section A (2) and (3), Sec. C (13) and (14) of the Agreement between the Union and the Department due to the Department's alleged violation of the Stipulation by imposing a forfeiture after the Stipulation was in place and no new violations had occurred.

At the mediation meeting, the Union contended that Article 3 – Child Care Provider Bill of Rights, Section A(3): the right to substantially consistent and fair application of the rules among all state regulators had been violated.

DISCUSSION

The major contention of the Union in this dispute is that the Stipulation Harvat and DCF entered into represented full resolution of the events of March 16, 2009, and that the subsequent assessment of a \$1,000.00 forfeiture was inequitable and inappropriate. DCF, on the other hand, although admitting that the Stipulation was not as clearly written as possible, contends that the Stipulation refers only to one violation of the administrative code and that the forfeiture relates to a different violation of the code, even though all code violations arose from the same event: a child falling off the changing table. DCF further contends that it is necessary to enter into such a stipulation as quickly as possible after it becomes aware of a violation so as to allow the center to continue to operate, even though further investigation might reveal additional violations and the need for additional punitive action, such as the forfeiture herein.

As a remedy for the alleged violation of the Memorandum of Agreement between the Union and DCF, the Union seeks repayment to Harvat of the \$1,000.00 forfeiture. DCF argues that Harvat failed to appeal the forfeiture during the ten (10) day time period and, therefore, the forfeiture must stand. While I am sympathetic to the Union's argument that Harvat did not appeal due to lack of knowledge of the manner in which the system works, I cannot disregard the clear wording of the Notice of Forfeiture and the statutory scheme of which it is a part. Accordingly, I will not order that DCF refund the \$1,000.00 to Harvat.

I am not, however, persuaded that DCF needs to act as quickly to obtain a stipulation with respect to uncontested violations that it cannot put a licensee on notice that an investigation is on-going and that additional stipulations or forfeitures may be required as a result of an incident. Additionally, I am not persuaded that a licensee need release the State of Wisconsin of any liability without a parallel release by the State whereby it acknowledges the actions that it has taken in a particular situation is all that will occur, or notifies the licensee of the potential of additional action.

It is clear to the undersigned that the licensee herein, Patti Harvat, has not been treated in a fair and consistent manner by representatives of DCF. Accordingly, the following practices shall be adhered to by DCF in future situations:

AWARD

1. The current Stipulation between Patti Harvat and DCF will remain in place.
2. The Stipulation will be posted by Ms. Harvat for a period of two (2) years beginning March 20, 2009. Ms. Harvat will continue to comply with the terms of the Stipulation thereafter.
3. The parties agree that the nature of the Stipulation executed by Ms. Harvat gave rise to a disagreement as to its application, resulting in the filing of the instant grievance.
4. DCF agrees that in the drafting of future stipulations between a licensee and DCF under circumstances similar to the instant situation, the stipulation shall be specific as to the rules that were violated and shall encompass all issues addressed by the stipulation.
5. In the event that DCF intends to conduct an on-going investigation as a result of events of the same date as that giving rise to the stipulation, the aforesaid stipulation shall specifically state that there is an on-going investigation that may result in additional claims of statutory or code violations which could result in the assessment of forfeitures or other penalties.
6. Any stipulation shall provide for appropriate waivers by both the State and the licensee with respect to the matters covered by the stipulation.
7. Unless a provider has legal counsel or other representation, DCF licensors will give providers at least 10 business days opportunity to review any proposed stipulations with an AFSCME-CCPT representative unless there is a health and safety issue in which case there will be a three (3) business day period. This provision shall be included in all future stipulations.
8. This order applies to stipulations that are entered into in lieu of a potential enforcement action arising out of rule or law, or issues that give DCF concerns about the health, safety and welfare of children.

Dated at Madison, Wisconsin, this 3rd day of June, 2010.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Grievance Committee