

IN ARBITRATION

BEFORE

MICHAEL E. de GRASSE, ARBITRATOR

STATE OF WASHINGTON,) AAA No.: 75 390 00333 07
DEPARTMENT OF SOCIAL AND)
HEALTH SERVICES,)
Employer,)
and) AWARD OF ARBITRATOR
WASHINGTON FEDERATION OF) (Mary Casady Grievance)
STATE EMPLOYEES,)
Union.)

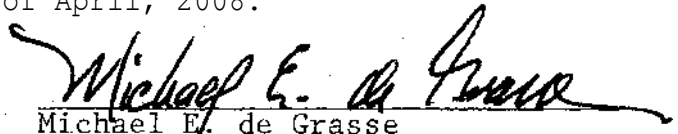
By its disciplinary demotion of the grievant, the Employer violated the collective bargaining agreement of the parties. The disciplinary action taken against the grievant lacked just cause.

Therefore, the grievance is sustained.

The grievant shall be restored to her former position and made whole.

In accordance with the stipulation of the parties, the arbitrator will retain jurisdiction of this case _ for a period of forty-five days following the date of this award to resolve any controversy concerning its implementation.

Dated this 14th day of April, 2008.


Michael E. de Grasse
Arbitrator

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ATTORNEY GENERAL'S OFFICE
SPOKANE

MICHAEL E. de GRASSE, ARBITRATOR

STATE OF WASHINGTON,)	AAA No.: 75 390 00333 07
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES,)	
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Employer,)	
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and)	OPINION OF ARBITRATOR
)	
'WASHINGTON FEDERATION OF)	(Mary Casady Grievance)
STATE EMPLOYEES,)	
)	
Union.)	

The arbitrator was selected by the parties pursuant to the terms of their collective bargaining agreement. The American Arbitration Association provided case management services.

The hearing was held in Yakima on February 20 and 21, 2008. The Union was represented by Gregory M. Rhodes, Younglove Lyman & Coker of Olympia, WA. The Employer was represented by Assistant Attorney General Patricia A. Thompson.

Testimony was taken under oath or affirmation, and exhibits were received. A verbatim transcript of the hearing was prepared by Katherine VanGrinsven, Certified Shorthand Reporter.

At the outset of the hearing the parties stipulated that: (1) the grievance is arbitrable; (2) the grievance is properly before this arbitrator; (3) this arbitrator

is authorized to resolve the grievance. The parties agreed that the arbitrator would retain jurisdiction of this case for a period of forty-five days following the award to resolve any controversy concerning its implementation.

In lieu of oral closing argument, the parties elected to write posthearing briefs. Those briefs were received in accordance with the schedule established by the parties. Accordingly, this case was deemed submitted for a decision on April 7, 2008.

An award has been rendered sustaining the grievance. This opinion is not part of that award. Rather, it is merely the arbitrator's rationale.

ISSUES PRESENTED

The parties stipulated that these issues were to be resolved by the arbitrator.

1. Was there just cause to discipline the grievant?
2. If not, what is the remedy?

FACTS AND CONTENTIONS

This case arises from the grievant's performance as a social worker in Child Welfare Services of the Division of Children and Family Services, Region 2, of the Washington State Department of Social and Health Services. In June, 2006, the grievant was assigned to a case arising from a near drowning of a young child allegedly resulting from his mother's neglect. At the

initial stage of the dependency proceedings filed by the Employer in the Yakama Nation Tribal Court, the child was removed from his mother's home, and placed with a relative. The grievant then assumed responsibility for providing services to the mother and the child. A formal fact finding hearing was set on October 3, 2006, after at least one intervening continuance. The grievant failed to attend that hearing, and the dependency petition was dismissed without prejudice. The grievant was demoted from social worker to secretary because, in the Employer's view, her failure to attend the October 3rd hearing, and her consequent behavior were egregious and dishonest.

In his testimony, Kenneth Nichols, Regional Administrator, acknowledged that social workers miss court dates and suffer little, if any, discipline. (I Tr. 68:6-15) The distinguishing feature of the instant case, according to Mr. Nichols, was the grievant's behavior after the miss. As stated by Mr. Nichols (I Tr. 68:23-25):

So missing court dates is not unique, but the issue is making sure that their supervisor knows so they can help with that.

While the Employer's disciplinary letter to the grievant criticized some of her work on the dependency case prior to October 3, 2006, the specific grounds for demoting the grievant are found in the Employer's

characterization of the grievant's absence from the October 3rd hearing, and its aftermath.

In the disciplinary letter to the grievant, Mr. Nichols stated (Employer Ex. 4):

This demotion is in accordance with Article 27 of the Collective Bargaining Agreement (CBA) between the state of Washington and the Washington Federation of State Employees. This action is a result of your putting a child . . . at risk by your failure to provide required case management services. You failed to appear in court and . . . was returned home without a safety plan or appropriate services being in place. Additionally, when you became aware he was returned home, you did not attempt to notify management staff so they could assess the risk to the child. You falsified an affidavit to the court regarding the reason you failed to appear and only modified the document because your supervisor refused to sign it as written.

Although you have not received any prior disciplinary actions, I have considered the egregiousness of your actions and your trustworthiness to safely and appropriately perform services for the vulnerable children and families on your caseload. As a social worker, you are entrusted with a high level of responsibility for the safety of the children and families we serve. In this case, your failure to perform your social worker duties put a toddler at risk of serious harm or death. However, your inaction was even more blatantly irresponsible when you became aware of the child being returned home, you did not take any action to mitigate the risk to the child or report this to anyone in your chain of command. Leaving this child in a situation where he was at serious risk to harm belies

your primary duties as a social worker for this family and is totally inexcusable. When questioned about this, you were not forthcoming in the initial affidavit that you prepared for the court. Your actions were so totally inappropriate and negligent I have no faith in your ability or credibility to safely perform the duties required of your position.

The Union rejects this conclusion totally and absolutely.

The Union seeks an award reinstating the grievant and making her whole.

The Union denies the Employer's assessment of the grievant's misconduct. In the Union's view, missing court dates is not uncommon for busy social workers, and, quite properly, has never occasioned a regular disciplinary response. Thus, the Union disputes the Employer's conclusion that the grievant's absence from court on October 3rd fatally undermined her effectiveness as a social worker.

Additionally, the Union contends that the Employer was not genuinely concerned that the child in question was truly at risk. The Union finds support for this contention in the Employer's handling of the dependency petition that was refiled after the October 3rd dismissal without prejudice. Then (October 6) the court denied the Employer's request to remove the child from his mother's care, but allowed the Employer to reapply for relief, if warranted, pending the formal fact finding hearing scheduled for November 30, 2006.

No further relief was requested by the Employer, and the dependency case was dismissed on November 30, 2006.

As to the claim that the grievant falsified an affidavit, the Union argues that the Employer has failed to carry its burden of proof. Absent the affidavit in question (which was never produced), and in the face of the grievant's testimony denying falsification, the Union concludes that this claim of serious misconduct cannot be sustained. Finally, the Union notes the grievant's good work record, testimonial support and lack of prior discipline all of which, the Union contends, show a lack of progressivity and disparate treatment.

RATIONALE

The Employer demoted the grievant because of her purportedly egregious job performance that jeopardized a child's physical safety. As the Employer sees the matter, the grievant's misconduct was composed of three elements: the missed court date on October 3rd; the grievant's action and inaction after October 3rd; and the falsified affidavit. These elements combined, in the Employer's view, to justify its demotion of the grievant from social worker to secretary because the Employer had lost all faith in her ability and

credibility.

As acknowledged by the Employer, the grievant's failure to attend the October 3rd hearing, standing alone, would likely not have resulted in discipline. Rather, the crucial question is whether the grievant's behavior on and after October 3rd affected the child who is the subject of the dependency case that was dismissed on that date. The Employer's conclusion that the grievant's behavior exposed the child to significant risk of harm must be examined, therefore, in light of all the evidence.

The Employer laudably and necessarily regards the safety of children as paramount. Thus, filing the initial dependency case to which the grievant was assigned in June, 2006, cannot be faulted. The child was removed from his mother's care, and the matter was continued to October 3, 2006. During the June to October period, the mother apparently had liberal visitation without incident. By October 3, 2006, it is not clear that the child was at risk in any significant sense. Events after October 3rd contravene the Employer's assertions in this case concerning the gravity of the child's situation.

Weight must be given the court's refusal to remove the child from his mother's home on October

6th when a refiled dependency petition and request for removal of the child from his mother's custody was presented by the Employer. No further effort was made to secure the child away from his mother, and the second dependency petition was dismissed at the time of the formal fact finding hearing on November 30, 2006. Apparently, no representative of the Employer appeared on November 30th, and nothing has happened since.

On these facts it cannot be concluded that the grievant actually jeopardized the child. The court, itself, found no basis for removing the child from his mother's custody in October, 2006. The return of the child to his mother's custody that the Employer contends was the great risk that the grievant's negligent job performance caused was not appreciated judicially. Indeed, it is hard to reach a different conclusion given the Employer's own action in the refiled dependency case. Simply put, the Employer's management of the second dependency case undercuts its conclusion that the grievant behaved egregiously by exposing the child to the very risk of harm that the Employer was striving to avert.

Although the risk of harm to the child was not as stated by the Employer, there remain questions concerning the grievant's behavior after she realized

that she had missed the October 3rd hearing. The no harm no foul rule does not avoid all grounds for discipline in this case. In early October, 2006, it must be noted, both the grievant and the Employer believed the child to be at risk. That this belief has been overstated by the Employer does not relieve the grievant of responsibility for her actions on and immediately after October 3rd.

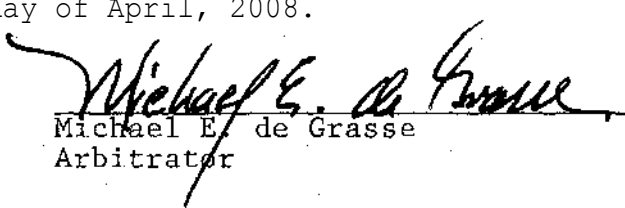
Arguably, the grievant should have attempted to reach her supervisors who were away from the office on October 4th by cell phone. Yet, her overall conduct on October 4th and 5th indicates no plan to conceal misbehavior. If the grievant had been bent on concealment on October 4th, she never would have communicated with the prosecutor who was representing the Employer in the dependency case. She would not have been forthright with him concerning the missed court date. She would not have followed his instructions concerning the court or her supervisors. Equally important to an evaluation of the grievant's behavior is an evaluation of the effectiveness of the response advocated by the Employer. It is not at all clear that a cell phone call on October 4th to off campus supervisors would have been more effective than the course actually chosen by the grievant on that day.

Concerning the claim that the grievant falsified an affidavit, the Employer fails in its proof. The Employer did prove that the grievant submitted a draft to a supervisor who criticized the draft. Neither the draft nor the final product was Offered. The grievant denied falsification. No evidence undercut the grievant's denial. The record evidence militates against any conclusion that the grievant falsified an affidavit.

CONCLUSION

On the basis of the evidence and the collective bargaining agreement of the parties, the grievance should be sustained. The grievant should be restored to her former position and made whole.

Dated this 14TH day of April, 2008.


Michael E. de Grasse
Arbitrator