

ARBITRATOR'S DECISION AND AWARD

IN THE MATTER OF ARBITRATION

Between

The State of Ohio
Department of Administrative Services
Office of Collective Bargaining

and

District 1199
The Health Care and Social Service Union
Service Employees International Union
AFL-CIO

Arbitration No. 16-00-930507-0030-02-12

Discipline

APPEARANCES:

For the Employer:

Gretchen Green, Human Resources Administrator
Ohio Department of Human Services
Georgia M. Brokaw, Labor Relations Specialist
Ohio Department of Administrative Services, OCB

For the Labor Organization:

Harry W. Proctor, Organizer
Sherry J. Bush, Grievant
Michael Robison, Delegate

James L. Ferree
Arbitrator

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Authority

Grievant Sherry Bush filed a grievance on May 27, 1993 alleging that the Ohio Department of Human Services unjustly disciplined her by suspending her twenty (20) working days in violation of Articles 5, 6 and 8 of the contract. A third step meeting was held and the grievance was denied on September 17, 1993. Pursuant to Article 7 of the Agreement between the parties which is effective from July 1, 1992 through May 31, 1994, the grievance was submitted for arbitration. The hearing was conducted October 5, 1993, at which time the parties made oral arguments and waived briefs.

Issues

The parties failed to reach agreement on a statement of the issues. The State submitted a written proposed issue statement: "Was the discipline imposed upon the grievant for just cause? If not, what shall the remedy be?" The Union proposed language to the effect of, "Was the discipline progressive?" and requested a remedy including removal of the discipline from the Grievant's personnel records and payment of backpay. The "Statement of Grievance" on the Grievance Form reads, "Ohio Dept. of Human Services has unjustly disciplined Sherry Bush (suspend for twenty (20) working days, in violation of the contract including but not to the following: Contract Article(s) and Section(s) Art. 5, Art. 6, Art. 8 sections 01, 02 and 03. *Resolution Requested* The union request that Ms. Bush be made whole in every way, including rescinding the suspension of twenty (20) working days (Art. 7.09 "

In light of the above, I adopt the State's proposed issue statement because it is broad enough to encompass all issues raised in this proceeding.

Summary of Facts

In what will be referred to here as the "first situation," the county agency responsible for investigating reports of child abuse requested assistance from the Grievant's office. In the course of investigating the complaint at a day care center, the Grievant obtained no confirmation of the alleged abuse but received reports of other possible misconduct. She had not acted on these reports when her supervisor, in responding to an inquiry, found references to the misconduct in the Grievant's notes. The supervisor reported these new allegations to the county agency which had initiated the investigation, and that agency subsequently found that child abuse had occurred.

During a series of inspections of another site which was being developed as a day care center, which will be called the "second situation," the Grievant advised the license applicant that the Grievant wanted certain actions taken before she would recommend approval of the application. In the course of one discussion, the applicant complained of treatment of children at an existing center, but the Grievant did not report the allegations to the appropriate county agency. After the Grievant's supervisor rejected the Grievant's

report on the license application and the Grievant held further discussions with the applicant, the applicant complained to the Grievant's supervisor that the Grievant had held the applicant to a higher standard for licensure, because of the applicant's race, and had caused the applicant to suffer unnecessary expenses and loss of income.

The Grievant's supervisor and the chief of the Child Day Care Licensing Section investigated the above situations and initiated disciplinary action against the Grievant which resulted in a suspension without pay of 20 working days.

Pertinent Contract Provisions

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08 (C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this Agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

ARTICLE 6 - NON-DISCRIMINATION

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, union affiliation and activity, handicap or sexual orientation, or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio. In addition, the Employer shall comply with all the requirements of the federal Americans with Disabilities Act and the regulations promulgated under that Act. The Employer and Union hereby state a mutual commitment to affirmative action, as regards job opportunities within the agencies covered by this Agreement.

ARTICLE 8 - DISCIPLINE

8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

- A. Verbal Reprimand
- B. Written Reprimand
- C. Suspension
- D. Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

8.03 Pre-Discipline

Prior to the imposition of a suspension of more than three (3) days, demotion or termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story. This opportunity shall be offered in accordance with the "Loudermill Decision" or any subsequent court decisions that shall impact on pre-discipline due process requirements.

Chronology of Events

The Grievant has been employed nearly eight years as a Facilities Standards Representative 2 in the Child Day Care Licensing Section, in the Bureau of Child Care of the Ohio Department of Human Service's Office of Child Care and Family Services. Her primary function is to inspect day care facilities to ensure that they meet State requirements concerning the physical plant, staffing and operations. Hence, the "usual working title" of her position is "day care licensing specialist." Her work includes pre-licensing inspections and assistance to applicants and post-licensing follow-up to assure continued compliance, which sometimes is in response to complaints ("Position Description," Employer Exhibit 2). Employees in this job are considered "mandatory reporters" who are required by law to report allegations of child neglect or abuse.¹

¹ Chapter 5000 of the employees handbook (Employer Exhibit 3) states, in part:

5010 Legal Basis

The director of human services shall establish procedures to be followed in inspecting and licensing centers. . . .

5030.1 Receiving and Recording Complaint

8. At any time a complaint alleges abuse or neglect, or where in the course of an investigation the specialist determines it is possible that abuse or neglect has occurred, the specialist must immediately report those allegations to the local protective services agency. The complainant may not specifically mention abuse, only allegations which refer to spanking, slapping or other forms of harsh and/or inappropriate discipline; or children being left without adequate supervision. The following guidelines will assist in identification of reports which must be referred to protective services:

1. Any report is to be referred which alleges a sexually oriented act by an adult or adolescent toward a child.
2. Any report is to be referred which alleges that a caregiver caused physical injury to a child which required medical treatment, or which indicates that medical treatment was warranted, if not received.
3. Any report is to be referred which alleges that a caregiver's lack of attention to a child caused an injury which warranted medical treatment, whether or not medical treatment was actually received.
4. Any report is to be referred which alleges that corporal punishment of any type resulted in bruising or any other injury.

5030.4 Investigation Activities

Footnote continued on next page.

The Grievant is one of 40 day care licensing specialists who oversee more than 3200 facilities in the state. The grievant works in the Columbus District Office and was assigned to 107 licensed day care centers in Scioto, Clark, Franklin and Fairfield counties. She prepares a proposed plan of each inspection, for approval by her supervisor, before performing the work. Inspections are conducted on-site by the inspector alone, generally, and may be routine periodic inspections of licensed facilities, unannounced inspections investigating complaints, or visits to sites which have made application for a license. An inspection of a licensed day care center results in a letter from the licensing specialist which may note deficiencies found and corrective action necessary. A copy of the letter serves as the specialist's report to his or her supervisor regarding the inspection. Inspections of the site of an applicant for a day care center license ultimately result in the licensing specialist's report recommending issuance of a license, which is reviewed by the supervisor.

The events giving rise to the discipline which is the subject of the grievance in this case occurred at two sites during January and February, 1993. To put the events in context, it should be known that the Grievant had been working with an applicant for licensure of a new day care center since the applicant's initial contact in March, 1992. The applicant requested an inspection in June, 1992 but agreed that the site was not ready for inspection until August, at which time the building was still undergoing renovation and the owner had not secured the required on-site play space. After further visits to the site and recommendations by the Grievant, the application packet was submitted to the Grievant's supervisor for approval of the license on January 11, 1993. The next day, the applicant telephoned the field office of the Agency and complained to the Grievant's supervisor about the Grievant's conduct.² As a result of the supervisor's review of the application

7. If the complaint allegations include abuse or neglect, the specialist must immediately telephone the local protective service agency. The specialist is to give the protective service agency as much information as is available about the alleged abuse and any other information requested about the complaint allegations. The specialist is to advise the protective service agency that we plan to do a licensing investigation, clarify parallel investigatory roles, and request that the protective service agency notify us of their findings upon the conclusion of their investigation.

The supervisor is to send a confirming letter to the protective service agency including (1) a summary of the allegations; (2) our unit's investigative plans; (3) clarification of joint or parallel investigative roles; (4) a request for notification of the results of the protective service agency's investigation. The supervisor is to be the contact person for the protective service agency and is to coordinate communication between the licensing unit and the protective service agency.

The supervisor will also immediately telephone the report to the unit administrator. He or she will relay the report to the Division of Family and Children's Services, the Office of Public Information, and other designated administrative staff according to the department's abuse protocol.

² Although Grievant's supervisor testified that the telephone call was February 14, the third-step Response to the prior grievance (Union Exhibit 2) indicates that it occurred January 14, 1993. In light of the applicant's confirming letter

Footnote continued on next page.

packet, she issued the Grievant a written reprimand (Union Exhibit 3) on February 1, 1993 for "errors in the licensing packet" and "giving inappropriate information to a potential day care operator." That warning was the subject of a grievance which is not part of this proceeding. A hearing was held in that matter on April 15 and the grievance was denied at third step on May 14, 1993. Thus, it was in the context of an inquiry into the complaint of the Grievant's handling of the application that the first event considered here arose.

The "first situation:" on January 28, 1993 an anonymous person, presumably a parent, reported to the district office that a day care teacher had spoken to children in a harsh manner, yelled a lot, and pulled children around by the arm. The complaint was assigned to the Grievant, whose plan to make an unannounced visit to the center was approved by her supervisor on February 3 ("Complaint/Disposition Report", Employer Exhibit 6, page 2:). The inspection did not substantiate the complaint, but on February 10 another complaint was received about the same teacher. This complaint was transmitted to the field office by a county children's protective services agency, which is the agency responsible for investigating child abuse and neglect. The county agency had received an anonymous report which included allegations of failure to maintain standards necessary for licensure as a day care center and allegations of a teacher "observed choking children, putting them in closet, threatening them" (Employer Exhibit 6, page 1). According to the District Office employee who wrote the form based on the county employee's telephone call, the source claimed that he "had made complaints to District Office (where Grievant is employed) who contacted [the day care center manager's] friends who also will not correct situation." The form noted that the county agency requested assistance because "CSB cannot pursue w/o child/victim name." The complaint was assigned to the Grievant.

The following day, Thursday, February 11, the Grievant visited the day care center, observed the operation and spoke with staff members about the allegations. She took seven pages of notes (Employer Exhibit 7) and testified that she phoned the county agent who had contacted her office and left a message that she had been unable to obtain the names of victims which had been requested. The Grievant had not written the usual letter to the day care center regarding her two visits when, on Friday, February 19, the Grievant's supervisor received a call from a member of the center's staff complaining that nothing had been done. The supervisor got the Grievant's file and read the notes, after which she contacted the county children's services agency and reported allegations of child abuse. The following Monday, in response to that report, the county agency sent the supervisor a letter (Employer Exhibit 8) confirming the allegations referred to the State and "requesting feedback . . . including the failure of any mandated reporter to provide us with information."

Eventually, on April 16, 1993, the county children's services agency wrote to the Grievant's supervisor reporting that the county agency had substantiated emotional abuse

dated February 9 and the supervisor's further testimony that she reprimanded the Grievant on February 1, 1993. I conclude that the call was on Thursday January 14, rather than February 14, a Sunday.

on 8 children and physical abuse on 3 victims at the center. The letter said that one teacher was "substantiated as a perpetrator of physical and emotional abuse of children" at the center and that two members of the center's staff "failed to report incidents of suspected child abuse as is their legal mandate." The letter said that the failure to report had been submitted to the county prosecutor's office and continued, "Your department should assure that appropriate personnel actions are taken and that such actions take into account the fact that failure to report incidents of suspected child abuse can place children at extreme risk."

The "second situation:" Meanwhile, among the Grievant's other duties was the inspection of the site of the proposed new day care center in another city, mentioned above. During her visits, the Grievant and the owner who applied for a license to operate the center discussed the Department of Human Service's "Licensing Rules" (Employer Exhibit 4), especially the requirement for outdoor play space. The applicant had thought of renting a vacant lot a short walk from the site of the proposed center, but it needed fixing up; the Grievant and the applicant discussed using a public park somewhat more distant, as did other day care centers, and expanding indoor play space. Among other deficiencies pointed out to the applicant were incomplete medical examination records (staff members' names were missing), and an incomplete document which failed to show that the staff member had graduated from high school. During her January 7, 1993 inspection the Grievant noted the failure to designate a separate space for infants and the lack of a food service exemption from the county health department.

On January 14 the Grievant was scheduled to make another pre-licensure inspection at the site proposed for a day care center. However, the owner telephoned the District Office and complained to the Grievant's supervisor that the Grievant had said her license was delayed because the supervisor was racially prejudiced against the applicant and the supervisor dislikes the Grievant and therefore will not approve her work. The supervisor asked the applicant to confirm her remarks in writing and immediately reviewed the licensure packet developed by the Grievant. Finding errors in the packet, the supervisor later issued a written reprimand (Union Exhibit 3). The Grievant testified that when she called the applicant that afternoon, the latter told her that she had talked to the supervisor and did not have to deal with the Grievant.

After receiving the applicant's letter dated "2-9-93" (Employer Exhibit 11), confirming complaints made in her telephone call, the supervisor initiated disciplinary procedures. She and the chief of the Child Day Care Licensing Section investigated the above matters. They obtained signed statements from the license applicant and a coworker (Employer Exhibits 13 and 14).³ The supervisor summarized the allegations against the grievant arising from both "situations" in a memorandum to the section chief

³ Because the people who gave the statements were not present at the arbitration hearing to testify and be cross-examined, the contents of their statements have not been considered here. Nor have I considered the allegations of a civil suit (Union Exhibit 4), for the same reason.

dated March 18 (pages 2 through 11 of Employer Exhibit 12). The section chief endorsed the recommendation for discipline, and it was approved March 24. On April 22 a "pre-disciplinary hearing" was conducted; the Grievant and her Union representative attended. The labor relations officer who conducted the hearing issued his report May 12, crediting the testimony of management witnesses and finding "ample evidence to substantiate the charges" which "constitute just cause for disciplinary action" (Employer Exhibit 12, page 5 of report). On May 20, the Director of the Ohio Department of Human Services issued a letter to the Grievant informing her of her suspension for twenty (20) working days for: "1) Failure to report child abuse; 2) Failure of good behavior; 3) Acts of discrimination; 4) Incompetence; 5) Failure to carry out assigned duties and to follow policy directives."

The grievance herein was filed May 27. A step 3 meeting was held July 27, and management's third step answer, denying the grievance in its entirety, was issued September 17, 1993.

Conflicts in the Evidence

As mentioned above, management's decision to discipline the Grievant was based on its determination to credit certain evidence which contradicts the Grievant's testimony. Such credibility conflicts also arose in the arbitration hearing. A brief summary of the testimony follows.

The State's first witness was **Henry L. Jenkins**, Assistant Deputy Director, Office of Child Care & Family Services, Ohio Department of Human Services. He testified regarding the mission of the Department, his Office and the Bureau of Child Care, of which the Child Day Care Program is a part. He testified that the twenty-day suspension was selected as the discipline because of the severe nature of the offense, especially the failure to report allegations of child abuse as required in the employee handbook. He also said that it was not clear to him that the "discrimination" against the applicant for a license was racial in nature, but that the applicant understood she was being asked to comply with a higher standard than others, was asked to provide a physical plant not required of other day care centers, and suffered a financial impact from it.

The second State witness, **Pauline Hosenfeld**, is Chief of the Child Day Care Licensing Section of the Bureau of Child Care. She described the scope of the licensing operation, training received by licensing specialists, their position description, their duties under Chapter 5000 of the Employee Handbook (see footnote 1), the "Licensing Rules" (Employer Exhibit 4) applied by licensing specialists in their work, and the "Disciplinary Guidelines" (Employer Exhibit 5) which guide the Department in determining the appropriate discipline for various employee infractions. She explained that a Day Care Licensing Specialist will work with a day care center in developing a plan to correct areas of noncompliance with the Licensing Rules but is required to refer allegations of child abuse to the appropriate children's protective services agency.

Section Chief Hosenfeld identified items in the Disciplinary Guidelines' "disciplinary grid" which applied to the Grievant:

- Violation 17, "Acts of discrimination which include, but are not limited to, sexual harassment and insults or acts on the basis of race, color, sexual preference, sex, religion, national origin, handicap or age", which carries a penalty of "written reprimand/ 6-day suspension" for the first offense and 6-day suspension/removal for the second offense;
- Violation 19, "Refusal to follow written policies and procedures," for which the first offense penalty is a verbal reprimand, the second is a written reprimand and the third is a 2-day suspension;
- Violation 25 a, Incompetence, Performing at substandard levels, with discipline progressing from a verbal reprimand to written reprimand to a 2-day suspension for the third offense.;
- Violation 25 b, Incompetence, Failure to carry out assigned duties or failure to follow direction of supervisor or written policies, for which the penalties are: first offense, written reprimand; second, 2-day suspension; third, 6-day suspension.
(I have omitted fourth offense penalties, which are invariably "6-day suspension/removal", inasmuch as there is no contention the Grievant committed any offense more than three times.)

Section Chief Hosenfeld testified that the Grievant's actions had an impact on children under the Agency's protection. In the first situation, the management and discipline of children which was later found to be "harsh" could have ended sooner if the Grievant shared her information with Children's Protective Services. It was alleged that the Grievant was lenient with the owner of the day care center due to personal friendship, which gave the appearance that the Department was not doing its job. In the second situation, complaints made to the Grievant by the applicant for a license regarding day care centers which were already operating should have been investigated by the Grievant, and her failure to do so put children at risk. The Grievant's actions also had an impact on the applicant for a license which consisted of financial loss, assertedly because of her race.

This witness testified that a twenty-day suspension was warranted due to the nature of the actions of an eight-year veteran, which left the community feeling that the Department is deficient.

On cross-examination, Ms. Hosenfeld was asked about a form titled "Ohio Department of Human Services Corrective Action Form" (Union Exhibit 1). The State objected to admission of the document, which is a form with blank spaces remaining empty. There is no reference to the Grievant on the form, and it was not shown to be relevant here, so I will not rely on it. The witness testified on cross examination that the collective bargaining agreement (Joint Exhibit 1) requires progressive discipline and that

the procedure in Chapter 5000 (see footnote 1) is followed in all cases of child abuse claims. On re-direct examination, she explained that management exercises discretion in deciding what level of discipline to levy and that the Grievant's punishment was in line with the seriousness of her infraction and followed a verbal reprimand and a written warning.

The State's final witness was **Peggy Blevins**, supervisor of the Columbus District Office of the Child Day Care Licensing Section. She is the Grievant's immediate supervisor, and her testimony, together with that of the Grievant, underlies the bulk of the "Chronology of Events" section above. Supervisor Blevins' testimony conflicted directly with that of the Grievant on some points.

With respect to the first situation, Supervisor Blevins emphasized the Section's role ensuring the health and safety of children in day care centers. The Grievant's initial task was to "narrow down" the possible victims of abuse where the alleged perpetrator was known; she uncovered other instances of potential abuse, but reported her findings "to no one." The Grievant claimed in the investigatory meeting that she found no substantiation of a teacher choking a child or locking one in a closet, and the other items were not listed for investigation, the supervisor testified. The county agency was able to get the names of children who were victims, but the Grievant did not. Because of the Grievant's failure to perform her duty as a "mandated reporter," children were left in an abusive situation, and the day care staff was left feeling that the agency was not doing its duty, and that nothing will happen to day care center operators if they are friendly with their licensing specialist.

In the second situation, the applicant for a license complained to the Grievant that one of the other centers in town stole her proposal for a block grant and mistreated children. The applicant and her employee said that one day care center had an insufficient ratio of adults to children and that another left children in their cribs all day, with unchanged diapers, and forced children to sit all day and struck them, causing bruises. According to the supervisor, the applicant said the Grievant told the applicant she didn't want to discuss other centers, and if the applicant wanted to do so, she should file a complaint. When the county children's services agency was advised, they found abuse had occurred.

Further, the Supervisor testified that the pre-disciplinary procedure disclosed that the Grievant had held the applicant to a higher standard than set forth in the "Licensing Rules."

- She misread 5101:2-12-38, "Outdoor Play Space," which requires only an on-site play space or an easily accessible off-site area; the nearby vacant lot would have been acceptable, contrary to the Grievant's belief that the supervisor would not approve it as "on site."
- She misinformed the applicant by saying that existing centers were permitted to use the park because they were "grandfathered in," but the law would no longer allow it.

Consequently, the applicant unnecessarily purchased a van to transport children to a more distant park.

- She accused the applicant of falsifying medical documents and declined to telephone the examining physician to verify them.
- She required production of high school transcripts, a hardship in the case of staff who graduated long ago, and thereby delayed issuance of the license.
- She told the applicant, "you're different," which was taken as a racial remark, and said that the supervisor is prejudiced, so it would be worse for the applicant to complain to the supervisor.

On cross-examination, the supervisor testified that when the county agency investigated the allegations of child abuse, the supervisor and Section Chief Hosenfeld went along to find out what the applicant and her staff had told the Grievant. The applicant was upset with the Grievant's manner of treating her. The Grievant's failure to report allegations left the children in the established center (which was on the Grievant's caseload) in an abusive situation for a year. There is no formal training specifically for abuse allegations, but Section 50301.8 of Employer Exhibit 3 (footnote 1) clearly requires specialists to report any allegation of abuse or neglect. The supervisor denied that the Grievant asked her to accompany her on any investigation. When the supervisor and another licensing specialist performed the 90-day inspection of the newly-opened center, they found it to be substantially in compliance.

The written reprimand (not a subject of this proceeding) was given for the Grievant's errors in compiling the applicant's licensing packet, which needed correction before the license could be granted, and for her unprofessional comments to the applicant; the 20-day suspension was due to other infractions: failure to report child abuse, applying dual standards to an application and inappropriate behavior.

Recalled by the State after the Union presented its case, the supervisor testified that the Grievant had "absolutely not" said she was nervous about investigating the first situation; such allegations of child abuse are not unusual, and the District Office calls Children's Services about such allegations about once a week. She testified that the Grievant participated in an earlier investigation of abuse which resulted in the day care center closing down. A licensing specialist does not need "proof" of abuse or neglect to make such a report; the discipline was for her failure to report, not for failure to investigate. Such reports are made by immediate telephone call and there is no need to send the usual letter to the day care center before reporting child abuse.

Continuing, Supervisor Blevins conceded that the Grievant asked her to go with her to see the license applicant's facility, but she was too busy. Supervisors don't normally go out with licensing specialists. Ms. Blevins denied that the Grievant asked her to accompany her on the inspection in the first situation. The handbook requires licensing

specialists to issue their letters to day care centers, which serve as a report on their investigation, within two weeks, but this is not always adhered to because they are too busy.

The Union's first witness was **Michael Robison**, an employee of the Department of Human Services and a Union delegate. Testifying from his experience as an employee, he said that the county agency which passed along the report of abuse in the "first situation" could have investigated the report without knowing names of victims, since they had the name of the alleged perpetrator. If the Grievant had reported the alleged abuse, the report would just go back to the same agency which already knew about it.

As Union delegate, Mr. Robison participated in the investigatory meeting and grievance meetings. With respect to complaints of delays in issuing a license in the "second situation," some of the delays were caused by the Grievant's supervisor, who repeatedly rejected the licensure packet for new reasons each time it was submitted.

Licensing specialists are not trained to investigate child abuse and neglect, and the guidelines for identifying it (Employer Exhibit 3; footnote 1, above) are insufficient to enable licensing specialists to determine when abuse or neglect has occurred. None of the guidelines listed at 5030.1 8. occurred, so there was nothing to report in the first situation.

On cross examination, Mr. Robison testified that as a "mandated reporter," the Grievant is supposed to report any incidents of child abuse or neglect she discovers, although she has not been trained or authorized to investigate abuse or neglect. She was instructed merely to obtain names of child victims, but was unable to do so. On re-direct examination, he asserted that the written reprimand of February 1 (Union Exhibit 3) is too broadly worded, and that the Grievant was afforded no technical assistance or corrective action after receiving the warning.

Grievant Sherry Bush was the Union's primary witness. Where her testimony is in harmony with that of her supervisor, Ms. Blevins, it is the basis for much of the "Chronology of Events," above. The following account of her testimony, therefore, will be limited to significant variances from, or additions to, the supervisor's testimony.

Regarding the first situation, she said that she actually observed the alleged perpetrator working, without being seen, for 15 minutes and saw nothing to support the complaint. Nor did the coworkers of the alleged perpetrator support the complaint. When the second report was received, Ms. Bush asked her supervisor how to handle it; when told to interview each staff member, Ms. Bush asked her supervisor to go with her because she had never had a child abuse situation, but the supervisor was too busy. The only instructions were to get names of victims and report them to the child protective agency; being unable to get the names, Ms. Bush assumed the county agency would be unable to act, so she called the agency and left word that she had no names. She also asked to speak with her supervisor, intending to seek further guidance, but her supervisor was unavailable. Before Ms. Bush could write the letter regarding her inspection, her

supervisor had reviewed her file and reported to the county children's protective services agency.

With respect to the second situation, Ms. Bush had previously approved an application where there was no on-site play area, so she knew "we had problems" with this one. She asked her supervisor to accompany her to see the site, but she was unable to go. In fact, the Grievant testified that she made two written requests for her supervisor to accompany her. The applicant believed she did not need an outdoor play space, but Ms. Bush explained the requirement and pointed out that two other centers use a local park. The Grievant denied that the applicant made any allegations of child abuse or neglect by these two day care centers.

The applicant showed Ms. Bush a vacant lot she considered renting; Ms. Bush told the applicant she would need to remove an abandoned car and broken glass, and that Ms. Bush would have to check with her supervisor regarding whether the lot would be considered "on site" since it was not the same address as the day care center. The applicant seemed to be confused about the outdoor play space requirement, the Grievant testified: she dropped the idea of renting the neighborhood lot; when asked whether the children would walk or ride to the park, the applicant came up with the idea of a van; the Grievant suggested consideration of another small park closer to the day care center.

Another inspection January 7 was largely wasted waiting for a county food service inspector to show up; the food service exemption was received from the health department January 11. The delay in approval of the application, however, was in satisfying the supervisor's request for clarifications of the application packet. When Ms. Bush returned to get clarifications of the application, the applicant expected to receive her license that day and was disappointed. The grievant denied portraying her boss as an ogre to the applicant.

The Grievant admitted characterizing the proposed day care center as "different" because -- unlike most centers -- it would accept part-time children, it aimed to meet the needs of low-income children, and the applicant's husband intended to teach the children to use a computer. The reference was to the different idea of what the applicant wanted to do with her center, not to her heritage. The applicant made allegations of racial discrimination against local jurisdictions (lawsuit, Union Exhibit 4), but left the State agency out of the suit.

While inspecting staff records, the Grievant found three medical examinations bore no staff member's name and appeared to be exact copies of one another, so she asked why they were all the same date and whether they could be verified. The applicant offered to call the physician, but Ms. Bush said that would not be necessary.

Some staff members' high school education was documented by diplomas, but one member submitted a transcript which omitted the second page, which would show completion of the education.

The Grievant reported receiving a verbal reprimand in March, 1991, but no other discipline prior to the events recounted here.

On cross-examination, she testified that there was training on recognition of child abuse in 1986, but it was law enforcement training. In the first situation, she determined some teachers used inappropriate discipline, but she got no names of victims; the names in her notes were reminders to herself to speak with a staff member and names of children who got "time out" a lot, but nobody ever asked her what the notes meant. The Grievant attempted to speak with her supervisor when she was unable to obtain victims' names. Ms. Bush has reported suspected child abuse in two or three instances, but if there are no names of victims or bruises, Children's Services won't take the report.

It is common to be in the office only one day a week, and other duties (taking questions about licensure on the phone) may interfere with completing reports even then, so two weeks may elapse between a visit and the follow-up letter.

A license application packet includes a comprehensive plan of operation for the proposed day care center, Ms. Bush said, including how the staff will cover their breaks, how to clean nap cots, etc. Attached are fire, building and food inspection certificates, forms they will use, the parents' handbook, etc. The first time she submitted the application in the "second situation," the supervisor did not return the packet, but asked clarification on building occupancy limits. The second time, the supervisor said the ratio of teachers to toddlers was wrong, there was a question about bringing sack lunches for meals and snacks, she wanted information about transportation and telephones available for emergencies at the park, she pointed out a false claim in the parents' handbook that the State licenses the staff, a menu needed to be changed, and schedules need to be changed. The third time, the supervisor wanted clarification on the medication policy, more toddler equipment was needed, as were car seats, and playground equipment would be needed if the center used the nearby vacant lot.

The Grievant testified that the first time she heard allegations of infractions in handling the second situation was at the pre-disciplinary interview. In that hearing, the State gave its information, but the day care center owners were not called as witnesses. The Labor Relations Officer who ran the pre-discipline hearing said at one point that he thought he had heard everything and closed the hearing. At the July 27 level three grievance meeting, however, the Union was able to present all its information and testimony. She testified that her testimony in the arbitration hearing did not differ from that in the preliminary hearings.

Union's Contentions

The Union argued on the record at the hearing that Ms. Bush is a long-term employee with a good record. The Agency responded prematurely when faced with allegations of racial discrimination in the second situation. The Grievant suffered loss of

pay and professional reputation; the Union asks that she be made whole for wages and benefits lost.

Employer's Contentions

In summation, the State argued orally that it had acted correctly in suspending the Grievant for twenty days for misconduct, inasmuch as the policies and procedures which she violated are clearly written. In the first situation, she failed to report child abuse, thereby delaying the cessation of abuse by eight months and damaging the credibility of the Department. In the second situation, the Grievant held a minority-owned center to a higher standard than applied to its competitors, caused the license applicant to spend funds for a van unnecessarily, and damaged it by causing a loss of income.

Findings of Fact and Opinion

As the foregoing shows, both sides to this dispute deserve considerable respect. The Grievant is constantly in a position of exercising her best judgment regarding matters which sometimes have potential for harming the welfare of children, a heavy responsibility, to say the least. She is caught between a supervisor who wants her to go by the book and clients who want her to bend the rules for them. Two situations arose in a relatively short span of time where interested parties (a parent in one case and a license applicant in the other) made accusations about child abuse by day care center staff and failure by the State to investigate and prevent that abuse. The Grievant exercised her judgment, on the spot, and was not moved to report abuse. Her supervisor reviewed the situation and concluded that such reports should be made. A similar difference of view arose regarding the Grievant's handling of the application for licensure. Agency management reviewed the facts, in the 20/20 vision of hindsight, and decided that the supervisor was right and the licensing specialist had been wrong. I am now asked to review those facts, or as many of them as were presented to me in a hearing, and to determine whether or not those facts and the provisions of the collective bargaining agreement support the Agency's decision to discipline the Grievant by suspending her without pay for twenty working days.

Prior to being educated by the parties in this case, my concept of child abuse was something far more severe than speaking harshly, yelling and pulling children around by the arm, as alleged in the first complaint Ms. Bush investigated. My idea of child abuse was more in tune with the "physical injury to a child which required medical treatment" or "corporal punishment [which] resulted in bruising" quoted in footnote 1. I was particularly unmoved by the urgency of reporting back to the very agency which had first raised the allegations; they were obviously aware of the complaint. Even the newly discovered incidents in the first situation did not strike me as requiring urgent action by Ms. Bush. The supervisor's quick decision to report alleged abuse and to accuse the Grievant of failing in her duty as a "mandated reporter" I attributed mainly to the threat that the county agency would make the Department look bad.

As events unfolded, however, those responsible for making such determinations were convinced that child abuse had taken place and should have been reported by day

care center staff who are also "mandated reporters" under the law. This development certainly lends weight to management's condemnation of the Grievant's failure to report those same allegations.

On the heels of this came the second situation, which included as one side issue an allegation of child abuse by the license applicant's competitors. These complaints arose almost as a smoke screen to obscure the fact that the applicant did not have her preparations completed yet, and her accusation appeared to be more in the nature of a spiteful lashing out to express her frustration. The Grievant appears to have remained determined to keep focused on the main purpose of her long, repeated trips to the site of the proposed new child day care center: inspecting the site, staff, organization and procedures to determine whether the application should be approved. In one sense, I admire the Grievant's ability to deal with the applicant's impatience and distrust. On the other hand, it is understandable in the circumstances that the supervisor was very sensitive to another claim that the Grievant again failed to investigate and report an allegation of child abuse.

In the second situation, also, the children's protective agency responsible for investigating child abuse found that abuse had taken place. Who could blame the supervisor for closely scrutinizing the Grievant's actions, regarding both the failure to follow up on a report of child abuse and the apparently unprofessional handling of an application for licensure where the applicant was accusing the Grievant of racial discrimination, badmouthing the supervisor, etc.?

The issues before me, as discussed above, are: "was the discipline imposed upon the grievant for just cause" and "if not, what shall the remedy be?" Article 8 of the Contract, "Discipline," specifies in Section 8.01, "Disciplinary action may be imposed only for just cause." I will apply a series of tests commonly used by labor arbitrators in considering "just cause." As summarized by one author: ⁴

Carroll R. Daugherty has developed seven criteria that he has set forth and applied in a number of published decisions on discipline cases. The stature of this arbitrator makes these standards particularly noteworthy. They are embodied in seven questions.

1. Did the employee have foreknowledge that his conduct would be subject to discipline, including possible discharge?
2. Was the rule he violated reasonably related to the safe, efficient, and orderly operation of the company's business?
3. Did the company make a reasonable effort before disciplining him to discover whether he in fact did violate this rule?

⁴ Arbitration for the Practitioner, Walter E. Baer (McFarland, Jefferson, NC 1988) Chapter 6, Concepts - Theories - Issues, P. 126. Perhaps by design, the blank form which the Union introduced as its Exhibit 1 and to which the State properly objected, follows very closely this same series of tests.

4. Was its investigation fair and objective?
 5. Did it obtain substantial evidence that the employee was guilty of the offense with which he was charged?
 6. Was its decision nondiscriminatory?
 7. Was the degree of discipline given him reasonably related to the seriousness of his proven offense and/or to his record with the company?
- ...Daugherty's carefully reasoned standards are the most complete and yet succinct. ... to be upheld, all 7 questions must be answered in the affirmative.

Test One: Forewarning

With respect to the first test, whether the employee had foreknowledge that her conduct would be subject to discipline, I conclude that the rules in chapter 5000 of the employee handbook introduced as Employer Exhibit 3 (see footnote 1) were explicit enough that the State can rely upon them to put the Grievant on notice that she was expected to report all allegations of child abuse and neglect which came to her attention. Similarly, she was forewarned by the "Disciplinary Guidelines" (Employer Exhibit 5) that the following are "violations" which lead to disciplinary action:

- violation number 17, under "failure of good behavior", discrimination
- violation number 19, refusal to follow written policies and procedures
- violation 25, incompetence, specifically number 25. a., "performing at substandard levels" and
- violation number 25. b., "failure to carry out assigned duties or failure to follow direction of supervisor or written policies".

Apart from any other issue, I am satisfied that the first test of "just cause" was met.

Test Two: Reasonableness of the Rule

As Employer Exhibit 3 reflects, the licensing specialists, as "mandated reporters," are required by law to "immediately report" information of child abuse to an appropriate agency. The requirement is, moreover, consistent with the primary purpose of the Child Day Care Licensing Section related to protecting the welfare of children in day care centers. I believe this rule is reasonable. On their face, the other rules which the Grievant was charged with breaking, the numbered "violations" listed above, appear to be reasonably related to the Agency's ability to accomplish its mission. The Union did not assert that the rules are unreasonable. I believe this test was met.

Test Three: Management Investigation

Section 8.03 of the Contract provides that "prior to the imposition of a suspension of more than three (3) days, . . . the employee shall be . . . confronted with the charges . . . to offer his/her side of the story . . . in accordance with the "Loudermill Decision" . . . on pre-discipline due process requirements." Testimony at the hearing and documents included in Employer Exhibit 12 indicate that management conducted an investigation

which included an interview with the Grievant and that a Pre-Disciplinary Hearing was conducted April 22, 1993, with the Grievant and her Union representative present. The procedural safeguard was afforded, and the third test was met.

Test Four: Fairness of Investigation

The Contract requires that the opportunity for an employee to be confronted and to offer her side of the story must be in accordance with the "Loudermill Decision", 470 US 532 (1985). In that decision, which arose from the discharge of an Ohio civil servant, the Supreme Court said that the predetermination hearing "need not be elaborate", that "'something less' than a full evidentiary hearing is sufficient" if it is "an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action". The Court held that the "essential requirements of due process . . . are notice and an opportunity to respond. . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." ⁵

The Grievant testified that "we had time to give our information" in the Pre-Disciplinary Hearing, although the testimony of the license applicant in the second situation was presented by written statement and the accuser was not called to testify. The Grievant said her testimony in the "past hearings" was the same as in the arbitration hearing. The Union Delegate, Mr. Robison, represented the Grievant in the Pre-Disciplinary Hearing; his testimony raised no doubt about the fairness of the hearing. Given the specific reference in the Contract to the Loudermill decision as the standard, I am in no position to impose a higher standard. I find that the requirements of Section 8.03 of the Contract were met, as was "test four."

Test Five: Evidence of Misconduct

Documents gathered in Employer Exhibit 12 reflect that the Agency based its decision on substantial evidence that the Grievant performed certain acts, and failed to perform others, which reasonably could be found to constitute violations in the "Disciplinary Guidelines." One could question the hearing officer's decision to credit written statements by the license applicant over the contrary testimony of the Grievant, who was available for cross-examination, but the pre-disciplinary hearing seems to have met the minimal standards set forth in Loudermill. The Employer passed this test.

⁵ Cleveland Board of Education v. Loudermill et al., 470 U.S. 532, at 546.

Test Six: Nondiscriminatory Decision

No evidence was presented that the Grievant's treatment was different from the treatment of any other employee in the same or similar circumstances. In the absence of any contention that the Agency's decision to discipline her was discriminatory, I conclude that this test is satisfied.

Test Seven: Penalty Suits the Offense

The documents in Employer Exhibit 12 track the pre-discipline procedures. Supervisor Blevins' March 18 memorandum to Section Chief Hosenfeld requested "appropriate disciplinary action." Section Chief Hosenfeld's memorandum of March 23 to Acting Director Moore concluded that "further discipline action needs to be considered." Labor Relations Officer Warren's May 12 describing his pre-disciplinary hearing concluded there were "grounds for disciplinary action." None recommended specific forms or degrees of discipline. Director Arnold R. Tompkins' letter to the Grievant dated May 20 reads, in part: "This is to inform you that as a result of the pre-disciplinary hearing held on April 22, 1993, you are hereby suspended for twenty (20) working days. You are being suspended for: 1) Failure to report child abuse; 2) Failure of good behavior; 3) Acts of discrimination; 4) Incompetence; 5) Failure to carry out assigned duties and to follow policy directives." Neither the documents nor the testimony at the hearing in this matter explained how the Agency arrived at precisely twenty days suspension for this collection of infractions.

Here, the parties have provided guidance in the form of a Contract clause and past interpretation of it. The Agreement states, in Section 8.02, that "The principles of progressive discipline shall be followed. These principles usually include: A. Verbal Reprimand B. Written Reprimand C. Suspension D. Removal. The application of these steps is contingent upon the type and occurrence of various disciplinary offenses."

In applying this Section, the Ohio Department of Human Services relies upon its "Disciplinary Guidelines," which includes a "Disciplinary Grid," described above. Although the introduction to the grid contains caveats and disclaimers, at bottom the grid defines the punishment employees should expect for their crimes, with progressively more harsh discipline for repeated offenses.

Testimony at the hearing disclosed that the Grievant had been given an oral warning, but there was no explanation of which category of "violation" it was for. Union Exhibit 3 reflects that on February 1, 1993 the Grievant was given a written reprimand for errors in the licensing packet and giving inappropriate information to the applicant in the second situation. In a "worst case scenario," this discipline was intended to apply to either a second offense of refusal to follow written policies and procedures (violation 19) or a second offense of incompetence, "performing at substandard levels" (violation 25 a) or a first offense of incompetence, "failure to carry out assigned duties or failure to follow direction of supervisor or written policies" (violation 25.b.), each of which carries a

written reprimand as the penalty. Conceivably, the written warning was for violations of all three categories. In that case, the next time any one of those violation occurs again would warrant a 2-day suspension.

The record herein will not support a contention that the Grievant had a worse disciplinary background than the one posited above. Disregarding for the moment both the reservation of management's rights to exercise discretion, on the one hand, and the injunction to offer the services of the Employee Assistance Program, on the other, the plain arithmetic of the maximum punishment is as follows:

Violation 17 (discrimination) 1st Offense	written reprimand/6-day suspension
Violation 19 (refusal to follow written policies and procedures) 3rd Offense	2-day suspension
Violation 25a (performing at substandard level) 3rd Offense	2-day suspension
Violation 25b (Failure to follow directions or policies) 2nd Offense	2-day suspension

Assuming that Director Tompkins applied the greater penalty for violation 17 and a 2-day suspension for each of the other four counts in his May 20 letter, the total suspension would be 14 days, not 20. It appears, therefore, that the Employer failed "test seven." Management witnesses testified that the twenty-day suspension was selected as the discipline because of the severe nature of the offense, especially the failure to report allegations of child abuse as required in the employee handbook. Given management's residual authority, it is nevertheless obliged not to exceed the published schedule of punishment without prior notice.

Decision and Award

For the reasons set forth above, I find that the discipline imposed upon the Grievant was not for just cause because the degree of discipline was not in accordance with the established "disciplinary grid" and no explanation was offered regarding why management, in its discretion, exceeded the written penalties. Because the Agency violated Article 8 of the Contract, "Discipline," I hereby grant the grievance.

The State is hereby ordered to remedy the contract violation by adjusting the length of the suspension from twenty days to fourteen days, amending the Grievant's personnel record to reflect the reduction, and paying the Grievant backpay in the amount of six days' pay at her regular rate which was effective during the last six working days of the suspension she served in June, 1993.

Issued at Loveland, Ohio, this 22nd day of October, 1993.


James L. Ferree, Arbitrator