

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

RAMSEY COUNTY COMMUNITY HUMAN SERVICES)	BMS CASE NO. 13-PA-0824
)	
“COUNTY”)	
)	
And)	DECISION AND AWARD
)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 5, LOCAL 151)	RICHARD R. ANDERSON ARBITRATOR
)	
“UNION”)	SEPTEMBER 17, 2013
)	

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson in St. Paul, Minnesota on August 14, 2013. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into evidence by both parties and received into the record. The hearing closed on August 14, 2013. Post-hearing briefs were timely received on August 31, 2013, at which time the matter was taken under advisement.

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties’ January 1, 2012 through December 31, 2014 collective bargaining agreement, hereinafter the Agreement, which was in effect at the time the grievance issue arose. (*Joint Exhibit 1*) The relevant language in Article 25 [GRIEVANCE PROCEDURE] provides for the arbitration to resolve all grievance issues. The parties stipulated that this matter does not involve contract arbitrability or any other substantive or procedural issues that would prevent this matter from being considered.

APPEARANCES

For the County

Marcy Cordes, Labor Relations Manager - Human Resource Department
Janine Moore, Former Director of Children and Family Services - Community Human Services Department
Julie Gunter, Senior Child Protection Worker - Community Human Services Department
Stephani Gunter, Human Resource Generalist - Human Resource Department

For the Union

Chris Cowen, Field Representative - AFSCME Council 5
Grievant, Senior Child Protection Worker - Community Human Services Department
Melinda Dols, Senior Child Protection Worker - Community Human Services Department
Suzanne Kocurek, Case Aide III Foster Care Licensing Intake - Community Human Services Department
Angela Sorum, Guardian Ad Litem - State of Minnesota
Zachery Kretchmer Attorney for Guardian Ad Litem
Steve Hildebrandt, President and Steward - AFSCME Local 151

THE ISSUE

Whether the Grievant was disciplined for just cause; and if not, what is an appropriate remedy?

BACKGROUND

Community Human Services (CHS), hereinafter the County or Employer, is charged with the responsibility to administer community human service functions within Ramsey County. The Children and Family Services (CFS) division handles child protection services, foster care, adoption, children's mental health and a variety of other services for children that have been abused, neglected or otherwise at risk. The American Federation of State, County and Municipal Employees (AFSCME), Council 5, Local 151, hereinafter the Union or Local 151, is the collective bargaining representative of the CHS employees including Child Protection Workers (CPW). The Union has represented this unit since the late 1960's.

The Grievant is a Senior CPW with over 15 years of CHS service. His major job responsibilities include investigate, assess and provide intervention and treatment services in order to protect children from child abuse, neglect and exploitation; to prepare and implement case management plans for the treatment of child abuse; and to participate in legal actions arising from child abuse case activities.

On February 6, 2012¹, the Grievant was directed by supervisor Julie Anderson to move a child² in his case load from an unlicensed foster home to an alternative licensed foster home by February 29. It appears the Grievant shortly thereafter may have also been instructed by CSF Manager Cheryl Barnes to remove Y. On February 27 the Grievant and then CFS Director Janine Moore had a meeting where they discussed the status of Y wherein Moore again directed the Grievant to remove Y by February 29.³ On February 29, The Grievant notified Moore in writing that he was unwilling to remove Y from her current foster home. (*County Exhibit 2*)

On March 5 Barnes issued the Grievant a Notice of Intent to Suspend the Grievant for 40 hours effective the end of the working day on March 8. (*Joint Exhibit 3*) Barnes thereafter issued the Suspension Notice to the Grievant. (*Joint Exhibit 4*) This Notice was undated but listed the suspension to be effective March 12 until March 19. AFSCME Local 151 President and Steward Steve Hildebrandt filed a Step 2 grievance on March 19 protesting the suspension of the Grievant.⁴ (*Joint Exhibit 2*)

On October 9, the parties held a Step 2 meeting to discuss the Grievant's suspension, which resulted in Moore denying the grievance in a Memorandum to Hildebrandt dated October 10.⁵ (*Joint Exhibit 5*) In this Memorandum Moore stated, "*The Employer reserves the right to determine the level and appropriateness of a disciplinary action based on the severity and impact of the incident(s) in question. It is clear that Mr. (Grievant)'s behavior was insubordinate. His decision to ignore the County's directives put the safety of the child at risk and was a direct violation of the law. Therefore, the Employer's issuance of a 4-day Suspension was warranted. The grievance is hereby denied.*"

The Union then appealed the grievance to Step 3 (exact date unknown). On December 12, Human Services Manager Marcy Cordes issued her Step 3 response in a Memorandum to AFSCME Field Representative Chris Cowen stating: (*Joint Exhibit 6*)

"After reviewing the circumstances surrounding the above-referenced grievance, I have determined there was just cause for the 40 hour (sic) suspension issued to (Grievant) for failure to follow a supervisory directive issued by both his supervisor and unit manager, as well as the Director of Children and Family Services.

¹ Unless otherwise indicated, all dates herein are in the year 2012.

² In order to protect the privacy of the child, she will hereinafter be referred as Y.

³ Moore has since voluntarily left the employ of Ramsey County for a similar position with Hennepin County.

⁴ Disciplinary grievances are filed at Step 2 of the grievance procedure.

⁵ It is not known why there was such a delay in this response.

The Grievant was suspended for his refusal to remove a child from an unlicensed foster care provider that was in the middle of the license approval process. While I appreciate the Union's argument that the Grievant was concerned about the impact on the child involved, the fact is that the division Director has had a well-communicated policy in place, based on DHS requirements, that children are not to be placed with unlicensed foster care providers. I assume the regulation was adopted by the State, and enforced by, the department, due to over-riding concerns about risk to children in unlicensed homes. The record also reflects that the Director herself instructed the Grievant on two separate occasions to find a different placement for the child because the grievant refused repeatedly. I believe a suspension is reasonably related to the seriousness of the misconduct at issue. The grievance is therefore denied.”

Thereafter, the Union filed for arbitration (exact date unknown). The undersigned was notified of my selection as the neutral arbitrator in this matter by Cowen on May 3, 2013.

RELEVANT CONTRACT PROVISIONS

ARTICLE 15 GRIEVANCE PROCEDURE

15.4

(a) The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of the contract. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the County and the employee and the Union, and shall have no authority to make a decision on any other issue not so submitted.

(b) The arbitrator's decision shall be submitted in writing within thirty (30) days following close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be based solely on the arbitrator's interpretation or application of the express terms of this Agreement and to the facts of the grievance presented.

15.8

Discipline in the form of a written reprimand, withholding of salary increase, Suspension or discharge shall be in writing. An employee receiving such discipline may submit the disciplinary action to the grievance procedure beginning at Step 2, or appeal the disciplinary action through the non-bargaining grievance procedures provided under the Ramsey County Personnel Act and Personnel Rules. An employee may not use more than one of these procedures in appealing a disciplinary action.

FACTS

CHS is responsible to place children who have been abused or neglected in foster care. Foster homes are licensed by the State of Minnesota after passing vigorous safety standards including finger printing and criminal background checks of all persons in the foster home, a home inspection and CPR and car seat training. The State allows counties to develop policies

whereby a child is placed temporarily in an unlicensed foster home in emergency situations where no licensed foster home can be found.

Moore, who was hired as the CFS Director in 2008, conducted a review of CFS practices and discovered that CFS was placing children in the system in informal arrangements called Voluntary Placements and Family Arrangements. Placements were not under court supervision in either case. In addition, the CPW Child Protection Service Plans associated with these emergency placements were outdated or did not exist at all.⁶ Moore also discovered that approximately 120 children were in unlicensed foster homes, and little was being done to move the children into licensed foster homes. As a result, Moore issued a policy directive to division employees including CPW's that all children were to be placed in licensed foster homes. This written policy was made available to all division employees. (*County Exhibit 1*) However, children could still be placed in unlicensed foster homes with the caveat that the unlicensed foster home had a 120-day grace period to obtain a license. Only Moore could make an exception. Finally evidence adduced at the hearing indicated that a county only receives federal assistance to cover certain costs of an unlicensed home for 120 days from the date of the initial placement. Moore testified that this did not play in her decision to remove Y from the foster home.

As stated earlier herein, the Grievant is a long-term CPW. His case load included Y who was placed in a temporary unlicensed foster home located in Anoka County in April 2011.⁷ Y was born in Liberia during its civil war, later moved to Ghana and then back to Liberia where she lived with her mother and finally relocated to the Twin Cities metro area to live with her remarried father. While living with her father, Y was physically abused by her step-mother and sexually abused by her step-mother's two nephews. As a result, she was placed in an emergency shelter and then transferred to the foster home in Anoka County. The foster mother, who is a nurse, had been friends with Y's mother when they both lived in Liberia. The foster father, also a Liberian, was employed in the trucking business.

In December 2011, Moore had granted an extension for Y, who had been in the foster home under the supervision of the Grievant since April 2011, so she could remain with her

⁶ A case plan developed by the CPW sets forth the terms of the child's placement and sets forth the responsibility of all parties to the placement and what happens if a party fails to comply with its terms.

⁷ Ramsey County CWF's have child protection responsibilities for children from the county placed in foster homes in other counties.

foster parents until February 29 with the understanding that the Grievant was to remove her if the home had not been licensed by then. According to the Grievant, he discussed the foster home's licensing problems both at the end of December 2011 and in a meeting with Moore on February 27. During this last meeting, the Grievant informed Moore that Anoka County anticipated that the foster home would receive its license by the end of March.

According to the Grievant, the foster parents were having a difficult time getting licensed, which had nothing to do with the quality of Y's care. Initially there were minor home repairs that had to be completed. Also, since all of the adults in the home were originally from Liberia, the background investigation took a considerable period of time. Further, the father and the mother, who still resided in Liberia, had to agree to the placement. A further delay resulted when the foster mother's mother, who moved into the home in late 2011 to help out with the care of the children, had to undergo a complete background check.

In addition, Anoka County was responsible for licensing the foster home since the foster home was located within its jurisdiction. There was a delay when the original Anoka County individual responsible for the licensing was replaced. Finally, there was an inherent delay in the licensing process since two counties were involved. Anoka County would understandably give foster care licensing preference for children placed by Anoka County.

Moore testified that she had no indication that the Grievant would not remove Y from the unlicensed foster home until she received the Grievant's written refusal dated February 29 which stated: (*County Exhibit 2*)

I am responding to the order I received to remove Y from her foster placement. I understand your job is to protect the agency but mine is to protect children; these objectives should not be at odds with one another, but in this case, apparently they are.

Y has been traumatized too many times in her life and I strongly believe that removing her from this home will seriously affect her mental health and well being (sic). She has established a strong bond with this family since her placement last April and is beginning to heal. We are in the process of assisting this family to adopt Y which should be completed in the next few months; in my opinion, moving her from this family would serve no purpose. Licensing officials said this process may take only another month. If this was a home that raised questions regarding their suitability, I would not be advocating to keep her there. I have been told by this agency that this is an "illegal placement" but also have been informed that by Minnesota State standards, it is not. As long as they are actively working to obtain a license, this is enough to satisfy the law. I understand that we need to have standards

and that this process has taken too long; however, I believe the courageous thing to do is make an exception and keep this child emotionally and physically safe.

Y has no power to speed up this licensing process yet she will be the one drastically affected by the move. The foster mother has completed everything that has been required of her and it is now in the hands of the System to complete. The County Attorney's office has been trying to transfer custody of this child for the last three months, which would make licensing a moot point; unfortunately this has also been delayed because of system failure.

Y should not be adversely affected because this system is too slow and cumbersome. She has the least power to change any of this. I, therefore, am unwilling to move her from this home and create more pain in this child's life. I believe it is unethical for me to participate in this.

There were never any concerns over Y's safety in the home or that the foster parents would be other than loving and caring providers. According to the Grievant, Y had adjusted to her new home environment, was becoming socially adjusted and was doing well in school with her foster parents academic help. The foster parents were dealing well with Y's behavior of sexually acting out and were addressing this through therapy. To remove Y from this foster home would severely traumatize her after she had been adjusting so well under the foster parents' guidance.

Senior CPW Melinda Dols became Y's CPW On March 1 and remained with her until July 17 when her case was transferred to the Permanent Care Unit.⁸ Dols testified that she visited the foster home weekly until March 23, when the foster home became licensed. According to her, Y was very happy in the foster home and her foster parents treated her as if she was their own child. She further testified that the foster parents were in the process of adopting Y after they received their license. Dols also testified that she was never instructed to remove Y from the foster home, only that she was pressured to get the home licensed. Dols was also aware that there was a court order keeping Y in the foster home shortly after she became her CPW.

Angela Sorum, who is employed by the State of Minnesota as a Guardian ad Litum testified that she was appointed the Guardian ad Litum for Y in January 2011. According to Sorum, a Guardian ad Litum is appointed to represent the best interests of a child before the courts, making sure that the judge knows the facts associated with the placement of the child. In the course of her duties she interacts with the courts, the child herself and anyone involved

⁸ According to Dols, the transfer is made during a pending adoption when both foster parents have signed an intent to adopt.

with the child including the parents and foster parents, teachers and professionals involved with the child's protection including CPW's.

Sorum further testified that when she first became involved with Y she was a very fragile child who did not trust adults, was scared as well as very cautious and was struggling in school both socially and academically. This had all changed by February 2012 through her foster home environment. In her foster home visits, she found the living arrangements for Y to be very desirable.

The foster home was spacious and Y had her own bedroom. She found the foster parents who had Y's best interests in mind to be very caring and loving. According to Sorum, she was also aware of the problems that the foster home was experiencing in getting licensed due to no fault of the foster parents. In essence she corroborated the testimony of the Grievant regarding what was causing the delays. She personally talked to the Anoka County individual responsible for the licensing in early February and was informed that it was 90% done and the licensing process would be completed shortly.

Sorum further testified that in the course of being Y's Guardian ad Litum she talked with the Grievant many times and with the foster parents and school officials concerning Y's development. Sorum testified that she agreed with the Grievant that it would not be in the best interest of Y to have her removed from the foster home where she was doing so well, and that such a move would traumatize her. According to Sorum when she learned from the Grievant that he was instructed to remove Y from the foster home because it was not yet licensed, she discussed the matter with her supervisor in the Guardian ad Litum office. As a result, she contacted Ramsey County District Court Judge Diane Alshouse in writing on March 2 regarding the facts surrounding the removal of Y. After an expedited telephone hearing, the Judge issued an order barring the removal of Y from the foster home (exact date unknown but probably within a week of the March 2 letter). According to Sorum, she never had any discussions with anyone in CFS other than the Grievant regarding Y's removal.

Case Aide III Suzanne Kocurek has been employed in the Foster Care Licensing section of CFS for 19½ years. She is currently involved in all aspects of foster care licensing including working with the license seekers, conducting background checks, finger printing and liaison with CPW's. She is very familiar with the County's rules and regulations regarding emergency child placement.

Kocurek testified that during the last four or five years (from date of hearing), there has been a push to speed up child adoption services and emergency child placements. The County now wants to complete emergency child placements within 120 days of the placement. According to Kocurek, the County and State use different dates to start the 120-day period. The County uses the date of placement while the State uses the application date.

Kocurek testified that she has been involved in every foster care licensing case over the past 2½ years. According to her, many licenses are delayed more than 12 months, but she is not aware of any discipline being assessed. Adding that, only 2 of 10 licenses are granted within the County's 120-day grace period. She stated that licensing can be delayed for a number of reasons especially if it is an inter-county child placement since it is a practice that counties process the licensing of foster homes for its children first. This practice is an issue that is now drawing the State's attention. According to Kocurek, the County loses its reimbursement for the child foster care costs after the 120-day period and she believes that this is the reason for this requirement.

Evidence adduced at the hearing reveals that the Grievant received Proficient or Exceeds Standards ratings in a number of areas. (*County Exhibits 5 and 6*) However, the Grievant was rated Requires Improvement in a number of areas including Quality of Work, Productivity, Accepts Responsibility, Work Commitment and Planning Organizing in both his July 2010 - July 2012 and his September 2011 - October 2012 evaluations. These lower ratings cite his incomplete or late case plans, struggles with documentation, lapses in making home visits and his challenging of the State's requirements for documentation and case plan compliance.

On September 14, 2010, the Grievant was put on a Performance Improvement Plan (PIP). The Grievant was put on the PIP for his failure to complete case management plans and court reports in a timely manner, and for his failure to document visits with the children on his case load. (*County Exhibit 3*) According Anderson, the Grievant failed to comply with every single one of the directives listed in the PIP and she subsequently issued him a written reprimand on June 22, 2011. (*County Exhibit 4*) This Exhibit discloses that the Grievant was disciplined for failing to follow department policy regarding timely and accurate completion of case management plans, and was also disciplined for failing to meet with his supervisor as directed, and for failing to meet with children on his case load once per month. In the reprimand he was

clearly notified that a "recurrence of this conduct or similar conduct could result in more severe discipline." There is no record that this reprimand was ever grieved.

COUNTY POSITION

The County's position is that it had just cause to discipline the Grievant, and the appropriate discipline was a 40-hour suspension. In support of this position, the County argues that:

- There are enormous responsibilities for the care and welfare of children at risk in the County and the services are heavily regulated. Not only does CHS have a clearly established right under the labor agreement to direct the workforce, the Agency simply cannot operate safely in an environment where CPW's are permitted to make up their own rules in the event they have personal or professional differences with their superiors.
- The Grievant blatantly refused directives issued by his Supervisor, Manager, and Department Director to remove Y from her current unlicensed foster home by February 29 in violation of CHS policies and procedures. There is no question that the Grievant engaged in the activity that he was disciplined for. Besides his February 29 letter, he also testified at the hearing that he made an intentional decision to ignore the direction of his superiors.
- CHS policy requiring that children in foster care must be placed in licensed foster homes is reasonable. The CFS Division has a policy in place requiring that all children who need to be removed from their homes of origin and placed in foster care are to be placed in licensed homes. There is an exception to this rule for emergency placements with family or kin. In those cases, they are permitted a 120-day grace period to obtain a license as part of an emergency placement. Children were to be otherwise removed to a licensed home. Only the Director could make an exception.
- The Director's decision to not grant an exception was not unreasonable since she had already reviewed the case at the end of 2011, and permitted a waiver at that time. She was presented with no evidence of progress when she met with the Grievant at the end of February when the licensing was still eight months overdue.
- The Director was not presented with any actual evidence that would justify a waiver. Neither the Grievant nor the Guardian ad Litum nor the Union presented any

evidence nor was there any psychological report or testimony that Y would suffer emotional damage as a result of the move. The testimony from the Guardian ad Litum was speculative opinion based on a handful of visits to the home.

- There was no evidence presented by the Union that the policy was created or enforced based on arbitrary or retaliatory reasons.
- The Grievant was fully on notice that failure to follow policies and directives could subject him to discipline.
- The Grievant has a lengthy history of coaching and discipline for his failure to follow supervisory direction and department policy. The Grievant had to be put on a performance improvement plan on September 14, 2010 for his failure to complete case plans and court reports in a timely manner, and for his failure to document visits with the children on his case load. As in the instant case, rather than follow instructions and get his case load in order, he preferred to challenge the fact that the rules existed and substituted his own judgment once again.
- The Grievant failed to comply with every one of the directives listed in the PIP and was subsequently issued a written reprimand on June 22, 2011. The Grievant was disciplined for failing to follow department policy regarding timely and accurate completion of case plans, failing to meet with his supervisor as directed and for failing to meet once per month with children on his case load
- In the reprimand, he was clearly notified that a "recurrence of this conduct or similar conduct could result in more severe discipline."
- In the Grievant's July 2010 – July 2011 performance evaluation his supervisor at the time noted the fact that his case management plans were out of compliance with departmental standards, that he failed to meet monthly with children on his case loads; and that while he was fully knowledgeable, his work was out of compliance. The Grievant made no effort to improve since his supervisor had made similar comments in his September 2011 - October 2012 evaluation.
- The Grievant's blatant refusal of a directive issued by his superiors is blatant insubordination and constitutes just cause for the 40-hour suspension.
- Stability and accountability in the performance of the duties of the CPW position are critical to a child's welfare. Permitting employees to make their own policies on how

individual cases should be handled could indeed create "chaos" in the management and the delivery of its services. CHS should be permitted to expect order and compliance from professionals like the Grievant, particularly in light of the fact that so much of the child protection work being performed was not in compliance with best practices or State regulations when Moore first arrived at CFS.

- It is also clear from Moore's testimony that the decision to discipline the Grievant was carefully reviewed with all of the other directors in CHS. Moore had never seen similarly insubordinate behavior in her long career, and wanted the case thoroughly reviewed with other members of the leadership. The progressive nature of the discipline and the fact that this refusal to follow the order was both blatant and repeated fully support the discipline imposed.
- There are also no significant mitigating factors in this case that would warrant a reduction in the penalty.
- The Union has tried to present the Grievant as an employee acting with greater ethical or moral authority than the Director, freely suggesting that she made the decision for financial reasons. This claim is both specious and unsupported.
- No one ever questioned the Grievant's sincerity or his concern for Y as they discussed this case. This was not a refusal based on some higher moral authority. This was a professional difference of opinion. The Grievant is entitled to his opinion; however, there is only one Director. There are no exceptions in arbitral law based on an employee's personal or professional opinion about a work place matter. There is no question that the Grievant had a sincerely held belief that he was acting in the best interest of the child, so did the Director.

UNION POSITION

The Union's position is that the Grievant was not insubordinate and the County did not have just cause to discipline the Grievant or issue him a 40-hour suspension. In support of its position, the Union argues that:

- The grievance was brought because management's directive contradicted what is known as best practice and jeopardized the well-being of a child. The decision to challenge this directive was not made lightly nor alone; legal officials, foster parents, school officials, coworkers, therapists, and licensing workers were consulted and they

unanimously agreed that moving Y would bring her harm and was unnecessary. Moving Y would entail placing her in a shelter with strangers not of her culture and in an environment that is often chaotic and unstable. It would also involve removing her from her school and would interrupt her therapy.

- The rule that required Y to be removed from her foster home was unreasonable. The State allows emergency placements in unlicensed foster homes. The County legally employs the provisions of the law on a regular basis. It was okay to keep Y in an unlicensed home for eleven months until Moore determined that since the foster home had not been licensed the home must have been by defacto unsafe. There was no need for Y's removal since the Grievant informed Moore in his February 29 letter that the licensing process would only take another month. The license was then granted on March 23 as the Grievant had so predicted.
- The rule that required Y to be removed from her foster home did not support her best interests. When Guardian ad Litum Sorum learned that the County was going to remove Y from the foster home she immediately called Judge Alshouse who subsequently conducted a telephone hearing and ordered that Y not be removed. Others involved in this matter have also testified that it was not in Y's best interest to remove her from the home. This is clear evidence that vindicates the Grievant's judgment.
- The County strongly endorses not moving children once placed in a foster home to reduce the amount of stress and trauma.
- The health and safety of Y was the overriding concern for the Grievant and should be given top consideration per the County and State Standards where the safety and stability of the children are emphasized and moving children around is discouraged.
- There was no harm to Y resulting from the Grievant's actions. As the Grievant proposed, Y was not removed from the foster home, the foster home was licensed within a month and the foster parents have begun adoption proceedings.
- There was a lack of knowledge of the consequences of the Grievant's actions. Although the Grievant was told to remove Y, he never was warned what would happen if he didn't. Management had a number of options available in this situation.

They could have agreed with the Grievant's assessment of the situation or they could have reassigned him.

- Kocurek testified that 2 out of 10 licenses are granted after the 120-day grace period, that there have been other licensing cases open for a year and that she is not aware of anyone being disciplined because of this.

OPINION

This issue presents a well-settled two-step analysis: first, whether the Grievant engaged in activity which gave the County just and proper cause to discipline him; and second, whether the discipline imposed was appropriate under all the relevant circumstances. It is the Employer's burden to show that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was a 40-hour suspension.

The evidence established that Moore promulgated new rules and procedures after becoming Director in 2008. One of the rules was that all children were supposed to be placed in licensed foster homes. Moore had determined that placing children in unlicensed foster homes was not a safe practice and had to be discontinued. Moore, however, did allow a grace period for the placement of children in unlicensed foster homes; but this was limited to 120 days unless the Director granted an exception.⁹

In December 2011 after Moore reviewed the case of the foster home where Y had been placed in April 2011 under the case management of the Grievant, she granted an exception to allow her to remain in the foster home. It appears that the foster home was experiencing licensing problems unrelated to the care of Y or due to any fault of the foster parents. In early February Moore again reviewed Y's status and determined that if the foster home had not been licensed by the end of February, Y would have to be removed. As a result of this decision, the Grievant was directed by his supervisors in early February and by Moore in their February 27 meeting to remove Y from the foster home by February 29 if the home had not received its license.

The Webster Online Dictionary defines "insubordinate" as "*not obeying authority; refusing to follow orders*" while Black's Law Dictionary defines "insubordination" as "*the refusing to obey orders of a person in authority.*" According to the Society for Human

⁹ It appears that when Moore first reviewed the CFS procedures she discovered that there were approximately 120 children who had been in unlicensed foster homes in excess of 120 days.

Resource Management, insubordination in the workplace has been defined as “*the willful or repeated disobedience to an order or directive from a higher level manager or superior to a subordinate.*” The evidence is uncontroverted that the Grievant engaged in insubordination when he refused direct orders from his superiors to remove Y.

It is a well-established principle in industrial relations that an employee must obey management orders and carry out their assignments. [*Elkouri & Elkouri, How Arbitration Works, 6th Ed. p. 1023 (2003)*] An exception to this rule exists if the disobedience involves an unusual safety or health hazard. (*Id*) In order to invoke this exception, the employee must tell management the reason for his /her refusal and demonstrate that the alleged safety hazard existed at the time of the refusal. (*Id at 1023-1024*) This exception applies even if the hazard only jeopardizes the safety of others. (*Id at 1024*) Some Arbitrators have extended this exception to include situations even where the safety hazard did not exist. If the employee “*is sincere in his belief of the danger*” and “*makes a reasonable appraisal of the potential safety hazards, he is protected in his decision not to act, regardless of whether later on, in fact, it should be established that no hazard existed*”. (*Id at 1025*) Arbitrators have also reduced or set aside discipline if the employee had never been warned of the consequences of his/her action. (*Id at 966*) While these principles are generally applied in industrial settings they are also applicable herein.

The evidence disclosed that Y had been significantly traumatized prior to her being placed in the foster home. While in the foster home she had come under the care of loving and caring foster parents who were guiding Y toward a normal life and providing her with a safe environment.

There is no question that when the Grievant refused to remove Y from the foster home, he stated affirmatively that the reason that he was refusing this order was because he feared for the safety of Y. As Y's CPW, the Grievant, who had been a CPW for over fifteen years, was in the best position to evaluate Y's safety if she was forcibly removed from the foster home.

This was not only the Grievant's fear but also the fear of other professionals within the CFS Division as well as the Guardian ad Litem who also expressed fear for Y's safety if she were to be removed from the foster home. It is hard to imagine that the Judge involved in the

court hearing who subsequently ordered CHS not to remove Y from her foster home, did not consider Y's safety in making her ruling.

Insubordination should rarely be allowed in the workplace. However, when the safety of an individual(s) is in jeopardy, an exception is allowed. Clearly, the Grievant has established that his decision not to remove Y from her foster home was his fear for her safety. This fear was corroborated by other seasoned child care professionals as well as the Judge who reviewed Y's case and issued an order directing CHS not to remove her from her foster home.¹⁰

In view of the foregoing, I conclude that while the Grievant may have engaged in insubordination, his refusal to remove Y from her foster home was protected activity; and I shall, therefore, sustain the grievance in its entirety.

AWARD

IT IS HEREBY ORDERED that the grievance be and hereby is sustained.

IT IS FURTHER ORDERED that the Grievant be reimbursed for all lost wages due to his discipline.

FURTHER, any reference to his 40-hour suspension will be expunged from his personnel file.

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

Dated: September 17, 2013

Richard R. Anderson, Arbitrator

¹⁰ I am also troubled by other aspects of this case. The County failed to put the Grievant on notice that his failure to remove Y would result in discipline, which would under arbitral precedent nullify or reduce the penalty imposed. It should also be noted that there is evidence that other placements in unlicensed foster homes exceeded one year without the child being removed or discipline issued. (Kocurek's testimony) Finally, it appears that management was aware of the Judge's order before the Grievant began serving his suspension.