

**IN RE ARBITRATION BETWEEN:**

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**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,**

**AFSCME, COUNCIL 5**

**and**

**COMMUNITY ACTION PARTNERSHIP OF RAMSEY AND WASHINGTON COUNTY**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS Case # 07-PA-830**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**September 4, 2007**

IN RE ARBITRATION BETWEEN:

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AFSCME Council 5,

and

DECISION AND AWARD OF ARBITRATOR  
BMS Case 07-PA-830  
RaLynn Arreguin, grievance matter

Community Action Partnership of Ramsey and Washington County.

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**APPEARANCES:**

**FOR THE UNION:**

Tom Burke, Business Representative  
RaLynn Arreguin, grievant

**FOR THE COUNTY**

Michelle Soldo, Attorney for the Employer  
Joanna Morken Hardy, Human Resources Mgr.  
Irene Gross DHS Investigator (by telephone)  
Patricia Weyandt, Supervisor  
Jeanne Dickhausen, Center Director  
Cathy Arentsen, Sr. Director

**PRELIMINARY STATEMENT**

The hearing in the above matter was held on August 16, 2007 at the offices of the Community Action Partnership of Ramsey and Washington County located at 450 Syndicate St., St. Paul, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties waived post-hearing Briefs.

**ISSUES PRESENTED**

Did the Employer have just cause to terminate the grievant and if not, what shall be the remedy?

**PARTIES' POSITIONS**

**EMPLOYER'S POSITION:**

The Employer's position is that there was just cause for the grievant's termination since she was observed physically grabbing a child by the upper arm and yanking him up and then forcibly pulling him to the ground. This is in clear violation of the Employer's policy as well as State law. In support of this position the County made the following contentions:

1. The Employer noted that the grievant is teacher in the Head Start program and has been with the program for approximately 18 years. As a long-term employee she received training regularly on the proper treatment of children at the program. The Employer cited numerous examples of the training provided and the clear messages given to all employees, including the grievant, about this.

2. The grievant is thus well aware of the Employer's policies and the law with respect to the proper way to handle children including how not to handle them physically and the proper way to redirect them when they misbehave. The children in the grievant's care were pre-school children aged 3 to 5 years. As such they are quite vulnerable and must be treated with the utmost care and respect.

3. The Employer pointed to specific training given regarding such things as the avoidance of "nursemaids elbow" and noted that the employees are taught not to grab a small child by the forearm or wrist in order to avoid dislocating the child's elbow. The grievant received this training and was aware of what not to do here. See Employer exhibit 14. See also Employer exhibit 6, Procedure and Policies handbook given the grievant along with the other teachers in the Head Start program.

4. The Employer pointed to several State laws and regulations regarding the treatment of children. Minn. Rule 9503.0055 subpart 3, the so-called Rule 3, specifically prohibits the "subjection of a child to corporal punishment." Corporal punishment includes rough handling, shoving, hair pulling, ear pulling, shaking, slapping, kicking, biting, pinching, hitting and spanking. In addition that Rule prohibits emotional abuse, which is defined as name calling ostracism, shaming, making derogatory remarks about the child or the child's family and use of language that threatens, humiliates or frightens the child.

5. The Employer also noted its own policies that mirror these requirements. See Joint exhibit 3. The Employer pointed to the code of ethical conduct, which the grievant was bound to abide by, of the National Association for the Education of Young Children, NAEYC, See Employer Exhibit 17 as well in this regard.

6. The Employer pointed to the grievant's evaluations and argued that she has been counseled several times in the past about the treatment of children and warned not to do so in the future. She was even placed on an improvement plan, which outlined very specific expectations for improvement of her demeanor with children in the classroom. See Employer exhibit 10.

7. The basis for the Employer's action was an event that took place on October 26, 2006. The grievant was observed grabbing the arm of a small child pulling him up sharply and then yanking him to the ground. Her direct supervisor observed this as she entered the grievant's classroom. Even though there was much confusion in the room that day and the school was in lockdown due to threats made by an adult against some children at the school, the supervisor testified that she clearly saw the grievant yank up on the child's arm and scowl at him in a threatening manner.

8. The supervisor testified that she even said, "be careful" to the grievant and that she made eye contact with her at that time.

9. Later the supervisor confronted the grievant about this and the grievant indicated that she "had almost lost it" with that child. The supervisor indicated that she had in fact "lost it" and had abused that child and that this incident would need to be reported to the department of Human Services, DHS.

10. DHS was contacted and conducted an independent investigation of this event and substantiated that there had been a rule violation, even though there was no evidence of actual maltreatment of a vulnerable child. The investigator from DHS confirmed what the Employer's internal investigation had shown.

11. The Employer argued that their internal investigation also confirmed what the supervisor had seen and that the grievant was guilty of serious rule violations with regard to the events of October 26, 2006.

12. The Employer asserted most strenuously that it takes the welfare and safety of children extremely seriously and works very hard to safeguard them in every way. Having a teacher who would do this simply cannot be tolerated and that the grievant is unsafe in the classroom and cannot be reassigned there under any circumstances.

13. The Employer went through the generally accepted 7 tests of discipline and argued that it had met each and every one. The grievant had clear notice of what not to do, the rule was clearly related to the operation of the business, the investigation was fair, thorough and objective in every way, the grievant was found to have done what was alleged, and there was no way that a such a serious offense could be excused or mitigated. The grievant would have to be fired for this offense.

14. The essence then of the Employer's argument is that the grievant physically grabbed a small child under her care in clear violation of policy and even State law and simply cannot be trusted with leaving them in her care as a teacher any longer.

The Employer requests an award denying the grievance and sustaining the discharge.

## **UNION'S POSITION**

The Union's position is that there was insufficient cause for the termination as there was no evidence that the grievant physically abused the child in question and that she in fact did not do so. Instead she caught the child as he was about to jump off a counter in order to safeguard him as well as other children in the immediate area. In support of this position the Union made the following contentions:

1. The Union argued that the grievant simply did not do what was alleged. The Union also pointed out that the Employer's main witness acknowledged that she did not see the entire event and simply caught a snapshot at best.

2. The Union asserted that what in fact really happened was that the child in question had either hit someone or had been hit by another child and was running away. He was a known climber and ran across the room, scrambled up onto a couch and was about to jump off a countertop or table of some sort that was approximately 30 inches off the floor.

3. Another teacher in the room yelled to the grievant to catch this child and as she turned she saw him about to leap off the table into the middle of many other children in the area. She was not able to catch the child in any other way than by his upper arm in order to keep this child from hurting himself or others as he careened off the edge of the countertop/table. The grievant in desperation grabbed him by the upper arm and lowered him safely to the floor where he landed softly and without incident. It was at this moment that Ms. Weyandt walked into the room. She acknowledged that she did not see the entire event and missed both the beginning of it where the child was scampering across the floor and onto the couch and missed the end of it where the grievant claimed she picked the child up by placing her hands under his arms and setting down on the floor.

4. The Union and the grievant acknowledged that the rules are quite clear and prohibit abuse of children in any way. The Union however claimed that the grievant simply did not violate those rules and never once abused that child in any way.

5. The Union pointed out that under state law, every teacher in that room, including the grievant's supervisor who alleged saw all this, were mandatory reporters of child abuse. They all clearly know that such abuse must be reported within 24 hours. Here however, neither of the other two teachers reported this and the supervisor waited until well after the 24 hours to do so. Even then it was only after consulting with others who essentially talked her into making the report. Had there truly been a violation of law or policy, this should have been reported immediately. The fact that it wasn't only bolsters the Union's claim that no such abuse in fact occurred and it was only after thinking about it and concocting details of the story that did not in fact exist did the supervisor report this to DHS.

6. Moreover, the grievant was not removed from the classroom that day even though the grievant's supervisor later testified that she thought abuse had occurred. The grievant was allowed to return to work the next day and went on a field trip with the students, including the student in question and was allowed to be on a bus with him for the entire trip. Again, if any true abuse had occurred the grievant would never have been allowed to do this.

7. With regard to the DHS investigation, the Union asserted that the investigator never even talked to the grievant about this and never sought to gain her side of the story. In fact, one of the other teachers indicated that she saw nothing out of the ordinary and never confirmed any part of the story at all. Moreover the DHS report was done well after the termination decision was made and cannot now be used as the basis for that action. The Union asserted that it is of no evidentiary value whatsoever and that the fact that the investigator did not even try to talk to the grievant before concluding that a rule violation occurred completely taints the report with obvious bias and lack of thoroughness and objectivity as to render it worthless.

8. The Union further noted that the evidence did not show any intentional abuse of the child in question nor even of negligent abuse or rough treatment of the child. The grievant acknowledged that the child was upset when she took hold of him but that was because he knew he had done something wrong and had been caught. The child was fine within seconds and gave the grievant a hug, as he normally did, when he left for the day.

9. The Union further argued that the facility tried to fire the grievant once before for similar concerns but Arbitrator Gallagher reinstated her after a full evidentiary hearing. He also found that there was no credible evidence to support any of the Employer's allegations and reinstated the grievant with full seniority and benefits along with back pay. The Union intimated that this is yet another attempt to "get rid of" this grievant with another weak story that should again be rejected by this arbitrator.

10. The essence of the Union's argument is that there is simply no evidence to support this discharge. The grievant did take the child by the arm but did so in response to a request by another teacher to do so and to prevent the child from injuring himself or others around him.

The Union requests an award sustaining the grievance, expunging the grievant's record of any discipline and awarding her full back pay and accrued benefits due to the County's actions herein.

### **DISCUSSION**

The Employer operates a Head Start program for young children. The events in this matter took place at the Bigelow location. The evidence showed that this center has multiple classrooms for children of various ages. The children in the grievant's classroom at the time of the incident in question were pre-school age, i.e. 3 to 5 years old.

The grievant has been a head Start teacher for some 18 years and has been trained in classroom management techniques for years. It was clear that the Employer has done an admirable job of providing training and education to its teachers on how to run a classroom for children of this age and how to manage discipline issues. It was further clear that disciplinary and behavior issues arise frequently as one can imagine. In addition to their young age, many of the children enrolled in the program have social and family issues that make it imperative that they be treated with the utmost respect and that they not be subjected to abuse or inappropriate treatment of any kind, either physically or verbally.

The Employer introduced into evidence both its own policies and procedures that make this clear as well as State laws and regulations that strictly prohibit any sort of rough physical treatment of these children or any sort of verbal or mental abuse. It was abundantly clear that the grievant was adequately trained on these rules. It was further abundantly clear that the rules in place regarding the treatment of children and how to handle them when behavior issues arise were made available to the staff and that the grievant was well aware of her duties and responsibilities in this regard. The facility clearly takes these issues very seriously and works very hard to make sure that all staff follow these rules at all time.

The issue here arises out of one incident that took place on October 26, 2006 between the grievant and a small child in her classroom. The evidence showed that the discharge in this case was based solely on this incident. See Joint exhibit 4 and testimony of Joanna Morken Hardy.

There was some evidence that the grievant had been warned about her handling of children in the past but it was further clear that these items were not the basis for the discharge in this matter. Thus they cannot be considered for purposes of determining guilt or innocence of the charges at hand but could be considered for purposes of the remedy. It is axiomatic that prior discipline may not be considered for purposes of determining whether the grievant violated policy in this instance but may be considered to determine the remedy in the event just cause for some discipline is found.

The evidence showed that the grievant was in the classroom on October 26, 2006 and that the day was particularly hectic and stressful. The facility had been locked down since the day before due to threats made by a parent to do violence to some children enrolled in the program and staff as well. The police were apparently in the facility that day and were working with Bigelow Staff to assure the safety of everyone. The children were not allowed outside to play as that posed a security and safety risk. There was no evidence however that this chain of events affected the grievant any more than it apparently affected everyone else in the facility but it was clear that the whole place was on edge due to this situation.

The evidence further showed that the grievant was in her classroom when another teacher called to her to catch or grab a child that was running across the room. The other teacher, who did not testify, told the grievant that the child had either hit someone or been hit by someone (that was never clear) and that he was running away.

The grievant testified credibly that in an instant the child got up on a couch and ran across the back of it to a countertop that was at the rear of the couch. It was at this moment the grievant turned to see the child about to jump off the couch into the midst of several other children who were under him.

This child was known to do rash things occasionally and was about to leap off the counter top when the grievant grabbed him by the arm just as he apparently jumped. She testified credibly that she had been trained not to take a child of that age by the forearm or wrist in order to prevent “nursemaid’s elbow.” Nursemaid’s elbow is apparently a dislocation of the elbow that can occur if a young child is grabbed by the forearm that results from the underdeveloped nature of the arm at that age. In order to avoid that, the Employer provided training and direction not to do that. Accordingly, the grievant did not in fact do that but rather took the child by the upper arm between the shoulder and the elbow. She testified credibly that this was the only way to get him at that point as this happened in a flash and that she was concerned that the child would crash into other children or fall and hurt himself once he leaped off the countertop.

The grievant testified that she had the child by the arm and lowered him to the floor and that this could well have looked like she pulled him up but that she in fact did not do that at all but was setting him down. She then testified that she simply helped the child for an instant while she turned to hit the power button on a CD player to play the “clean-up music” that was the signal for the children to clean up the room in order to get to lunch. The evidence showed that this action by the grievant took well under a second, perhaps a fraction of a second and that there was no evidence she physically harmed this child or grabbed his arm too tightly or in a way designed to hurt or harm him in any way. She then picked him up by placing both arms under his arms and set him down to sit quietly on a mat of sorts in order to get back to her other duties.

There were two other teachers in the room that day, one of whom called to the grievant to catch the child in question. Neither of these teachers filed a report with the State nor did either of them report this to the Employer as an act of abuse of this child. The evidence showed quite clearly that these teachers were mandatory reporters of abuse under State law.

Neither of these teachers testified at the hearing. This fact was frankly curious and was never explained by either side. Faced with this no evidentiary conclusions can be drawn from their conspicuous absence or from their statements. The statements were introduced into evidence but without their testimony they were of little probative value. In a case such as this it would be certainly relevant to know where the other teachers were, what they saw exactly and what the context was of their testimony to give it any particular evidentiary weight. Here one of the other teachers indicated that she essentially saw nothing unusual and the other indicated that the grievant grabbed the child's arm and "told him/forced him" to sit down. This latter statement comes from a written statement taken by the Employer, Employer exhibit 5 however and may or may not be the declarant's own words. Without actual evidence or testimony it is not possible to draw any evidentiary conclusions from these statements.

The only other actual witness to the events in question on that day was the grievant's supervisor. She testified credibly as to what she saw. She indicated that she entered the room with another person and saw the middle of the incident. She saw the part where the grievant had the child by the arm and appeared to be pulling him up. She did not see or witness the part where the other teacher called to the grievant nor of the child running across the room and climbing onto the couch and counter to jump off it. She did not see anything after the grievant set the child down. She saw the grievant with her hands on the child's upper arm. She testified that the grievant had a stern tone of voice but this was adequately countered by the fact that the grievant was clearly straining to lean over other children in order to grab the child who was about to jump and that she was grimacing to do that.

Ms. Weyandt called to the grievant "be careful" and testified that the two made eye contact. There was some dispute about the eye contact but it is quite likely that Ms. Weyandt did look at the grievant. It is also quite plausible that the grievant did not make eye contact back but that Ms. Weyandt thought she did. In this case it is of little consequence, since the grievant did testify that she heard Ms. Weyandt call out to her to "be careful."

It was however at the very moment she had the child in the air by the arm as he was jumping down off the countertop. In that context it was clear that the meaning as spoken was not at all the meaning as heard. What Ms. Weyandt appeared to be talking about was that the grievant not violate facility policy about handling children. What the grievant heard was an advisory not to get hurt or to be careful about where she set the child down physically.

Ms. Weyandt then left the room in what was shown to have been a very short time and did not see the rest of the incident. It was clear that the whole scenario took place in a very few seconds and that Ms. Weyandt's presence in the room could have been for perhaps a second or two and no more.

Ms. Weyandt also did not immediately report this to DHS as a potential child abuse incident. Instead she thought about it and consulted with others about it. The Union made much of this and attempted to undercut the credibility of this witness by arguing that this should have been reported sooner; i.e. within the 24 hours provided by statute. The fact that it was not does not serve to completely undercut the credibility of the story but does give the arbitrator pause in this context when viewed with other facts in the case.

First, no other teacher in the room reported it either even though one of them may well have seen it. Second, the grievant was not taken out of the room at that time, as she certainly could have been if there was truly an act of abuse. Further, she was allowed not only to return to work the next day but to go on a field trip with the very child she was involved with the day before. The entire class went on the trip as well. She was allowed to be on a bus with these children for the trip both to and from the field trip.

Ms. Weyandt did report this to DHS and an investigation ensued. The investigator for DHS testified by phone at the hearing. The DHS report is contained at Union Exhibit 2 and finds that the grievant was "not a perpetrator of maltreatment under the Reporting of Maltreatment Minors Act, nor have you been disqualified from positions allowing direct contact with, or access to, persons served by DHS licensed programs."

The Union made much of this finding but under these circumstances this finding alone does not control the result. If indeed the grievant violated facility policy the fact that DHS did not find statutory maltreatment would not control here. The question here is whether the evidence of this event introduced on this record at this hearing was sufficient to prove by clear and convincing evidence that the grievant abused this child or violated facility policy.

The Employer too made much of the DHS report and the fact that, even though post hoc, it confirmed the internal determination made by the facility. The DHS findings were also of little value in this case for several reasons. First, as the Union pointed out, it was done after the termination letter was sent and could not have been used as the basis for the discharge. One of the basic tenets of discipline and discharge is the notion that the Employer must take the action based on what it knew when the decision was made and generally may not include facts that occur after that. The DHS investigation was done after the termination and its conclusion were by definition also made afterward.

Second, there was the way in which the investigation was done and how the conclusions were reached. Ms. Irene Gross testified that she was the investigator who performed the investigation on behalf of DHS. She acknowledged that only one of the two teachers in the room even saw what happened. There was no information in her investigative report that indicated that the grievant had in fact been asked by another teacher to stop the child from jumping and thus hurting himself or others. Why this fact was not in the report was never explained by the evidence adduced at the hearing.

Most disconcerting was that she acknowledged that she did not talk to the grievant about the events of October 26, 2006 and never made any attempt to do so. This was shocking enough but she further admitted that it “would not have made any difference to her even if she had.” This startling admission was in stark contrast to the need and legitimate expectation that DHS will conduct an objective, thorough and competent investigation in cases like this and was disappointing testimony on an almost constitutional level to say the least. Suffice it to say that the findings of DHS, such as they are, were of no probative value in this whatsoever.

What this case thus boils down to is competing evidence by the grievant and the one witness who testified at the hearing about the events that day. Both testified credibly and both were quite sincere in their testimony. The Union attempted to undercut the testimony of Ms. Weyandt by arguing that she exaggerated the story and that this may have been due to the delay in her reporting it. That did not appear to be the case. She was justifiably distracted and busy the day this happened and did not have time to deal with this issue at that moment. Moreover, it was an understandably difficult decision and she knew reporting it might well mean harming the facility by having to post a notice advising parents of what had happened.

The Employer made an attempt to undercut the grievant's credibility by arguing that the grievant maintained that this incident was "not a big deal." This too was not very successful. It was clear that the grievant was in no way saying that abuse of a child was not a big deal but was rather saying that what happened that day did not arise to that level and was in no way abuse of or harmful to the child in question.

As noted, there was no other probative competent evidence upon which to base the decision of whether abuse within the meaning of the Employer's policies occurred. Why the other teachers or adults who were in the vicinity were not called to testify was not explained and no inferences were drawn from that fact.

The case must therefore be decided on what was proven, or not proven, by the evidence. Here there was simply insufficient evidence on this record to establish that the grievant abused or mistreated this child. Clearly, two very plausible and yet competing inferences can be drawn from the sparse evidence on this record. Given the fact that the employer bears the burden of proof here, the discipline cannot be sustained without more actual evidence of the violation alleged.

Had there been more evidence one way or the other it can only be speculated as to what the result would be. Arbitrators cannot speculate about what evidence that was not presented might have been if it had or what people who did not testify might have said. Here without more the Employer simply cannot sustain its burden of proof in this matter.

Having said that it must be emphasized in the strongest possible way that this case must not be read as condoning abusive behavior. It is never acceptable to harm a child physically or verbally. It is never acceptable to violate State laws and regulations with respect to the treatment of children in the care of teachers and adults in this capacity. It is never acceptable to violate Rule 3 or any other rule promulgated by the State or this facility for the protection of children in its care. That however is not the basis of this decision. This decision is about what was proven on this record and whether the actual evidence that was adduced at this hearing proved that the grievant harmed or even intended to harm, threaten or abuse this child. It did not for the reasons stated above.

Accordingly, the grievance must be sustained and the grievant reinstated to her former position with appropriate back pay and reinstatement of all contractual benefits and seniority. There was evidence that the grievant has had other employment during the period between her termination herein and the present. Thus, the Employer is to make the grievant whole for all lost back pay less any earnings the grievant has had in the period of her termination. The grievant and the Union shall provide evidence of those earnings prior to the payment of such lost wages. Once that is done however, the Employer shall make the appropriate payment within one pay period of being provided such interim earnings information.

## **AWARD**

The grievance is SUSTAINED. The grievant is to be reinstated to her former position within 3 working days of this Award. In addition, the grievant shall be made whole for all lost wages, as set forth above, along with any and all accrued contractual benefits and seniority. The grievant's record shall further be expunged of the discipline herein.

Dated: September 4, 2007

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Jeffrey W. Jacobs, arbitrator

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