

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration  
of a Dispute Between

CLARK COUNTY

and

LOCAL 546-A(1), AFSCME, AFL-CIO

Case 86  
No. 51982  
MA-8796

Appearances:

Mr. Jeffrey J. Wicklund, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 44, Stevens Point, Wisconsin 54481-0044, appeared on behalf of the Union.

Ms. Kathryn J. Prenn, Esq., Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, #205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the County.

ARBITRATION AWARD

On December 22, 1994, the Wisconsin Employment Relations Commission received a joint request from Local 546-A(1), AFSCME, AFL-CIO and Clark County to appoint William C. Houlihan to hear and decide a grievance pending between the parties. On February 3, 1995, the Commission appointed the undersigned to hear and decide this dispute. An evidentiary hearing was conducted on March 23, 1995, in Neillsville, Wisconsin. The proceedings were not transcribed. Post-hearing briefs and reply briefs were submitted and exchanged by June 6, 1995.

This arbitration proceeding involves the discharge of employe N.T.

BACKGROUND AND FACTS

The Union and the County are signatories to a collective bargaining agreement, the relevant portions of which are set forth below. N.T., as of the date of discharge, had been employed by the County for a period of approximately 15 years. The grievant began employment as a limited-term employe and subsequently became a Clerk I, a Clerk II, and ultimately a Clerk III. The grievant was active in her union, and was the local union president, at the time of her discharge. The grievant worked in the county Department of Social Services, and among her duties included billing certain work time out, making journal entries, handling vouchers, foster

care payments, EDS billings, monitoring contracts, preparation of various vouchers, and following their approval, mailing those vouchers to a variety of vendors. According to all testimony in the record, the grievant was a hard-working, energetic, productive employe of the County.

LTD Commodities is a direct marketing firm which sells novelty and gift products through employers. The Company places catalogs in business and government offices and permits employes to order from those catalogs. The Clark County treasurer's office had an account with LTD for a number of years prior to the events giving rise to this proceeding. Employes regularly ordered from the catalog, received and paid for items ordered. In December of 1992, N.T., ordered a number of items as Christmas gifts, totalling \$497.11.

Kathryn Brugger was elected County Treasurer in November of 1992. Brugger took office in January of 1993. Shortly after taking office, Brugger received a billing statement from LTD indicating that the treasurer owed monies for purchases made. Brugger understood that those purchases had been made by N.T., turned the statement over to the grievant, and was advised that the bill had been paid. Sometime in February or March, 1993 Brugger terminated the arrangement with LTD, and the ability of employes to order from its catalog. On or about March 12, 1993, the Treasurer's office was sent an invoice by LTD Commodities in the amount of \$509.84. One item, in the amount of \$12.73 was for an item purchased by Brugger. The balance were for items purchased by the grievant. On March 22, 1993, Brugger wrote LTD Commodities, advising them that the grievant did not work in the Treasurer's office, that in the past the grievant had been permitted to use the Treasurer's account, but that that relationship had ended, and that the grievant had assured the Treasurer's office that the bill had been paid and that LTD had been contacted about keeping the grievant's bill separate from the Treasurer's department.

On or about March 25, the grievant provided Brugger with a copy of the following letter:

LTD Commodities, Inc.  
2800 Lakeside Drive  
Bannockburn, Illinois 60015-1296

March 25, 1993

Please find enclosed copies of money orders number 044536 for \$200.00, number 044534 for \$67.18, and number 044535 for \$229.96 for a total of \$497.11.

I have also enclosed a recent billing you mistakenly sent the Clark County Treasurer's office instead of to me. It was for the above-mentioned \$497.11.

If you have not received these three money orders and cleared my account, please let me know by calling me at @ or writing me at the

address below.

Sincerely,

N.T.

The letter provided Brugger had photocopies of the three personal money orders referenced.

In late March of 1993 LTD billed the County Treasurer once again for the items referenced in the prior charge. Excerpts from Ms. Brugger's April 5, 1993, response are as follows:

Dear Sirs:

We have received the enclosed statement from you on March 31, 1993. I have been trying to call your phone number 708-295-6058 at different times for the last three days and getting either the busy signal or no answer. I wrote you a letter on March 22, 1993, explaining the circumstances of this bill. I have had no response. Ms. N.T. has assured our office that she has paid this bill. Enclosed are copies of the money orders she said she sent you. If you have not received these money orders, please call me so I can pursue this matter to a close. I am extremely sorry this matter has gone on as far as it has and assure it will not happen again. . .

The billings continued. Following receipt of each statement, Brugger talked to N.T., and on each occasion was assured that the bill had been paid.

On June 11, Brugger wrote a letter on this matter to the attorney for LTD. The contents of that letter include the following:

Dear Mr. Blum:

This letter is in regard to a notice we received from LTD Commodities, Inc. concerning an account under the name of Treasurer OFC Clark County, 517 Court, Fourth Floor, Neillsville, Wisconsin 54456.

We have written and talked numerous times to LTD

regarding the statement (copy enclosed). As you can see, these items were ordered by N.T. N.T. does NOT and never has worked in our office. She works in the Courthouse on the fifth floor in the Social Services department. Ms. N.T. used our office catalog to order. We have been asking and reminding Ms. N.T. many times to get this matter settled, to no avail. We are turning over copies of the bill and all correspondence to the district attorney for further attention.

Subsequent to this, Brugger insisted that the grievant allow her (Brugger) to oversee payments for the bill. N.T. brought the checks and an envelope to Brugger so that Brugger could witness that a check was being sent. N.T. wrote a check dated June 17, 1993 in the amount of \$429.93 to LTD Commodities, Inc. The check was accompanied by a note indicating "Please deposit this check on 6/22/93 and it will be good. I will deposit my husband's payroll check that day." The check was returned for insufficient funds. The grievant wrote Brugger the following note: "I got my statement from the bank Friday, but that check was not in. It was sent back even though I made exact deposit of \$429.93 on 6/22 as promised. I had even asked them to call me if there was any problem. I need to go get a money order at noon after I find out from LTD if this is correct amount or if there is a charge."

On or about July 22, N.T. provided a personal money order addressed to LTD Commodities in the amount of \$129.93 in an envelope for Brugger to mail to the company. It was accompanied by a note to LTD indicating that it was a partial payment with the balance to be forthcoming. Additional payments were not forthcoming. On October 12, 1993, counsel for LTD notified the Treasurer's office that he would undertake legal action to collect the outstanding balance unless the balance was paid within ten days. Following receipt of Mr. Blum's letter, Brugger brought the matter and her files on the matter to the County's district attorney.

The grievant wrote another check, a copy of which she showed to Brugger, on or about October 25 to LTD Commodities in the amount of \$200.00. That check was also returned for insufficient funds.

Detective Sergeant Robert Powell initiated an investigation into this matter following its referral to the district attorney. What follows is a series of excerpts from the report prepared by Powell dated May 26, 1994:

On December 16th, 1993 the Clark County District Attorney's Office referred a case to the Clark County Sheriff's Department in reference to a possible forgery and issuance of worthless checks.

. . .

In the past, the Treasurer's Office would place orders with LTD Commodities of Bannockburn, IL for anyone in the courthouse that was interested in purchasing items from the LTD catalog. Apparently, when the items arrived, the individuals would pay for their items when they picked them up.

. . .

It was later learned that the other two money orders which [N.T.] claimed to have sent were indeed never sent to LTD. Instead, they were made payable to herself (#044536) and to the IGA Store (#044535) and the carbon copies were then made out to reflect that they had been issued to LTD. These were then photocopied and given to Brugger and LTD on or about the date of March 25th, 1993 in an attempt to make it appear as though all three money orders were issued and sent to LTD for her outstanding balance. When copies of the three money orders were sent to LTD and given to Kathryn Brugger, there was writing underneath two of the money orders that said "resent - original lost in mail". In fact, only one money order was made out and sent to LTD. This was confirmed by reviewing the bank records. . .

. . .

. . .The check was issued on June 17th, 1993 and accompanying the check was a note asking that the check not be deposited until June 22nd, 1993 at which time she would deposit her husband's payroll check. This check, which was made out to LTD, was returned for non-sufficient funds (NSF).

In reviewing her checking account records, she did deposit an exact amount of \$429.93 on June 23rd, 1993 (not June 22nd, 1993 as indicated), however she had a negative balance on June 17th, 1993 of \$103.50. Even after the deposit on June 23rd, 1993 she did not have enough money in her account. . .

. . .

. . .Kathryn Brugger was notified of the returned check and

failure to clear the account. She contacted [N.T.] and [N.T.] gave her a note stating that she had received her bank statement and discovered that her payroll check was not included in her statement, even though she had made the deposit on June 22nd, 1993 "as promised". She stated that she would be sending out a money order after she found out if LTD was assessing her a fee for the returned check.

On July 22nd, 1993 [N.T.] sent LTD a personal money order for \$129.93 for partial payment of the \$429.93. [N.T.] sent a letter with this money order indicating that she was going to send another money order for \$150.00 on August 6th and another money order for \$150.00 on August 22nd. [N.T.] showed this money order and letter to Kathryn Brugger prior to mailing it. The promise of sending the other two money orders for \$150.00 each was never kept by [N.T.].

Ultimately, Attorney Leonard Blum sent the Clark County Treasurer's Office a letter on October 12th, 1993 requesting payment for the outstanding balance of \$300.00. . .The attorney indicated that if the Treasurer's Office of Clark County did not pay the amount, legal action would be taken to ensure the remittance of the delinquent balance.

This prompted [N.T.] to issue personal check #221 from the Citizens State Bank of Loyal (Granton Branch) for \$200.00 to LTD on October 25th, 1993. With this check, she wrote LTD a note stating that she was sending \$200.00 as partial payment and that she would be sending the remaining \$100.00 on November 5th, 1993. Check #221 for \$200.00 was returned for NSF and the remaining \$100.00 was never sent.

. . .

On May 19th, 1984 at approximately 10:40 a.m. I interviewed [N.T.] I advised [N.T.] that she was not under arrest and that my office door was closed for our privacy only. [N.T.] stated that she understood.

[N.T.] went on to explain how she ordered personal items from her own catalog that she requested and that LTD made a mistake and billed the Treasurer's Office instead of her. She stated

that in the past she had ordered from the Treasurer's Office catalog and had paid that bill. I then showed her a copy of a letter that she had sent to LTD on March 25th, 1993 along with copies of three money orders that she claimed to have sent them. I marked the letter as Item "A" and the copy of the three money orders as Item "B". When I showed her Item "B", she stated, "that's money orders that went to LTD." She advised that she was attempting to prove to LTD that she had paid her bill. She also stated that she gave a copy of the three money orders to Kathryn Brugger at the same time as proof to Kathy that she had paid her bill. When I mentioned that the amount that she stated she sent was \$497.11, she stated that there was a merchandise return that dropped the amount due down to \$429.93. I knew that the reason why it dropped from \$497.11 down to \$429.93 was because one of the money orders actually was sent for \$67.18 (#044534), not because of a merchandise return. [N.T.] then stated that she issued a personal check on June 17th, 1993 for the amount of \$429.93 which was ultimately returned for NSF. She stated that she thought her account balance was "over \$530.00". She stated that she was surprised that the check came back NSF. I advised her that on June 17th, 1993 her account had a negative balance of \$103.50. She stated that she "found that out later". She stated that she had inadvertently added a \$600.00 deposit twice and that it was a bookkeeping error.

In looking at her statement, the only deposit made close to the date prior to June 17th, 1993 was a \$400.00 deposit made on June 8th, 1993. . .She did make a deposit on June 23rd, 1993, however her balance was already on the negative side. . .

. . .

. . .At that time I started to discuss the money orders again. I went through the paperwork that was received from the issuing institution. I confronted her with the fact that two of the money orders were not made out to LTD as she indicated to LTD and Kathryn Brugger. She was not able to explain the discrepancy. As I continued to interview her in reference to the discrepancy, she eventually admitted that she did alter the carbon copies of two of the money orders in order to make them appear as though they had been made out to LTD. I again asked her about the order form and she again stated that she placed the orders on her personal order

form and not the Treasurer's Office form. She advised that it was LTD's mistake. . .

Following the investigation, two sets of criminal charges were filed against the grievant. One of the charges was dropped in exchange for a plea of "nolo contendere" on the other. The grievant pled "nolo contendere" to: "Attempt to obtain title to property of another by intentionally deceiving him with a false representation which is known to be false, made with intent to defraud and which does defraud the person to whom it is made. . ." In the negotiations leading to the plea disposition, the grievant asked the District Attorney whether her plea might compromise her job. He advised her that he would be surprised if she lost her job as a result of this plea. It was his understanding that her job did not involve the handling of money. It was the grievant's understanding that the handling of vouchers was not the equivalent of handling money. The meeting broke up with her expressing her understanding that with respect to her job, she was on her own.

When the conviction was reported in the local newspapers, Tom Renne, Personnel Director, contacted the Social Services Department management to determine whether the conviction was related to the grievant's job. The various managers had a meeting and concluded that the grievant should be suspended with pay pending an investigation. She was subsequently suspended on September 22. On September 30, 1994, the grievant was discharged by the following letter:

"In light of the recent court findings concerning your involvement with LTD Commodities, the County was obligated to evaluate your position of employment to determine if it and the findings are substantially related. It has been agreed that there is a substantial relationship and therefore, upon the recommendation of the County labor attorney's office and subsequently by the personnel committee, your employment with Clark County has been terminated as of 5 p.m. on this date, September 30, 1994."

The discharge was grieved and that grievance has led to this proceeding.

#### ISSUE

The parties stipulated to the following issue:

Did the County violate the collective bargaining agreement when it terminated the grievant? If so, what is the appropriate remedy?

#### RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

## ARTICLE II - MANAGEMENT PREROGATIVES

2.1 Except as otherwise specifically provided in this Agreement, the County retains all the rights and functions of management that it has by law.

2.2 Without limiting the generality of the foregoing, this includes: . . .

- D. The determination of the size of the workforce; the assignment of work or workers; the determination of policies affecting the selection and training of employes, and the right to hire, recall, transfer, promote, layoff, suspend, or dismiss employes for just cause. . .

### POSITIONS OF THE PARTIES

The Union contends that the grievant acknowledges the mistakes she made in her personal life, but the conduct should not have led the County to discharge her. The Union cites a number of arbitral cases for the general proposition that an employer may not discipline a worker for off-duty activities absent a direct impact upon the employer's operation. The Union contends that there is no record evidence of a reasonably discernable impact upon the County's reputation or product. Any argument the County offers advances to the effect that it has been harmed is merely speculative. The Union contends that the orderly and efficient operation of the County is more harmed by the loss of an excellent employe than through retention.

There is no realistic concern that the grievant may abuse her position and misappropriate money. The County is so confident of this fact that it has not, even as of the hearing date, seen fit to review its procedures, or audit departmental finances.

The plea of "no contest" does not render the grievant unable to perform her duties or to appear at work. There is no evidence in the record that would suggest that co-workers would refuse or be reluctant to work with the grievant in the future.

The grievant accepted a plea of "no contest" with the expectation that it would not affect her employment with the County. The grievant testified that she decided to accept the plea of "no contest" to a misdemeanor complaint rather than engage in a costly and possibly lengthy proceeding into the merits of the dispute. The District Attorney speculated that the matter should not affect her job. The Union cites authority for the proposition that a plea of "nolo contendere" may not be used as an admission against interest and may not be used in a subsequent or collateral civil action for that purpose.

The Union contends that the County has culpability in this matter due to its tacit sanction of an unauthorized account in the name of the County Treasurer's office. The account existed for many years prior to 1993. County officials were aware of this account. It is now unfair for the County to discharge the grievant for off-duty conduct involving a mail-order account which was in the County's name, was probably unauthorized by the County, and was used by employes and the County Treasurer for a number of years without incident. Had the account not been in the County's name, but rather in the grievant's name, there would have been no employment-related dispute.

The Union contends that the grievant's long and exemplary work record is a key consideration in this case. The Union notes that the grievant had 15 years service to the Department and was the recipient of glowing performance appraisals. There is nothing in the record to suggest that the grievant would do anything other than to continue performing at a demonstrated high level. She is not a bad employee.

The County contends that it had cause for terminating the grievant's employment as a Clerk III following her conviction of attempted theft by fraud. Contending that the key facts are not in dispute, the County notes that the grievant, as a part of her job, prepared vouchers, COP reporting, foster care payments, posting payments, EDS billing and monitoring contracts with the County, and that these were all essential functions of the Department of Social Services. All departmental checks were prepared by the person in the grievant's position; the grievant handled cash at times. The County contends that it relies upon the individual in the position to be honest and truthful.

The County attacks the grievant's credibility on a number of points.

The County contends that the termination is supported by the record. The County notes that there is no progressive discipline provision contained in the parties' collective bargaining agreement. The concept of "just cause" is recognized and accepted as encompassing two basic elements; first, the employer must establish the existence of conduct by the grievant in which it has a disciplinary interest. Second, the employer must establish that the discipline imposed for the conduct reasonably reflects its disciplinary interest. The County cites authority for these propositions. The County notes that the grievant was not forthright and honest in responding to the various allegations. Supervisory personnel testified that they would be uncomfortable having the grievant prepare vouchers following her conviction and that there is no other job within the Department which she could do. Every position in the Department handles checks and vouchers.

The Employer contends that the grievant's conviction substantially relates to the circumstances of the job of the Clerk III. Citing authority, the County contends that approximately two-thirds or more of the forgery/fraud/embezzlement offenses are the product of recidivists. The County notes that the Clerk III position offers a variety of vehicles for an employe to engage in

theft, and/or to divert monies that would otherwise go to either the County or recipients. This forms the nexus of the behavior with the position. The County contends that the grievant's various actions breach the trust required of her position.

The grievant's alleged off-duty misconduct had a sufficient nexus to her employment to warrant discharge. The County contends that the Union has chosen to disregard the fact that the grievant intentionally brought the County into her web of deceit. The grievant's actions had a direct impact on the treasurer's office and its employees. Because of the grievant's dishonesty, treasurer Brugger was forced to spend 11 months trying to resolve the grievant's "personal" problem with LTD. The grievant's lack of honesty and integrity in concealing various facts from Ms. Brugger for 11 months has cast grave doubts in the County's mind as to her ability to function in the Clerk III position. The County regards her as untrustworthy around cash and vouchers. The County contends that it would ultimately have borne responsibility for the grievant's bill with LTD had the grievant not paid.

The County cites arbitral authority for the proposition that the decision to terminate the grievant was appropriate under all of the circumstances, and it is not the role of this Arbitrator to substitute his judgment for that of the Employer.

In its reply brief, the County attacks the contention that it terminated the grievant solely due to her conviction on a plea of "nolo contendere". The grievant was terminated because of her lack of integrity, honesty and candor in connection with an independent investigation. Both the department director and immediate supervisor testified that they would have very legitimate concerns about placing the grievant into any position in the Department or County because her dishonesty makes her untrustworthy around cash and vouchers.

## DISCUSSION

This grievant encountered personal financial difficulties. Her approach to dealing with her financial woes is nothing short of outrageous. Her actions led to the filing of criminal charges and ultimately to the imposition of criminal sanctions. There is no doubt that she has paid a price for her actions, and, as argued by the Union, it is not the role of this employer to further punish her for transgressions she has committed in her personal life. However, the behavior described above, has strong workplace ties. The catalog from which the orders were placed was located in the workplace. All bills were sent to the Treasurer, and had historically been sent to the Treasurer. The Treasurer was the ongoing target of the various billing letters that continued for approximately 11 months. While it may be true that the grievant attempted to have an account open in her own name, and for some period of time believed that she had accomplished that, it quickly became apparent to even the most casual observer that that was not to be the case, and that the County and County Treasurer's office were to be the ongoing focus of collection efforts.

In January of 1993, the grievant assured County officials that her account had been paid.

Certainly by March it was clear that: 1) her bill had not been paid; 2) whatever effort had been made to put the account in her own name had failed, and 3) the County was on the receiving end of a series of collection letters. The March money orders incident was an outrageous attempt to deceive both LTD and the County. By March, the County's level of aggravation had reached the point where it was insisting upon proof of payment.

The matter persisted into April, notwithstanding the assurances provided by the grievant that money orders had been sent. Following her June conversation with attorney Blum, Brugger insisted that the grievant bring the payments to her (Brugger) so that she could mail them personally. Under these circumstances, it is somewhat of a stretch to characterize the grievant's financial difficulties as personal problems, unrelated to work. In June of 1993, the grievant wrote a check which could not possibly have cleared the account in an effort to repay the bill. In July, she actually made a payment of \$129.93 and promised to make two other payments in August. Those payments were not forthcoming. When the treasurer's office was threatened with a lawsuit in October of 1993, the grievant made an effort to pay \$200.00 on the outstanding account. That check also bounced.

Throughout this affair, the grievant understood that the County was an unwilling participant in the repayment schemes. Following each of the numerous incidents, including the repeated billing efforts by LTD, Brugger and the grievant met to discuss what was being done to satisfy the account.

People get into trouble. The grievant is not the only person on earth who has encountered financial difficulty. If this case were simply about an employe who got into financial trouble and had trouble getting herself out, I would view it much differently. It is not. The grievant continued to lie and deceive right to the bitter end. She lied and misrepresented the truth during a criminal investigation into her behavior until such time as she was literally trapped, and without any avenue of escape. It was only at the point when she was forced to confront proof of her behavior that she confessed to having engaged in that behavior.

I think the County has a right to be concerned about having an employe handling vouchers and payments who has forged documents. The grievant's behavior, in attempting to mislead County officials, and the LTD company, and her incredible acts to try to manipulate and deceive properly raise alarm with the County. I think the County has a right to be concerned about the viability of an employe who would put the Treasurer through the grinder in the way that the grievant did.

The grievant was told by the District Attorney that her "nolo" plea should not affect her job. While I regard that as an unfortunate exchange, I do not believe it to be of consequence in this proceeding. The statement was borne of a misunderstanding of the fact as to whether or not the grievant handled money (vouchers). More importantly, the District Attorney is not the employer. The employer is not required to honor the representations of the D.A. in this matter,

and the D.A. is in no position to represent the employer in this matter. Any reliance placed upon the assurances of the District Attorney were certainly misplaced. The record also indicates that the grievant left the meeting understanding that with respect to her employment she was on her own.

The County is not free to rely upon the conviction borne of a "nolo contendere" plea for purposes of discharging the grievant. Here, however, it conducted its own factual investigation. More to the point, County officials lived through this experience. There is no reliance on some abstract, admission-less conviction for purposes of this discharge. County officials, especially Brugger, lived through the year-long series of events brought about by the grievant.

The Union contends that the Treasurer's office is somehow culpable in all of this. I disagree. The fact that the County sponsored this account does not excuse the grievant's behavior. Contending that it does is similar to arguing that the existence of County-sponsored disability insurance permits employes to engage in insurance fraud. Once Brugger became Treasurer, she tried to end the account altogether. It appears to me that Brugger was extraordinarily patient with the grievant during the protracted life of this experience.

This grievant has been a long-time employe with a good work record. Her evaluations speak highly of her work performance and her attitude. This weighs very heavily in her favor. However, her behavior here was outrageous. Her attitude toward her employer was abusive to the point of being criminal. The employer tolerated her behavior for nearly one year. She lied repeatedly to her employer, and her employer tolerated her actions even after it became obvious to the employer that the grievant had lied.

The employer demonstrated restraint, compassion and tolerance. The grievant's response was entirely inappropriate over the entire course of these events. It is in that context that I have been asked to overturn this employer's decision. I will not do that. Nothing in this record suggests that would be appropriate.

#### AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 11th day of September, 1995.

By William C. Houlihan /s/  
William C. Houlihan, Arbitrator

