Opinion & Award

In the Matter Between

Local 2586
American Federation of Government Employees, AFL-CIO
(Local, Union)

&

Department of the Air Force
Altus Air Force Base
Altus, Oklahoma
(Agency, USAF)

FMCS No. 121208-51629-3

Patrick Halter, Arbitrator

Appearances

For the Union:	Auka Laplanche Legal Rights Attorney
For the Agency:	Captain Joseph B. Ahlers Chief of Civil Law

Dates of Hearing
July 25 - 26, 2012

Date of Post-Hearing Briefs
August 31, 2012

Date of Award
September 30, 2012

Issue
Removal

Summary of Award
Grievance Sustained

Findings

Melinda Uriegas, hereinafter referred to as the grievant, entered on civilian duty with the USAF in 1986. In 2011 she encumbered a position titled Program Technician, GS-1702-05, and was assigned to the Child Development Center (CDC) at Altus Air Force Base, Altus, Oklahoma. Grievant's first line supervisor was CDC Director Christine T. Matthews.

On December 05, 2011, grievant and co-worker Gillian Diehl were assigned to the same room at the CDC. During nap time for the 3 to 5 year olds, grievant was preparing for activities to take place later that afternoon and co-worker Diehl was hanging paper snowflakes on the wall. They had their backs to each other while performing their duties but remained in near physical proximity.

Grievant observed a 4-year old boy (Noah Adams) not napping but jumping off his cot and kicking his legs. Concerned that the boy would awaken the other children, grievant moved the boy with his cot to an area that was near the sand and water table. Later grievant heard the boy crying and discovered that he was not on his cot but underneath the table. Grievant startled him when she called his name such that he bumped his head on the table's underside. Using one of her arms, grievant reached under the table and pulled the boy towards her by one of his arms.

Grievant noticed there was a pin-point size blood on the boy's ear; she had co-worker Diehl dab the blood spot with a wet compress while grievant instructed Front Clerk Sharon Ames to notify the boy's mother (Kelsey Brightbill). The mother arrived approximately fifteen (15) minutes later and, after comforting her son, took him home.

The boy has hearing loss in the ear dating from his very early years. Since the pin-point blood was on his hearing-impaired ear and, the next day (December 6) that ear was "puffy" the mother took him to the audiologist. After a follow-up visit the audiologist determined no impairment or other permanent affect on his ear from the incident.

On December 6 Kelsey Brightbill asked Director Matthews for information about the prior day's incident. Specifically she sought to view the video but Director Matthews was unable to access it at that time. Without the video immediately accessible, Brightbill and Matthews discussed the incident with grievant.

Grievant informed them that she had placed the boy in a different area with his cot near the sand and water table so as not to disturb the other children during nap time. Instead of remaining on his cot, she heard him crying under the table. Grievant called his name which startled him; he bumped or scraped his head on the under side of the table. Grievant pulled him from underneath the table.

The incident of December 5 was recorded in the log book on December 6 and grievant wrote an incident report on December 7. At that time grievant was placed on leave pending investigation.

On March 1, 2012, the grievant received a Notice of Proposed Removal based on a charge of "conduct unbecoming a federal employee" with proposed action "in accordance with Cause of Action Item(s) 6b and 24c, Atch 3, AFI 36-704." [Jt. Exh. 10]

Attachment 3, Guide to Disciplinary Actions, assists officials in selecting the appropriate penalty. The Cause of Action at Item 6b focuses on safety and "[w]hen failure may result in serious injury, loss of life, or major damage to property" and Item 24c is "Careless workmanship or negligence…which results in possible or actual major damage to aircraft or other property or

possible or actual danger to personnel." The range of penalties under both Items is reprimand to removal depending on the number of offenses. The Notice of Proposed Removal identifies two incidents.

The first incident is December 5, 2011:

> …you were seen on the video moving a child from underneath the sand and water table by one arm. As you are fully aware, it is the Center's policy that when moving a child, it should be done using both the childcare givers arms to both arms of the child to prevent dislocating the child's arm/shoulder. When moving the child in this manner, it appears you pulled him against the table resulting in injury to the child's ear that required medical attention. You admitted to me that your actions were not in accordance with established standards of care.

The second incident is September 19, 2011:

> …you were involved in another incident concerning a child in your care who had marks around his neck. The mother of the child filed a report with the Oklahoma Department of Human Services. You reported that you believed the marks came from another child that had pinned him down, causing the marks. However, your co-worker reported that she noticed the marks on his neck at his naptime, prior to the two children's scuffle. You neglected to write an incident report, but you did speak with the mother explaining where you thought the marks came from, and that you could have also scratched his neck when you were trying to catch him after he ran out of the classroom. When the mother was asked by investigators what the allegation was, she stated that her son had said that the teacher had squeezed his neck because he was crying.

Based on the two incidents, the Notice of Proposed Removal states that grievant's "actions…raise serious concerns for your ability to work in your position as a Child Development Program Technician and be trusted to follow childcare safety procedures to maintain our record of excellence in the Center."

On March 12, 2011, grievant filed a timely response to the proposed removal noting "[t]here is no regulation that has been cited in the packet that shows that she did anything to constitute 'conduct unbecoming a federal employee'." [Jt. Exhs. 12, 13]

On March 13, 2012, grievant met with the deciding official. After considering her response, the deciding official issued the Decision to Remove on April 10, 2012. [Jt. Exh. 15]

A timely grievance was filed on April 26, 2012 wherein the Union noted that grievant "has always been an outstanding employee" and the "two incidents cited to justify this wrongful termination and neither one have the merit required to warrant a termination." The Local argued that grievant "did not receive fair and just consideration in correcting alleged erroneous behavior" and the "incorrect information was used for the Douglas Factors in determining if this action should be used." As a remedy the Union requested grievant's reinstatement "and that her 1st level supervisor be allowed to properly address this situation." [Jt. Exh. 17]

The Agency denied the first-step grievance on May 9, 2012, and the following day (May 10) the Union invoked arbitration. [Jt. Exhs. 17, 19, 20]

On July 25 and 26, 2012, a hearing in this matter was held before the undersigned with each party afforded an opportunity to present evidence, to examine and cross-examine witnesses, and to argue its contentions. Grievant was present for the hearing.

Admitted into the evidentiary record are twenty-five (25) joint exhibits, one (1) Local exhibit and two (2) Agency exhibits. The record in this proceeding closed on August 31, 2012, with the parties' timely filed electronic post-hearing briefs.

Issue

The parties stipulated to the issue for arbitration.

> Did the Department of the Air Force remove Melinda Uriegas for such cause as to promote the efficiency of the service?
>
> If not, what shall be the remedy?

Negotiated Agreement

Article 2:	Recognition and Coverage
Article 3:	Public Purpose Serviced by This Agreement
Article 6:	Management Rights and Responsibilities
Article 7:	Employee Rights and Responsibilities
Article 8:	Union Rights and Responsibilities
Article 11:	Negotiated Grievance Procedure
Article 12:	Arbitration
Article 30:	Disciplinary and Adverse Actions

Instructions

AFI 34-248:	Child Development Centers
AFI 36-704:	Discipline and Adverse Actions

Summary of the Agency's Position

The Agency's position and arguments are summarized in its post-hearing brief and were presented at hearing through the testimony of witnesses Christine T. Matthews, Kelsey Brightbill, Lt. Col. Calvin E. Daniels, Jr. and Col. James D. Peccia.

According to the Agency the grievant "forcefully yanked and dragged" a 4-year old by one arm from underneath a table as captured on video. [Jt. Exh. 25] This violates well-known policies for dealing with children. Caregivers are trained and retrained on the policy for a 2-handed lift. Even though it may not be written policy, every caregiver understands that is the policy to be followed and practiced.

The 4-year old is partially deaf in the ear that was swollen and bleeding due to grievant's conduct. Although there was no further or permanent injury to the boy's ear, grievant's failure to follow proper lifting procedure could have resulted in serious injury to the child. Allowing grievant to

continue working in the CDC would be disregarding safety and not promote the efficiency of the Federal service.

USAF details the applicable procedure and legal framework for evaluating this grievance. It sets forth the standards to follow in assessing a penalty that is reasonable as well as nexus to grievant's charged misconduct.

The Agency followed AFI 36-704 which is a guide for framing the issues of misconduct. Grievant received numerous trainings and hands-on instruction for dealing with children. Her conduct breached those standards of acceptable practice. She failed to use positive discipline towards the boy. The effect on the efficiency of the service and potential harm to others cannot be gainsaid.

Contrary to the Union's argument, progressive discipline is not required. The *Douglas* factors were appropriately considered and applied to grievant such that the penalty is reasonable given the lack of remorse by grievant and her failure to complete the written incident report as required on the day of the incident. Finally, the Agency disputes any claim for attorney fees.

Summary of the Union's Position

The Union's position and arguments are summarized in its post-hearing brief and were presented at hearing through the testimony of witnesses Melinda Uriegas, Gillian Diehl, Marshall Vega and Sharon Ames.

AFGE's position, in essence, is that the USAF lacks just cause to remove the grievant because she did not violate Agency policy, the removal is unreasonable as it does not promote the efficiency of the service and the USAF failed to properly assess the relevant *Douglas* factors in this situation.

Article 30, § A, in the Negotiated Agreement states that "basic procedures and rights of employees, as described by law, instruction, and this agreement, shall apply in handling all disciplinary action" and "[t]he parties agree that discipline will be appropriate under the circumstances[.]"

AFI 36-704, § C.10.1.1 states that a disciplinary or adverse action may initiated "only for such cause as will promote the efficiency of the service." Such cause requires the Agency to show that it promulgated a work rule affecting grievant and she had notice of it.

With respect to policy, there was no written policy on 2-arm lift in effect at the time of this incident. The Agency did issue a written policy addressing this situation after the fact; it cannot be applied retroactively to support grievant's removal. Furthermore, grievant was not on notice that a 2-arm lift was the only acceptable or proper method for lifting a child notwithstanding Director Matthews' testimony that "its a given."

Since the Agency did not apply progressive discipline for grievant, the penalty is not reasonable. Discipline short of removal should be applied unless the grievant's action are egregious which is not the situation. Furthermore, grievant was insubordinate or defiant as she complied with any order or instruction. She has no prior disciplinary record. For a first offense, removal is harsh and punitive. With fourteen (14) years experience in CDC and satisfactory performance, grievant can be rehabilitated.

The second incident cited to support the removal is in error; the boy (Jaxon Dixon) had the marks on his neck when he arrived at CDC on September 19, 2011, and they were exacerbated when the boy was held in a choke hold by another child at the CDC.

Finally the Agency did not consider the totality of circumstances. The deciding official was not amenable to considering rehabilitation. His comments to Ms. Brightbill were definitive - - this will not happen again - - and he informed CDC Director Matthews that he would have "wrung [grievant's] neck." Besides these comments, the deciding official relied on a domestic abuse charge. There was no such charge. There is no nexus between that alleged charge and grievant's position.

As a remedy, the Union requests that grievant be reinstated with back pay. The Agency's removal of grievant was an unwarranted personnel action that would not have occurred but for the Agency's violation of Article 30 and AFI 36-704.

Conclusions

The parties stated affirmatively on the record that the stipulated issue is before the arbitrator for a decision on the merits. The evidentiary record is established through sworn testimony that was subjected to cross-examination and documents submitted into the record after inspection and *voir dire* as necessary by each party.

The Agency is required to prove the charged misconduct by a preponderance of the evidence (5 U.S.C. § 7701(c)(1)(B)). That is, there must be sufficient evidence of a probative nature to persuade the arbitrator that the "issue asserted is more likely to be true than not." *Natividad v. Department of Agriculture*, 5 MSPR 415 (1981)

The Agency's burden of proof includes establishing the elements of the charge, demonstrating that the penalty is proportional or reasonable for the charge and showing a nexus between the discipline and the efficiency of the service.

Aside from establishing the charged misconduct by a preponderance of evidence, the substantive rules applied at the Merit Systems Protection Board also apply in arbitration. *Cornelius v. Nutt*, 472 U.S. 648, 86 L.Ed. 515 (1985)

The Notice of Proposed Removal and the Decision to Remove cite grievant for "conduct unbecoming a federal employee" and rely on AFI 36-704, Attachment 3, Items 6b and 24c. The proposing official acknowledged in his testimony that the "closest" item for "conduct unbecoming a federal employee" is Item 20 which is "insubordination, defiance of authority, refusal to comply with proper orders, wanton disregard of directives or insolence" and provides penalties ranging from reprimand to removal.

Item 6b focuses on safety practices such as wearing safety equipment and failures that may result from not wearing or practicing safety. Item 24c focuses on carelessness or negligence in worksmanship that damages aircraft or other property including personnel. These items do not align squarely with the charge but they are sufficient in scope to link safety practices in the CDC workplace, when not followed, to danger or harm to clients (pre-school age children) and that careless or negligent conduct in the performance of duties is not acceptable. Encompassed within these items is the Guidance Policy/Statement of Understanding signed by grievant. [Ag. Exh. 5] Items 6b and 24c are well-taken and pertinent in this situation.

The first specification relied on by the Agency for its removal of grievant is the December 5, 2011, incident. The evidence establishes that grievant did pull the boy from underneath the table using a 1-arm technique. She did not attempt to coax him out as the written guidance at the CDC advises and as she recognized as an acceptable practice in the Guidance Policy/Statement of Understanding.

The boy bumped or scraped his ear under the table when the grievant called his name to attract his attention. The witness present, but not viewing this incident, was co-worker Diehl. She did not hear any untoward language or tone of voice towards the boy from grievant. Grievant's voice caught the boy off guard which led to his scraped ear. The deciding official concluded that the video showed grievant "yanked" the boy from underneath the table and that caused his scraped ear; the video is conclusive that grievant pulled with one arm but the video is inconclusive as to the cause of the scrape. Inconclusive evidence is not construed favorable for the Agency's burden of proof.

With respect to the 2-arm lift, there is no written policy or instruction establishing that the only acceptable or proper procedure is a 2-arm lift. A written policy on 2-arm lift was in effect after this incident; it cannot be applied retroactively to support grievant's removal. Although Director Matthews testified that "its a given" that a 2-arm lift is the proper procedure, the testimony from grievant and co-workers Diehl and Ames is that 2-arm lift was not well-known among staff notwithstanding any training. Diehl and Ames are credited; the Agency did not establish any motive or bias for not crediting their testimony on this topic.

The testimony and documentation, or lack thereof, does not support the Agency's position on the written policy for a 2-arm lift. Nevertheless, grievant acknowledged during the investigation that she did not follow an acceptable standard of care in this incident and, retrospectively, could have handled the situation in a more adept manner. This self-recognition is consistent with expectations and written guidance she signed in the Guidance Policy/Statement of Understanding for interacting with children in her care. Having a child in her care with hearing issues, a measure of safety and caution is expected for an employee with 14 years experience.

As for the incident report, grievant materially complied with the practice to complete an incident report. On the day of the incident she immediately notified the mother and explained the situation to her. The next day she recited the incident to the mother again in the presence of Director Matthews and on December 7 she wrote an incident report. The testimonial evidence was mixed whether an incident report is written on the day an incident occurs. The practice or requirement for same-day written reports of an incident was not strictly applied or enforced.

Based on the foregoing under the first specification, grievant's calling the boy's name caused him to incur a bump on his ear. Grievant is responsible for his care; she failed to use techniques to coax or persuade children to alter his conduct and, instead, immediately pulled him from underneath the table. As Director Matthews testified, grievant's conduct for the first incident warrants a letter of reprimand and retraining.

The first specification, by itself, does not justify removal when considering the lax practice on written incident reports and the credited testimony that a 2-arm lift is not well-known among staff as the only acceptable practice. Furthermore, the Agency relied on erroneous information about grievant when it considered the *Douglas* factors to conclude she was not a candidate for rehabilitation. In this regard, the Agency's reliance on a domestic abuse allegation as indicative of anger management issues was erroneous in time and substance. That incident involved the dissolution of her marriage in 2000 but the Agency considered it as a recent event (2010).

The second specification cited in support of the removal is the September 19, 2011, situation where another boy (Jaxon Dixon) had marks on his neck. A complaint was filed with the Oklahoma Department of Human Services. The Agency's Children and Youth Programs investigated this matter.

Co-worker Diehl testified that the marks were on the boy's neck when he arrived at CDC on the day of the incident as noted in the written report produced by authorities investigating this complaint. "That caregiver [grievant] noticed marks on Jaxon's neck at that time, but when she mentioned it to the other caregiver [Diehl], she said that she had noticed the marks at naptime. " [Jt. Exh. 4]

The USAF investigator concluded "I have not found any reason to suspect the [CDC] staff of any criminal wrong doing or negligence in reference to the care of Mrs. Lindsey's child." The investigator noted that the "child mentioned in the DHS report has a history of behavioral issues while under the care of the Altus CDC staff, including rough play and frequent 'bumps and bruises' related to rough play with other children to the point the …staff requested the assistance of a clinical behavioral psychologist to observe the child…to address previous concerns from the caregivers." [Jt. Exh. 3]

Based on these documents and the testimony, the second specification is not proven. There is no evidence to support placing culpability on grievant. The Agency relied on this incident under the *Douglas* factors as, essentially, a pattern by grievant towards abuse or carelessness with the children and rendering her not amenable for rehabilitation; that is an arbitrary and capricious conclusion when placed in the context of the Agency's investigative conclusions documented in this record and cited in the preceding paragraphs.

Since the Agency has not established the second incident by a preponderance of evidence, it does not support removal. The Agency's basis for removal is not persuasive with one incident (December 5, 2011) which, previously noted, by itself, does not justify removal but a letter of reprimand and retraining for grievant.

Further support for discipline short of removal is the deciding official's disposition towards a punitive measure. His comment to Director Matthews that he would have "wrung grievant's neck" is emotionally charged towards a punitive measure and his testimony "why should I" review the Negotiated Agreement outright discredits the notion of progressive discipline. Grievant's 14-year performance record in CDC was cast aside by his comments and in his conclusion that she could not be rehabilitated. His basis for no rehabilitation has to do with both incidents of which the second incident is without any evidence for support and the domestic abuse claim which is historically remote and unpersuasive.

In view of these findings and conclusions, the removal is rescinded and, in lieu thereof, a written reprimand is issued. Grievant is reinstated to employment with the Agency. But for this unwarranted personnel action - - removal - - that is not proven by a preponderance of evidence, grievant would have remained employed in CDC. Grievant's reinstatement includes back pay with interest and other employment benefits.

References and citations to decisions of the Federal Labor Relations Authority, Merit Systems Protection Board and the courts have been reviewed and are incorporated by reference. Also, arguments not itemized in the preceding paragraphs but presented at the hearing and in briefs have been considered. The findings and conclusions are summarized in the Award that follows.

Award

1. Grievant's removal is not for such cause as to promote the efficiency of the Federal service. In lieu of removal, grievant is issued a written reprimand Based on the December 5, 2011, incident for not adhering to the Guidance Policy/Statement of Understanding.
2. Grievant is reinstated and made whole for lost pay and benefits due to this unwarranted, personnel action which was not proven by a preponderance of evidence.
3. Grievant will receive training as determined by the CDC.
4. The arbitrator retains jurisdiction for the purposes of matters arising from the remedy and consideration of a petition for attorney fees.

Patrick Halter /s/
Patrick Halter
Arbitrator

Signed on this 30th day
of September 2012