

submitted by the Minnesota Bureau of Mediation Services. A hearing in the matter convened on November 14, 2008, at 9:00 a.m. at the Union offices, 300 Hardman Avenue South, South St. Paul, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties elected to file post hearing briefs with an agreed-upon e-mail date of December 5, 2008. The post hearing briefs were submitted in accordance with those timelines and exchanged electronically by the Arbitrator, after which the record was considered closed.

The Parties agreed to bifurcate the hearing, allowing the Arbitrator to rule on whether the grievance is arbitrable. If arbitrable, the Parties agreed to hold a separate hearing on the merits of the case.

ISSUE AS DETERMINED BY THE ARBITRATOR

Was the grievance appealed to arbitration by the Union within the time limits required by the Collective Bargaining Agreement?

STATEMENT OF THE FACTS

The Parties have negotiated a grievance procedure contained in Article 18 of the Collective Bargaining Agreement. Article 18, Section 1, Grievance Procedure, defines a grievance "as a

dispute or disagreement as to the interpretation or application of any term or terms of this Agreement." Once a grievance is filed, there are steps to be followed by the Parties in order to resolve or advance the grievance to arbitration. These steps are contained in Article 18, Section 2(D) as follows:

Step 1: The designated Union representative, with or without the employee, shall attempt to resolve the matter by requesting a meeting, in writing, with the Court Administrator or designee. The Court Administrator or designee shall schedule a meeting to discuss the grievance with the designated Union representative within seven (7) calendar days of the request and shall respond, in writing, to the Union within seven (7) calendar days of the meeting.

Step 2: If the grievance has not been resolved to the satisfaction of the Local Union within thirty-five (35) calendar days after the employee, through the use of reasonable diligence, should have knowledge of the first occurrence of the event giving rise to the grievance, it may be presented in writing by the designated Union Representative to the Judicial District Administrator or designee who has been authorized by the Employer to process grievances. The written grievance shall state the nature of the grievance, the facts upon which it is based, the condition(s) of employment allegedly violated, the Articles of the Agreement allegedly violated, and the relief requested. The Employer/designee shall arrange a meeting with the Union Representative to discuss the grievance within fourteen (14) calendar days. A written response shall be forwarded to the Union Representative within fourteen (14) calendar days.

Step 3: If the grievance has not been resolved by the operation of Step 2 and the Union intends to continue the grievance, the Union shall, within fourteen (14) calendar days after receipt of the District Administrator's response, appeal the matter to the Employer's Labor Relations Manager. The appeal must be in writing. The Labor Relations Manager and the Union's Business Agent shall meet within twenty-one (21) calendar days of the date the Union filed its Step 3 notice in an attempt to resolve the grievance. The meeting shall be held within the judicial district in which the grievance arose either in person

or via electronic means, unless an alternate site is mutually agreed to. The Labor Relations Manager shall respond to the Union, in writing, within fourteen (14) calendar days of the Step 3 meeting.

Step 4: If the grievance remains unresolved after the operation of Step 3, the Union shall have sixty (60) calendar days from the date the Labor Relations Manager's response is due in which to submit a letter to the Labor Relations Manager stating its desire to proceed to arbitration along with a request for a panel of seven (7) arbitrators from the Bureau of Mediation Services, unless a mutually agreeable arbitrator can be selected. Within fourteen (14) calendar days after the receipt of the panel, the parties shall determine the arbitrator to hear the arbitration by the method provided for in Section 3 of this article. Expenses for the Arbitrator's services and proceedings shall be born equally by the parties; however, each party shall be responsible for compensating its own representatives and witnesses. If either party cancels an arbitration hearing or asks for a last-minute postponement that leads to the arbitrator's making a charge, the canceling party or the party asking for the postponement shall pay this charge. The decision of the arbitrator shall be final and binding upon the parties. Except as provided in the procedures for Section 4, the arbitrator shall be requested to issue his/her decision within thirty (30) calendar days after the conclusion of the testimony and argument, including the filing of closing briefs, if requested by either party. If either party desires a verbatim record of the arbitration proceedings, it may cause such a record to be made, provided it pays for the record and makes a copy available without charge to the arbitrator and, at the copy cost rate to the other party if a copy is requested.

The Parties negotiated in Article 18, Section 6, Time Limits, of the Contract a penalty and waiver clause and an extension clause pertaining to the processing of a grievance through the steps contained in the grievance procedure as follows:

If a grievance is not presented within the time limit set forth above, it shall be considered waived. If a grievance

is not appealed to the next step or steps within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Employer's last answer. If the Employer or its designee does not answer a grievance or an appeal thereof within the specified time limits, the Union or its agents may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step. If the Employer representative designated at any step is also the representative for the succeeding step, the grievance shall be heard only at the succeeding step. The time limit in each step may be extended by mutual written agreement of the Employer or its designee and the Union or its agent in each step and such extension will not be unduly denied. By mutual agreement of the Employer or its designee, and the Union, the parties may waive Step 1. By mutual agreement of the parties, time limits may be extended for the purpose of entering an employee into an Employee Assistance Program. Requests by the Union or Employer to so extend time limits shall not be unreasonably denied. All such agreements shall be in writing.

The facts are not in serious dispute. The Grievant, Ellen Edmonds, is a 12 year employee with the State of Minnesota Judicial Branch ("MJB").

The Grievant was terminated on November 26, 2007. A grievance was filed by the Union protesting the Grievant's discharge. A Step 3 grievance meeting between the Parties was held on January 29, 2008. (Employer Exhibit #3).

On February 19, 2008, Kristine Bolander, MJB Labor/Employee Relations Manager, sought a three-day extension from Carole Gerst, Union Business Representative, in which to file the Employer's Step 3 written response. (Employer Exhibit #2). Ms. Gerst agreed to the extension, with an agreed-upon Employer

response due on February 22, 2008. (Id.) Ms. Bolander timely filed the Employer's Step 3 response on February 22, 2008.

(Employer Exhibit #3). She denied the termination grievance.

(Id.) A copy of Ms. Bolander's Step 3 response was mailed, faxed and e-mailed to Ms. Gerst on February 22, 2008. (Employer Exhibits #3, #4).

Ms. Gerst prepared a letter dated April 22, 2008, indicating that the Union was intending to appeal the termination grievance to arbitration, the last step in the contractual grievance procedure. The letter was addressed to Ms. Bolander. (Employer Exhibit #5). The letter was mailed to Ms. Bolander with a post-marked date of April 24, 2008. (Employer Exhibit #6). Ms. Bolander received the letter on April 25, 2008. (Employer Exhibit #7).

On April 28, 2008, Ms. Bolander prepared a letter addressed to Ms. Gerst in which she indicates the following:

I have received your request to advance the above referenced grievance to arbitration. Article 18, Section 2 of the contract between AFSCME and the Minnesota Judicial Branch reads (in relevant part):

Step 4:

If the grievance remains unresolved after the operation of Step 3, the Union shall have sixty (60) calendar days from the date the Labor Relations Manager's response is due in which to submit a letter to the Labor Relations Manager stating its desire to proceed to arbitration along with a request for a panel of seven (7) arbitrators from the Bureau

of Mediation Services, unless a mutually agreeable arbitrator can be selected.

My response was due on February 22, 2008, and was submitted to you that day, via US Mail and Facsimile. The letter advancing the grievance to arbitration was due by the close of business on April 22, 2008. Your letter was received by me on Friday, April 25, 2008 and was postmarked April 24, 2008. I did not receive a request for an extension of time, nor did I receive anything via fax or email on the 22nd. The request to advance the grievance to arbitration is therefore untimely.

Article 18, Section 6, states that "if a grievance is not presented within the time limit set forth above, it shall be considered waived. If a grievance is not appealed to the next step or steps within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Employer's last answer." I will therefore consider this grievance resolved based upon the Step 3 response.

(Employer Exhibit #7).

On July 22, 2008, Ms. Gerst requested an arbitration panel from the Bureau of Mediation Services, received via fax by Ms. Bolander. (Employer Exhibit #8).

On July 24, 2008, Ms. Bolander received a telephone call from Union Representative Jerry Serfling that the Union intended to advance the Grievant's termination grievance to arbitration.

(Employer Exhibit #10).

In response, Ms. Bolander prepared a letter on July 24, 2008, addressed to Ms. Gerst, in which Ms. Bolander once again states that the Union's appeal to arbitration was untimely based upon the timelines set forth in the contractual grievance

procedure. Ms. Bolander also enclosed in this letter a copy of her April 28, 2008 letter addressed to Ms. Gerst. (Employer Exhibit #10). This letter and enclosure was mailed to Ms. Gerst on July 25, 2008. (Id.)

UNION POSITION

The Parties have for many years been lacked in adhering to the timelines set forth in the contractual grievance procedure in the processing of grievances to arbitration. The grievance timeline extensions were mutual, casual, fluid and informal between the Parties.

There were examples of where it would take several days for the mail to be received by the Parties. There were no claims of timeline violations when these mail delays occurred.

Ms. Bolander in her new role as MJB Labor Relations Manager continued the practice of informal adherence to grievance timelines that was formerly adhered to by Walt Wojcik, the previous MJB Labor Relations Manager. Through the testimony of Mr. Wojcik, the Union has demonstrated that there was not a consistent practice to reduce extensions of timelines to writing, or in some cases, to create a record of a grievance extension.

Ms. Bolander never notified the Union that it was her intention to begin strict adherence to the contractual grievance timelines.

This case has impacted the Grievant's life and involves her termination as a long-term employee. She deserves to have the merits of her grievance heard by the Arbitrator. The Grievant's future should not hang on the Employer's perceived technicality.

The grievance was timely processed to arbitration by the Union. The Arbitrator should find in favor of the Union on the issue of arbitrability.

EMPLOYER POSITION

The Union's contention that the Employer's enforcement of timelines had been lax in the past was unsupported by the testimony of Mr. Wojcik. The argument that the Employer had an obligation to inform the Union that they intended to discontinue the practice of ignoring timelines is therefore moot. Nor does the documentary evidence presented by the Union support the Union's contention that timelines have not been enforced in the past.

It is evident from the date on the appeal to arbitration letter that the Union was aware of the date that the appeal was due. Even if the Union composed the letter on the correct date, they failed to ensure that it was processed by the U.S. Mail on the day it was due. The Union could have transmitted the appeal in another manner if there was a reason to believe that the U.S. Mail was unreliable for time sensitive material. The Union could

also have sought an extension to appeal this matter. The Union knew when the appeal was due and had a number of ways to get the appeal to the Employer within the negotiated timeline. The Union failed to take ordinary care to make sure that the right to arbitrate this grievance was preserved. The Employer should not be penalized by the Union's inaction.

More significant is the Union's failure to pursue the matter to arbitration for an additional three months. No evidence was offered and no explanation provided regarding the Union's decision to wait three months after receiving the Employer's timeliness objection before notifying the Employer that it intended to pursue arbitration in this matter. Having made an objection on the grounds of timeliness, and having received nothing from the Union for almost ninety days, the Employer understandably believed this matter to be closed.

The Minnesota Court of Appeals has held on two recent occasions that similar delays in pursuing arbitration through established grievance procedures constitutes "waiver" of the grievance by the union, or otherwise extinguishes the right of the union to proceed to arbitration.

The Employer respectfully request that the Arbitrator adhere to the Court's reasoning and rule that the Union's failure to appeal the grievance to arbitration within the negotiated

timelines was a waiver of the right to proceed to arbitration on the merits of the case. This grievance should be considered settled on the basis of the Employer's last written answer, as provided by Article 18, Section 6 of the Collective Bargaining Agreement.

ANALYSIS OF THE EVIDENCE

In raising a procedural objection to arbitrability, the challenging party bears the burden of proof. As with any objection to arbitrability, the burden is on the employer: "[i]t is fundamental that the burden to establish a lack of timeliness is most often placed upon the party raising the issue; i.e., since a grievance dismissal, not based upon the merits, is generally viewed in disfavor." Summit County Eng'r and Am. Fed. of State Employees, Local No. 1032, 93-1 CCH Lab. Arb. 3142 (1992). This is similar to the more general principle in arbitration that, when an employer asserts an exception to the general rule under the contract, the burden of proving the exception is on the employer. Missouri Valley, Inc. and Int'l Bhd. of Boilermakers, Local 531, 82 LA 1018 (1984); Well-McClain and Int'l Molders Union, Local 316, 81 LA 941, 942 (1983); Int'l Bhd. of Teamsters, Local 839 v. Morrison-Knudsen Co., 270 F.2d 530 (9th Cir. 1959); Fairweather's Practice & Procedure in Labor Arbitration, at 194 (3d ed., Schoonhoven, ed. 1991).

It is axiomatic in arbitration that when reasonable doubts exist on procedural arbitrability claims, arbitrators usually resolve them in favor of finding jurisdiction upon the theory that the long-term interests of the parties are better served by resolving the merits of the case, rather than upon technical grounds. Bonita Unified School District, 79 LA 207, 214-215 (1982); Hayes-Albion Corp., 73 LA 819, 823 (1979); National Cleaning Contractors, Inc., 70 LA 917, 919 (1978). When reasonable arbitrability doubts exist, it is a well established equitable maxim that "forfeiture of a grievance is abhorred." Moreover, even if time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the contract. Elkouri and Elkouri, How Arbitration Works, 4th Ed. 1985, BNA, p. 194.

Moreover, given the well-settled federal labor policy favoring arbitration found in Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), any doubts should be resolved in favor of finding the grievance arbitrable.

It has often been stated by the courts and is well recognized by arbitrators that forfeitures are not favored. What is favored is a hearing and decision on the merits of the dispute between parties It is appropriate, then, to accord the grievant the benefit of any doubt or uncertainty that arises from the proofs.

Children's Aid Soc'y and Am. Fed. of State Employees, Local 1640,
87 LA 459, 463 (1986); Amana Refrigeration, Inc. and Int'l Ass'n
of Machinists, Local Lodge 1526, 93 LA 249, 257 (1989).

Following similar principles, in Elec. Hose & Rubber Co. and
United Rubber Workers of Am., Local 184, 59 LA 570 (1972),
Arbitrator Irvine Kerrison construed the grievance procedure
liberally to overrule the employer's objection to the arbitration
of a grievance based on the union's 18-month delay in filing the
grievance. Furthermore, in Maclin Co. and Miscellaneous
Warehousemen, Local 986, 52 LA 805 (1969), Arbitrator Arnold
Koven rejected the employer's arbitrability objection based on
these presumptions favoring arbitration over a technical default.
(Id. at 809-10).

The Employer asserts that the instant grievance is
in arbitrable because the Union failed to make the request for
arbitration in a timely manner under Article 18, Section 2(D) of
the Collective Bargaining Agreement. This Contract language
states the following in relevant part:

Step 4: If the grievance remains unresolved after the
operation of Step 3, the Union shall have sixty (60)
calendar days from the date the Labor Relations Manager's
response is due in which to submit a letter to the Labor
Relations Manager stating its desire to proceed to
arbitration along with a request for a panel of seven (7)
arbitrators from the Bureau of Mediation Services, unless a
mutually agreeable arbitrator can be selected.

Specifically, the Employer claims that the grievance is not arbitrable because the above Contract language requires that the Union's request for arbitration must be made not later than "sixty (60) calendar days from the date the Labor Relations Manager's response is due."

In this case, the Labor Relations Manager's response was due on February 22, 2008, and was timely submitted to the Union, via U.S. Mail, e-mail and fax, on that day. The Union then had 60 calendar days under Article 18, Section D, Step 4 to advance the grievance to arbitration which would be the close of business on April 22, 2008. The Union prepared a letter dated April 22, 2008, indicating their desire to process the grievance to arbitration. This letter was mailed to the Employer by regular U.S. Mail with a postmarked date of April 24, 2008. This letter was received by the Employer on April 25, 2008, some three days later than the deadline date of April 22, 2008. The Union again notified the Employer by telephone on July 24, 2008, of their desire to process the grievance to arbitration which is three months beyond the due date of April 22, 2008.

It is clear from the record that the Employer has consistently challenged the arbitrability of the grievance by letters to the Union dated April 28 and July 24, 2008. The Employer argues that the grievance is inarbitrable based on the

language in Article 18, Section 6, that "if a grievance is not presented within the time limit set forth above, it shall be considered waived. If a grievance is not appealed to the next step or steps within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Employer's last answer."

It is undisputed that the Union never sought an extension of the timeline in which to process the grievance to arbitration which is allowed by mutual agreement between the Parties. (Article 18, Section 6). The Union, however, contends that an extension was not necessary because the Parties have adhered to a practice of casual, fluid and informal processing of grievances through the steps contained in the contractual grievance procedure.

It is axiomatic in arbitration that if both parties have been lax as to observing the contractual grievance procedure timelines in the past, arbitrators will generally not strictly enforce them as written until prior notice has been given by a party of intent to demand strict adherence to the stated timeline requirements.

The record indicates that on occasion the Parties have deviated from observing the timelines contained in the contractual grievance procedure. Walt Wojcik, former MJB Labor

Relations Manager, testified that the Parties often extended timelines to accommodate the processing of grievances in hopes of resolving them before advancing to arbitration. In fact, the Parties were able to resolve all grievances without advancing to arbitration while he was employed as the MJB Labor Relations Manager. Although Mr. Wojcik stated that there were always communications between the Parties over timeline extensions, there was not an absolute rule or understanding between the Parties over adhering to the contractual timelines, as timeline extensions were "casual" in an attempt by the Parties to resolve the grievances before advancing to arbitration. Mr. Wojcik's testimony indicated that timelines were "casual, fluid and informal."

Even assuming arguendo that the Parties always adhered to strict timelines in the processing of grievances while Mr. Wojcik was the MJB Labor Relations Manager, there is evidence that since Ms. Bolander has replaced Mr. Wojcik as MJB Labor Relations Manager there has been a practice of informal adherence to contractual grievance timelines. In Union Exhibit #6, Ms. Bolander confirmed that her Step 3 Employer response was due on October 26, 2007, but her response letter was dated October 29, 2007. Ms. Bolander did not request an extension beyond the contractual 14 calendar days response timeline. This delay was

not challenged by the Union based on the practice of informal adherence to contractual grievance timelines.

Union Exhibit #7 is a request to proceed to arbitration for a grievance during Ms. Bolander's tenure as MJB Labor Relations Manager. Although this letter to proceed to arbitration is considerably past the 60 calendar day contractual deadline, Ms. Bolander did not inform the Union that this letter was untimely. This grievance was withdrawn by the Union 7 days after the appeal. It is likely, given the final disposition of this grievance, that the Parties were attempting to resolve the grievance through "casual, fluid and informal" discussions without regard to the contractual timeline to advance the grievance to arbitration.

It is axiomatic in arbitration that if both parties have been lax as to observing the contractual grievance procedure timelines in the past, arbitrators will generally not strictly enforce them as written until prior notice has been given by a party of intent to demand strict adherence to the stated timeline requirements. The above two examples (Union Exhibits #6, 7) and the instant grievance show that both Parties have been lax as to observing timelines in the past and neither Party has given formal notice of an intent to demand strict adherence to the contractual grievance procedure timelines. Therefore, until

either the Employer or the Union has given said notice of intent to strictly adhere to the contractual grievance procedure timelines, the long-standing resolution dispute technique adhered to by the Parties in the past shall endure.

In addition, in many cases, arbitrators require a showing of prejudice to the complaining party before a grievance will be dismissed on procedural grounds. Int'l Paper Co. and United Paperworkers Int'l Union, Local 723, 82 LA 306, 308 (1984). In this case, there is no showing that the Employer would suffer from prejudice by presenting evidence in support of their position to discharge the Grievant.

The Arbitrator has carefully reviewed the Minnesota Court of Appeals decisions offered by the Employer in support of their case. ISD No. 1 Aitkin and Education Minnesota-Aitkin, Unpublished, A05-900, Minnesota Court of Appeals, March 14, 2006; In re the Matter of Grievance Arbitration Between AFSCME, Council 96 and ISD No. 704, Proctor, Unpublished, A04-125, Minnesota Court of Appeals, August 17, 2004. The Minnesota Court of Appeals held in these cases that the union's unreasonable delay in processing grievances extinguishes their right to pursue arbitration. These cases, however, noted that there was a lack of any evidence in the record indicating a past practice, waiver, estoppel, unfairness, extenuating circumstances or other

considerations of lax enforcement between the parties in processing the grievance to arbitration.

In this case, as noted above, there is a past practice of the Parties adhering to lax enforcement of the contractual timelines. There were extenuating circumstances or other considerations of lax enforcement between the parties in adhering to the contractual grievance timelines. Finally, it would be unfair for the Employer to now demand strict enforcement of the contractual grievance timelines when due notice was not given to the Union before advancing the instant grievance to arbitration. Most certainly, as a result of the Employer's position in this case, the Union is now aware that the Employer is demanding strict adherence to the contractual grievance timelines.

AWARD

Based upon the foregoing and the entire record, the grievance is declared to be arbitrable. As a result, the merits of the case shall follow in a separate hearing.



Richard John Miller

Dated December 31, 2008, at Maple Grove, Minnesota.

IN THE MATTER OF ARBITRATION)	GRIEVANCE ARBITRATION
)	
between)	
)	Ellen Edmonds - Discharge
Minnesota Judicial Branch,)	
Tenth District)	
)	
-and-)	BMS Case No. 09-PA-0064
)	
AFSCME Council No. 5,)	
Local 3688)	April 3, 2009
)))))))))))	

APPEARANCES

For Minnesota Judicial Branch, Tenth District

Kristine A. Bolander, Labor/Employee Relations Manager
Jessi Bienfang, Labor Relations Specialist
Lynn Wagner, Human Resources Manager
Sarah Burkhalter, Court Operations Supervisor
Wanda Aaser, Court Operations Manager
JoAnn Bennett, Chief Deputy
Jan Krupicka, Court Operations Supervisor

For AFSCME Council No. 5, Local 3688

Carole Gerst, Business Representative
Joyce Carlson, Business Representative
Denise Olson, Senior Court Clerk, Hennepin County
Debbie Rolland, Senior Court Clerk, Anoka County
Ellen Edmonds, Grievant

JURISDICTION OF ARBITRATOR

Article 18, Grievance Procedure, Section 3, Arbitration, of the 2007-2009 Collective Bargaining Agreement (Employer Exhibit #1; Union Exhibit #1) between Minnesota Judicial Branch, Tenth District (hereinafter "Employer" or "MJB") and AFSCME Council No. 5, Local 3688 (hereinafter "Union") provides for an appeal to

final and binding arbitration of disputes that are properly processed through the grievance procedure contained in Article 18.

The Arbitrator, Richard John Miller, was selected by the Employer and the Union (hereinafter "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services ("BMS"). A hearing in the matter convened on February 27, 2009, at 9:00 a.m. at the BMS offices, 1380 Energy Lane, Suite 2, St. Paul, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties elected to file post hearing briefs with an agreed-upon e-mail date of March 27, 2009. The post hearing briefs were submitted in accordance with those timelines and exchanged electronically by the Arbitrator, after which the record was considered closed.

ISSUE AS DETERMINED BY THE ARBITRATOR

Did the Employer have just cause to terminate the Grievant?
If not, what is the appropriate remedy?

STATEMENT OF THE FACTS

The Grievant, Ellen Edmonds, is a Senior Court Clerk (SCC) who has worked for the Anoka County Courts since 1998. The Grievant began work at her current assignment within Anoka County

in April 2005. The Grievant's supervisor is Sarah Burkhalter. (Employer Exhibit A). The Grievant's duties consist of processing dispositional paperwork, warrants, modified orders, probation violations, search warrants, 48 hour affidavits and various other duties associated with case disposition. (Employer Exhibit B).

It is extremely important that SCC's be accurate in their work. The consequences of careless work are severe, both for the courts customer and the public. Consequences can include wrongful arrest, wrongful imprisonment, the referral of payables to a collection agency and the consequent negative impact on credit rating, job consequences, loss of license, a defendant being refused furlough, a defendant being refused work release and a defendant being refused leave or release to attend mandated treatment.

The Grievant received training for her current position through peer mentoring and one-on-one training with a supervisor. The SCC's typically put together their own process manuals based upon the training they receive. The Grievant's manuals were presented and the procedures for clearing a warrant, processing case dispositions, processing post sentencing investigations and the modified order procedures were reviewed. (Employer Exhibits C-F). Ms. Burkhalter testified that all of the information

required to correctly perform these duties were contained within the Grievant's training manuals. In addition to the usual training and the manuals, Ms. Burkhalter testified that the Grievant received one-on-one coaching and training from Ms. Burkhalter on an as-needed basis.

SCC work is reviewed for accuracy through a monthly case exception report. Ms. Burkhalter testified that she and another employee reviewed the case exception report and sent e-mails to the SCC's with a listing of errors to be corrected. When the Courts converted from one case management system to another (TCIS to MNCIS) on March 12, 2007, there was a back log on the reports; several months went by without reports available to supervisors. Ms. Burkhalter testified that it is not possible to catch every error through the case exception report. The kinds of errors that would not be captured by the case exception report include warrants that were wrongly issued or not quashed--these might not be caught until the individual encounters law enforcement. Financial errors might not be captured by the case exception report. Amendments to charges and pleas would also not be caught until a background check is done on the defendant.

The Grievant received an oral reprimand on June 6, 2007, concerning rude behavior to co-workers and defendants. (Employer Exhibit G).

On July 2, 2007, the Grievant met with her supervisors for a Loudermill hearing regarding a proposed written reprimand. (Employer Exhibit J).

The Grievant received a written reprimand on July 3, 2007, for excessive errors in case processing, including her failure to quash a warrant which could have resulted in wrongful arrest. (Employer Exhibit H). Altogether the Grievant made 22 errors between May 30, 2007, and June 29, 2007. (Id.) A number of the other errors appearing on the reprimand were cases where convictions were wrongly passed to the Department of Public Safety. This could result in a person's driver's license being wrongly taken away. In addition, financial information was not properly recorded, meaning that fines the courts should have been collecting were not appearing on defendant's record or that records were wrongly passed to collections where fees had been paid.

On the morning of September 27, 2007, the Grievant met with her supervisors for a Loudermill hearing regarding a proposed suspension of three days. The suspension notice detailed a number of errors in the Grievant's case processing and two complaints received from court customers regarding the Grievant's rudeness to them at the counter. (Employer Exhibit I). Among the errors detailed in the suspension letter, a defendant was not

released for work because the Grievant failed to modify an order as directed. A "No Contact" order that the Grievant was directed to vacate had also not been processed, putting the defendant at risk of being wrongly arrested. When the Loudermill meeting concluded, the Grievant returned to work and her supervisors withdrew to discuss the Grievant's suspension.

The afternoon of September 27, 2007, Jan Krupicka, another supervisor within the Division, had a conversation with a courts customer (Amy Carlson) who had been wrongly arrested. Ms. Carlson spent the day in jail and had to be bailed out by her husband-to-be. The warrant issued for Ms. Carlson had not been quashed as directed by the judge. Ms. Krupicka retrieved Ms. Carlson's file and determined that it was a file that the Grievant had worked on, that the Grievant had been directed to quash the warrant and that the Grievant had failed to do so. (Employer Exhibit M). Ms. Carlson was directed to send in details of her financial loss as a result of the wrongful arrest, including compensation for lost pay and a bill for towing her car. Ms. Carlson also submitted a written complaint. (Employer Exhibit K). The court subsequently expunged all record of the arrest from Ms. Carlson's record. (Employer Exhibit M). After being informed of this by Ms. Krupicka, Ms. Burkhalter spoke briefly with the Grievant on September 27, 2007, regarding Ms.

Carlson's file. According to Ms. Burkhalter's e-mail dated September 27, 2007, the Grievant "did not understand how she missed it", "she was sorry" and "this was a big one (meaning mistake)". (Employer Exhibit L). Because it was clear from the file what had happened, no investigation was conducted.

The following day, the Grievant called in sick and submitted a request for medical leave. The Grievant remained on medical leave until November 26, 2007. She was mailed a letter on October 10, 2007, indicating that after the September 27, 2007 Loudermill meeting, the Employer had decided she would serve a three day suspension. (Employer Exhibit I). The suspension was served on November 5-7, 2007.

The Grievant was mailed a Loudermill hearing notice on October 26, 2007, detailing the circumstances surrounding Ms. Carlson's wrongful arrest and two other instances of serious errors that were discovered while she was on leave. (Employer Exhibit R). Of the errors discovered while the Grievant was on leave, the two most serious involved an amended charge that was not processed by the Grievant and a Post-Sentencing Investigation (PSI) that was not forwarded to a defense attorney as required by law. (Employer Exhibits O, P). The defendant in the first case (Scott Lake) came close to losing his job when his employer conducted a routine background check and saw that Mr. Lake had

been charged with a domestic assault. In the second case, the defendant was deprived of an opportunity to comment on the PSI because the report was not forwarded to the defense attorney. There were a number of other errors discovered while the Grievant was on leave; these are included in the pre-Loudermill October 31, 2007 letter. (Employer Exhibits Q, R).

When the Grievant returned to work on November 26, 2007, a Loudermill meeting was held. The Grievant was given an opportunity to respond to the list of errors contained in the October 31, 2007 letter that had been mailed to the Grievant. The Grievant gave vague responses. (Employer Exhibit S).

The Grievant was subsequently provided with a notice of termination from Jo Ann Bennett, Court Administrative Manager II, dated November 26, 2007, which states the following:

This letter is to inform you of your discharge from employment effective immediately.

This action has been taken for the following reasons:

Failure to Quash Arrest Warrant:

In court file 02-T4-06-2394, the warrant was not quashed as directed on October 30, 2006. The defendant was falsely arrested on September 26, 2007, booked, posted bail and spent the day in jail. This matter came to the attention of Court Administration on September 27, 2007, the day prior to your medical leave. An expungement of records was required for the Sheriff's Department, BCA and FBI in order to remove the booking information.

Failure to Distribute Post-Sentencing Investigation in Timely Fashion:

In court file 02-K5-06-10455, the Post Sentencing Investigation dated August 28, 2007, was not sent to the defense attorney in a timely fashion on August 28, 2007. As a result, the attorney did not have the opportunity to agree or disagree with the report on behalf of his client.

Failure to Amend Charge on Defendant's File - More Severe Charge was Discovered by Defendant's Employer During a Records Check:

In court file 02-T7-96-19741 - A man was charged with domestic assault. The charge was amended by the Court to disorderly conduct on September 26, 2006; however, the domestic assault charge was not amended in the TCIS case management system. The defendant almost lost his job over this error.

Ongoing Errors Related to Updating Criminal Case Files:

In court file 02-T7-06-31601 while on TCIS, the January 8, 2007, hearing was not updated from the Court Trial. On May 7, 2007, the defendant came in to pay and the case was updated with the incorrect dates. The information needed to be backed out and corrected.

In court file 02-T5-06-37347 while on TCIS, the January 3, 2007, hearing was not updated. The conviction was not passed to the Department of Public Safety in a timely fashion.

In court file 02-T2-06-37502 while on TCIS, the January 3, 2007, hearing was not updated. The conviction was not passed to the Department of Public Safety in a timely fashion.

In court file 02-T8-06-30439 while on TCIS, the January 3, 2007 unpaid fine hearing was not completely updated. Documents were filed and the financial was updated; but, the hearing was not occurred and a new unpaid fine hearing was not scheduled. Consequently, the time to pay had to be extended and new notices had to be sent.

In court file 02-T4-06-35136 while on TCIS, the case was not updated after a hearing on December 13, 2006. As a result, the conviction was not passed to the Department of Public Safety in a timely fashion.

In court file 02-VB-07-10762, this case was not closed out completely in MNCIS and no updates were made to the plea, disposition and court decision information. The fine monies were receipted on 9/10/07. The conviction was not passed to the Department of Public Safety in a timely fashion.

In court file 02-TO-07-3987, the charge of vehicle registration was to be dismissed. The driver's license was reinstated on April 2, 2007, but the arraignment was left pending with the fine monies still owing.

In court file CR-07-2476 while on MNCIS, the fine payment was receipted in the amount of \$32.00 on August 10, 2007. The unpaid fine hearing was cancelled as if the fine was paid in full; however, the defendant still owed \$200.00.

In the past, you have been disciplined for:

Rude and Unacceptable Behavior:

On June 6, 2007, you received an oral reprimand for rude behavior. At that oral reprimand, you were advised of the following:

- That you will not treat anyone rudely. Co-workers and defendants both need to be treated with courtesy and respect.
- That you will not show impatience when dealing with members of the public or your co-workers.
- That there will be no more derogatory comments made to defendants waiting to be helped at your counter.

On June 4, 2007, you were observed to have addressed a defendant in a rude fashion:

You told the defendant that he had two pages in the computer and asked him if he was proud of that. The defendant replied "no." The defendant told you that he would be back later and you replied, "I can hardly wait." You were advised in the oral reprimand that: "Further misconduct of this nature may lead to further discipline."

Large Number of Errors Found in Criminal Cases:

On July 9, 2007, you received a written reprimand for a large number of errors found in criminal cases you had updated. In the written reprimand you were advised that: "Future misconduct of this nature may lead to further discipline, up to and including discharge."

Inappropriate and Unprofessional Behavior/Unacceptable Error Rate in Case Processing and Updating:

On October 10, 2007, you received a 3-day suspension for inappropriate and unprofessional behavior and for an unacceptable error rate in case processing and updating. In that suspension letter you were advised that: "Further incidents will lead to discipline up to and including termination."

Therefore, as a consequence of your failure to quash a warrant that led to the false arrest of the defendant and, of your ongoing errors in case processing/updating (both while using the TCIS case management system and the MNCIS case management system), you are discharged from employment as a Senior Court Clerk in Anoka County Court Administration and your authority to function as a Deputy Court Administrator is hereby revoked.

You will receive a letter from Human Resources regarding your pay and continuation of benefits.

(Employer Exhibit T).

A Step 2 grievance was filed by the Union on December 14, 2007, protesting the Grievant's termination. (Employer Exhibit #2). A Step 3 grievance meeting between the Parties was held on

January 29, 2008. (Employer Exhibit #3). The grievance was denied by the Employer on February 22, 2008. (Id.)

The Union indicated on April 22, 2008, that they intended to appeal the grievance to arbitration, the last step in the contractual grievance procedure. (Employer Exhibit #4).

The Employer contested the validity of the grievance alleging that the Union's appeal to arbitration was untimely based upon the timelines set forth in the contractual grievance procedure. The Parties agreed to bifurcate the arbitrability issue in a separate arbitration hearing held on November 14, 2008. The Arbitrator ruled on December 31, 2008, that the grievance was arbitrable. This resulted in the instant arbitration with respect to the termination of the Grievant.

EMPLOYER POSITION

The record demonstrates that the Grievant was on notice regarding the standards expected of her in the court system. The Grievant was on notice that her performance was unsatisfactory and the Grievant was on notice that termination was possible. There is no question that the errors and omissions cited in the termination letter are attributable to the Grievant. The Grievant was provided an opportunity to respond to the allegations in the termination letter. The Grievant's termination was appropriate given the volume and gravity of

the Grievant's case processing errors and the Employer's repeated attempts to improve the Grievant's performance through training, coaching, and the application of progressive discipline.

With respect to two of the case processing errors for which she was terminated, the Grievant was grossly negligent in that she was directed to perform a task, had an obligation or requirement to perform the act, there was actual or potential damage to persons because of her omission, the adverse consequences of the omission were foreseeable, the act or omission was unreasonable under the circumstances and the Grievant was trained and capable of performing the task.

The Grievant knew or should have known the consequences of the omission. The Grievant's conduct was grossly negligent in that it was habitual, likely to be repeated, caused actual and significant damage to Ms. Carlson and had the potential to cause significant damage to Mr. Lake.

The evidence and testimony support the Employer's position that the termination of the Grievant was for just cause. Accordingly, the grievance and all requested remedies should be denied by the Arbitrator.

UNION POSITION

The Union has demonstrated that the Grievant's termination is without supporting documentation concerning excessive error

rates. The Employer terminated the Grievant for errors already addressed in the suspension letter of October 10, 2007.

The Employer failed to provide training and/or coaching opportunities to correct and reduce the Grievant's errors.

The Employer has failed to provide the Union with requested evidence with respect to the Grievant's errors as required by the Public Employee Labor Relations Act, MS 179A. Section 13, Subd. 2.6.

The Employer failed to provide the criteria used to establish that the Grievant's errors were excessive when compared to other senior court clerks.

Lastly, the Employer failed to allow the Grievant sufficient time to address and reduce her error rate and improve her skills.

The Union requests that the Grievant be returned to work immediately with full back pay and all lost benefits to make her whole including but not limited to vacation and sick leave accruals, medical expenses due to lack of insurance, seniority rights, PERA contributions, lost overtime, holidays, etc.

ANALYSIS OF THE EVIDENCE

Article 17, Discipline and Discharge, Section 1 of the Contract provides that "[d]isciplinary action may be imposed upon an employee who has attained permanent status only for just cause." It is undisputed that the Grievant has attained

permanent status. Accordingly, the Employer must prove that it acted for "just cause," that is, that it acted in a reasonable manner in determining that the Grievant's conduct merited discharge.

Article 17, Section 3 of the Contract provides the following in relevant part:

Disciplinary action shall include only the following forms and depending upon the seriousness of the offense shall normally be administered progressively in the following order:

- (1) Oral reprimand
- (2) Written reprimand
- (3) Suspension
- (4) Demotion
- (5) Discharge

Nothing in the above listing of types of discipline shall preclude the Employer from exacting stringent forms of discipline where the egregiousness of the offense so warrants.

The import of this Contract language is that progressive discipline is the preferred method of correcting an employee's conduct. However, if the employee's conduct is so egregious the Employer is not required to adhere to progressive discipline, but instead, can skip to any of the listed discipline levels, such as discharge.

The Employer alleges that the Grievant's conduct was so egregious with respect to two of the errors for which she was discharged that it represents gross negligence. Arbitrators

generally require the employer to establish one or more of the following factors to sustain discipline based upon negligence or carelessness:

- 1) The employee had an obligation or requirement to perform the act;
- 2) There was actual or potential damage to persons, property, or the company;
- 3) The act or omission was the actual or proximate cause of the damage;
- 4) The adverse consequences were foreseeable;
- 5) The act or omission was unreasonable under the circumstances;
- 6) The employee was trained and capable of performing the act;
- 7) The employee knew or should have known the consequences of the act or omission.

Discipline and Discharge in Arbitration, Brand, Norman (ed.), BNA Books, 1998, pp. 144-145

Gross negligence is determined by examining the following additional factors:

- 1) whether the misconduct was habitual or the employee is likely to repeat the act or omission;
- 2) the attitude of the employee;
- 3) the actual injury or damage sustained to persons as a result of the negligent act or omission;
- 4) the potential injury or damage to persons or property as a result of the negligent act or omission;

- 5) the effect of the alleged negligence on co-workers or customers.

(Id., at pp. 146-147).

The record establishes that the Grievant was aware of the standards expected of her in performing the required duties and responsibilities of a SCC, and was aware of the consequences of violating these standards. The Grievant completed a Position Description Questionnaire (PDQ) in 2006 that acknowledges the importance of keeping and maintaining accurate records and details the job duties and responsibilities that she must perform. (Employer Exhibit #8).

The Union alleges that the Employer failed to provide training and/or coaching opportunities to correct and reduce the Grievant's errors. To the contrary, Ms. Burkhalter testified that she met frequently with the Grievant to discuss errors in case processing and provide guidance on proper procedures. This is supported by Section 8 of PDQ, wherein the Grievant wrote, "the court operations supervisors and/or the criminal division court operations manager are always available for guidance on procedures." (Employer Exhibit #8). According to Ms. Burkhalter, the training received by Grievant was more extensive than that provided to other SCC's within the division, particularly after the conversion from TCIS to MNCIS, when the

Grievant received significantly more one-to-one training than other SCC's.

It is clear from the record that the Employer placed the Grievant on notice that her work performance was inadequate and not satisfactory. The Grievant received a written reprimand on July 3, 2007, and a three day suspension on September 27, 2007, with regard to her errors in case processing. This prior discipline administered to the Grievant specifically stated that her performance was of great concern to the Employer and that failure to improve her performance would "result in further discipline up to and including termination." (Employer Exhibit H, I).

While there is some valid disagreement between the Parties as to whether some of the Grievant's errors are contained in both the suspension and termination letters and whether the Grievant committed all of the errors noted in those letters, it is clear that the Grievant is responsible for two of the most serious errors. It is undisputed that it was the Grievant's duty and responsibility to quash Ms. Carlson's warrant and to amend Mr. Lake's charge. The Grievant's initials appear on three places in Ms. Carlson's file; Mr. Lake's file was initialed by Grievant; the case files submitted under Exhibit Q are coded with the Grievant's initials. The PSI that was not forwarded to the

defense attorney as directed was found on the Grievant's desk while she was on medical leave.

There clearly was actual or potential damage to Ms. Carlson and/or Mr. Lake for the Grievant's errors and the consequences of the Grievant's errors were foreseeable. The Grievant's failure to quash Ms. Carlson's warrant resulted in Ms. Carlson being wrongly arrested, spending the day in jail, missing a day's work and a day's pay, and having her car towed. She was fingerprinted and to be bailed out of jail by her husband-to-be (who also missed work as a result of the wrongful arrest). The record of arrest had to be expunged and the courts were obligated to reimburse Ms. Carlson for her out-of-pocket expenses. It is fortunate that no litigation resulted from the Grievant's failure to quash this warrant.

The result of the Grievant's failure to amend the charge in Mr. Lake's file was potentially very serious. Mr. Lake was initially charged with domestic assault; the charge was meant to be amended to disorderly conduct. The Grievant failed to amend the charge as directed, Mr. Lake's employer, during the course of a routine background check, received information that Mr. Lake had been charged with Domestic Assault. Mr. Lake's employer intended to terminate Mr. Lake based upon that information. Mr. Lake complained to Anoka County, the charge was properly amended

and Mr. Lake was able to retain his job. However, as a result of the Grievant's negligence, Mr. Lake's employer was privy to information that should never have appeared on the background check. This damage cannot be undone.

The Grievant did not offer any valid explanation for her failure to amend Mr. Lake's charge or quash Ms. Carlson's warrant. It is clear from the testimony of Ms. Burkhalter and others that these two errors were unrelated to the conversion to MNCIS. No evidence was offered to suggest that Grievant did not know how to perform these two functions or was otherwise incapable of performing these two functions. She was adequately trained on these two functions.

It is permissible under Article 17, Section 3 of the Contract to terminate an employee without first resorting to progressive discipline if the employee engages in egregious conduct. The record is clear that the Grievant engaged in egregious conduct that was so grossly negligent that the Employer cannot reasonably be expected to continue to employ the Grievant. The Grievant was grossly negligent in connection with her failure to quash Ms. Carlson's warrant and her failure to amend Mr. Lake's charge as directed.

Even assuming arguendo that the Employer was required to follow progressive discipline, the Grievant was the subject of

progressive discipline between June 2007 and September 2007. The subject of the discipline was either errors in case processing, rudeness toward customers at the counter, or both. After receiving an oral reprimand, written reprimand and a three day suspension, the next step in progressive discipline for the Grievant was termination.

Ms. Burkhalter testified that the Grievant was responsible for a significantly higher number of errors than other SCC's under her supervision. However, Ms. Burkhalter failed to produce any data showing that the Grievant's error rate was higher than other SCC's. This error data was requested by the Union before the commencement of the arbitration hearing, but no one from management was forthcoming with this error data, which apparently existed in some computer file.

Whether the Employer's failure to provide the Union with this error data is a violation of the Public Employee Labor Relations Act, MS 179A. Section 13, Subd 2.6, as alleged by the Union, is not within the purview of the Arbitrator to decide. The Arbitrator's authority is to render a decision within the "four corners of the Contract" and not decide whether the Employer violated a state statute. The alleged violation of a state statute is to be decided solely by judges and not by arbitrators.

While there is no comparison of errors made by the Grievant with other SCC's to justify the Grievant's termination, three SCC's have been terminated for making errors in case processing. Thus, the Grievant is not being unfairly singled out or otherwise discriminated against by being terminated for making egregious errors in case processing.

Even though the Grievant's actions resulted in actual harm to only one person, Ms. Carlson, and the harm to Mr. Lake never materialized, misses the point. This is not a case where "no harm, no foul" is apposite. It is simply too risky for the Employer to retain an employee who cannot be trusted to perform simple tasks as directed; particularly when consequences of omissions and mistakes are so severe.

In the final analysis, the record patently demonstrates that the Employer had just cause pursuant to Article 17, Section 1 of the Contract to terminate the Grievant.

AWARD

Based upon the foregoing and the entire record, the grievance and all requested remedies are hereby denied.



Richard John Miller

Dated April 3, 2009, at Maple Grove, Minnesota.