IN THE MATTER OF ARBITRATION	OPINION & AWARD
-between-	Grievance Arbitration
A. F. S. C. M. E. COUNCIL NO. 65	Re: Employee Discipline
-and-	B.M.S. No. 05-RA-845
THE 9th MINNESOTA JUDICIAL DIST. BRAINERD, MINNESOTA	Before: Jay C. Fogelberg Neutral Arbitrator

Representation-

For the Employer: Christine Bolander, Employee Rel. Mgr.

For the Union: Teresa Joppa, Staff Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article 18, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievant on May 19, 2008, and appealed directly to binding arbitration when the parties were unable to resolve the matter to their mutual satisfaction. The undersigned was then selected as the Neutral Arbitrator to hear evidence and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. Subsequently, a hearing

was convened in Brainerd on September 24, 2008, and continued on November 24th. At that time, the parties were afforded the opportunity to present position statements, testimony and supportive documentation. At the conclusion of the proceedings, each side indicated a preference for submitting written summary statements. They were received on December 12, 2008, at which time the hearing was deemed officially closed. The parties have stipulated that all matters in dispute are properly before the Arbitrator for resolution on their merits, and that the following constitutes a fair description of the matter to be resolved.

The Issue-

Did the Employer have just cause to discharge the Grievant, Lisa Erickson? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that the Grievant was employed as a Senior Court Clerk in the Minnesota Judicial Branch's, Ninth District (hereafter "District", "Employer" or "Administration"). In this capacity, he/she is represented by the American Federation of State County & Municipal Employees Union, Council 65 ("Union" or "AFSCME") who, together with the

Administration has negotiated and executed a labor agreement (Joint Ex. 1) covering terms and conditions of employment for the clerical, administrative and technical employees (excluding supervisory and confidential personnel)that comprise the bargaining unit.

Ms. Erickson was hired by the Crow Wing County Court Administration in 1993, as a Tech Clerk – a title that was subsequently changed to Senior Court Clerk.[1] On March 24, 2008, the Grievant returned to work under the terms of a Last Chance Agreement (District's Ex. 5) negotiated by the parties following her termination which was grieved by the Union.[2] At that time, she was assigned to another Senior Clerk, Lisa Meyer, for re-orientation/training.

Sometime near the middle of the afternoon of March 24th, another Senior Court Clerk, Paula Lang, reported to the District's Court Administrator, Darrell Paske, that she had observed the Grievant standing at the desk of Ms. Meyer reading a civil case file involving her (then) husband, and more particularly, opening and examining the contents of a folder within the file marked "Confidential" which contained the hand-written notes of the presiding judge, Christine DeMay. At the time he was informed of the matter, Administrator Paske was in a workroom nearby. He then left and

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1. The County Courts became a part of the Minnesota Judicial Branch in 1999, at which time court staff personnel transitioned to employees of the state.
2. At the commencement of the proceedings, the parties stipulated that the terms and conditions of the Last Chance Agreement are not the subject of the instant matter.

returned to his own office, passing by Ms. Erickson's work area on the way. There , he observed the file in question on the Grievant's desk, and subsequently confirmed (by case number written on the edge of the document) that it was indeed the civil file for her husband.

Mr. Paske informed Judge DeMay of the discovery and the Administration's belief that the confidentiality of her notes may have been compromised. Paske testified that the judge became quite upset when advised of the events – particularly because the case was still eligible for appeal. Accordingly, a disclosure hearing was scheduled for March 27th (Employer's Ex. 3).

On March 26th the Grievant and Ms. Meyer were both placed on paid leave pending an investigation into the matter (District's Ex. 7). Thereafter, an investigation was undertaken by Travis Annette, the Human Resources Manager for the Ninth Judicial District. On April 8, 2008, after reviewing Mr. Annette's findings, the Court Administrator conducted a Laudermill Hearing at which time the Grievant and her Union Representatives were afforded the opportunity to review the findings and respond (Employer's Ex. 9). Following the meeting, Ms. Erickson was issued a notice of termination for violating relevant system-wide policies and the Court Employee Code of Ethics when she was charged with reviewing her husband's civil case file

including the confidential notes of the presiding judge (Employer's Ex. 10; *infra*).

A formal grievance was subsequently filed by the Union on behalf of Ms. Erickson alleging that the Administration's actions were unjust in violation of Article 17 of the Master Contract (Joint Ex. 2). The matter was then appealed to binding arbitration for resolution.

Relevant Contract & Policy Provisions-

From the Master Agreement:

Article 17
Discipline & Discharge

Section 1. Disciplinary action may be imposed upon an employee who has attained permanent status only for just cause.

* * *

Section 3. Disciplinary Procedure

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 o types of discipline shall preclude the Employer from exacting stringent forms of discipline where the egregiousness of the offense so warrants. If the Employer....has reason to discipline an employee, it shall not be done in the presence of other employees or the public....

From the Employee Code of Ethics:

Article 1.
Abuse of Position & Conflict of Interest

- Employees shall not use or attempt to use their official positions to secure unwarranted privileges or exemptions for that employee or any other person.....
- Employees shall act so that they are not unduly affected or appear to be affected by kinship, positing, or influence of any other person
- Employees shall avoid conflicts of interest, or the appearance of conflicts, in the performance of their official duties...

Article 2
Confidentiality

For the purpose of this rule, confidential information includes, but is not limited to, information that must be kept confidential pursuant to the Minnesota Statutes, federal law, court rule or court order, unless otherwise ordered by a court, or by a person authorized to release such information and any information that is the work product of any Judge.....including, but not limited to notes, papers, memoranda and case file information.

From the Judicial Branch's Confidentiality Policy:

It is the policy of the Minnesota Judicial Branch that court employees may disclose to any person any recorded information that is collected, created, received, maintained, or

disseminated by the court or its various boards, departments, and offices where:

* * *

Disclosure is reasonably necessary to the performance of the employee's duties.

Discussions between a judge, justice, and court staff regarding the adjudication of an individual case or proceeding, including delineation of issues, status of research and preliminary views shall not be disclosed to any person unless: 1) authorized by the judge, or 2) authorized by the Chief Judge or the court...

From the Rules of Public Access to Records:

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Rule 4
Accessibility to Case Records

Subd. 1 Accessibility. All case records are accessible to the public except the following:

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(c) Judicial Work Product and Drafts. All notes and memoranda or drafts thereof prepared by a judge or by a court employed attorney, law clerk, legal assistant or secretary and used in the process of preparing a final decision or order, except the official minutes prepared in accordance with Minn. Stat. §§ 546.24-25.

Positions of the Parties-

The **EMPLOYER** takes the position in this matter that the termination of Ms. Erickson was for just cause. In support of their claim, the District contends that the evidence shows Ms. Erickson, on March 24, 2008 specifically sought out and examined the contents of her husband's civil case file and moreover, removed the judges own hand-written notes from the envelope marked "Confidential" and examined same. Those notes constitute the judge's work product and as such contain information that is decidedly not public. The Administration argues that the Grievant's actions were most egregious in light of the published Employee Code of Ethics and Court promulgated policies which specifically prohibit the examination and/or disclosure of such materials to anyone without a court order. Indeed, when the presiding judge was notified of the infraction she became extremely concerned that the integrity of the file had been compromised – especially since the case was still eligible for appeal. Accordingly, she immediately ordered a "disclosure hearing" at which time the representatives in the case were advised of the breach. The District further maintains that Ms. Erickson was fully aware of the confidentiality rules prohibiting the examination of the file as spelled out in the Code of Ethics, and the Employee Confidentiality Policy. In fact, they note that she had received training on this very subject

only a few years previous to the events leading to her termination, along with intermittent reminders from Management that such conduct was strictly prohibited. Additionally, the District asserts that Ms. Lang's observations were very credible as she clerks for Judge DeMay and stood near the Grievant observing her examine the judge's hand written notes on the day in question. Finally, they contend that the decision to terminate Ms. Erickson's employment was the result of a thorough investigation during which the Grievant was given every opportunity to present her version of the events. Accordingly, for all these reasons they ask that the complaint be denied in its entirety.

Conversely, the **UNION** takes the position that the termination of this long-term employee was not justified under the facts and that the allegations made against her are untrue. In support, the Council claims that Ms. Erickson looked up her husband's case file number as part of a training exercise with Ms. Meyer that day as she was unfamiliar with the (new) "MNCIS" software system that had recently been adopted by the courts. They charge that Ms. Meyer was merely showing her how to access a case file under the new system and she knew that the Grievant's husband had recently been involved in a civil case which could be used for her retrieval training. The Grievant then examined the file later as she wanted to make

certain that she had all the documents that she needed and to check upcoming court dates. At the same time however, she argues that at no time did she review the judges personal notes contained in the envelope marked "Confidential." Further, the Union asserts that the review of cases involving relatives or friends within the District are commonly discussed and files routinely accessed for information by various clerks, and with the implicit knowledge of the Administration. They maintain that prior to Ms. Erickson's termination few, if any who work with the Grievant, have been disciplined for such conduct. Accordingly, AFSCME asks that the grievance be sustained and that Ms. Erickson be returned to her former position and made whole.

Analysis of the Evidence-

As the Union has accurately noted, the burden of proof initially lies with the District in this instance to first demonstrate through clear and convincing evidence that Ms. Erickson knowingly violated applicable rules and regulations promulgated by the Minnesota Judicial Branch ("MJB") as charged in their letter of termination sent to her in April of last year (Employer's Ex. 10). Should that be established then they must show that the discipline imposed was reasonable under the circumstances.

Any analysis of the relevant evidence in connection with the charge of misconduct leveled against the Grievant in this instance necessarily includes matters of credibility, her knowledge of the rules – actual or assumed, her work history, as well as the gravity of the purported transgression.

There is little doubt but that Ms. Erickson's behavior on her first day back from a relatively lengthy suspension and reinstatement as a result of a grievance settlement was, at minimum, questionable. Indeed, the Union does not challenge the fact that she demonstrated "poor judgment" when she retrieved her husband's (civil) file. Whether the true intent was strictly for training purposes as the Union maintains – to reacclimate Ms. Erickson on the new computerized system for tracking files and hearing dates, or for personal gain as she and her husband had recently separated (Employer's position), it remains a wrongful act that is subject to discipline.[3] Beyond this, the more critical question is whether, as part of her examination of the file, the Grievant opened and viewed the confidential notes of the presiding judge.

AFSCME argues that however erroneous Ms. Erickson's actions were that day, the Employer has failed to demonstrate that they constituted a

[3] The Union argues, *infra*, that if the offense is punishable, then past treatment of similar infractions by the Administration warrant a far less sever penalty.

violation of any specific rule or policy which she had knowledge of. This assertion however, cannot withstand the weight of the evidence to the contrary found in the record. While it is true that, with the exception of juvenile or adoption cases, all files kept in the courthouse are considered "public," and are therefore accessible, there are clearly limitations – not the least of which is the presiding judge's work product. As previously noted relevant language found in the "Employee Code of Ethics" for the MJB, defines confidential information to include, "...any information that is the work product of any Judge....(*supra*,. Article 2). This expressly encompasses their "...notes, papers, memoranda and case file information" (*id.*). Further the MJB's Policy Statement defines the use of a court employee's official job classification to secure "unwarranted privileges" as an "Abuse of Position and Conflict of Interest" (District's Ex. 12). Article V, "Performance of Duties," then concludes:

> "The appointing authority reserves the right to take timely and appropriate disciplinary action for any violations of this Code. The appointing authority may discipline or remove an employee for conduct that violates the Court Employee Code of Ethics" (*id.*).

This same exhibit demonstrates that the Grievant had attended a formal training session put on by the Employer in 2001, and again in 2006, less than two years prior to the events leading to her termination, where the issue

of confidentiality was specifically addressed. Indeed, under cross-examination, Ms. Erickson acknowledged that she was aware of the rule that a judge's personal notes kept in a separate envelope in a file and marked "Confidential" are not available to the public without the express permission of the author consistent with the Rules of Public Access to Records, *supra*.[4] On the other hand, the Grievant maintains that she did not open or view Judge DeMay's sealed notes found in her husband's file. The Grievant's claim however, is less than compelling in light of the evidence presented.

The first witness called to testify at the hearing, Paula Lang, stated that she observed the Grievant and Dawn Meyer standing at Meyer's desk on the afternoon of March 24th holding two sheets of yellow paper containing handwritten notes. Lang recalled recognizing the handwriting as belonging to Judge DeMay. The witness explained that she worked as Judge DeMay's clerk; that she was quite familiar with her handwriting, and; that she remembered handling the file for the Judge earlier that month, which included placing her notes into an envelope marked "Confidential," closing

[4] Moreover, the unrefuted fact that Judge DeMay became upset when advised that her notes may have been viewed by the Grievant and/or another employee of the Court, sufficient for her to order a disclosure hearing to inform the parties that the file might have been breached, lends further support to the dour reality of the situation.

the envelope and; writing "Judge's Notes" on the front (see also: Employer's Ex. 1).

Not only were Ms. Lang's recollections of the events detailed, they were also consistent. Both during the course of her testimony at the hearing, and in the accompanying investigatory notes and testimony of Administrator Paske and Human Resources Manager Travis Annette, Lang's description of what she observed that day remained constant. Her credibility is further buttressed by the fact that she clerked for Judge DeMay and was familiar with her hand writing.

Ms. Lang's testimony must necessarily be contrasted with the Union's witnesses to the event. Dawn Meyer testified at the hearing that the Grievant's husband's file was not opened at her desk that day. She offered the same information to Mr. Annette when he interviewed her some four or five days later on March 28, 2008 (Employer's Ex. 8). However, the day immediately after the events giving rise to Ms. Erickson's dismissal, Mr. Penske interviewed Ms. Meyer who, according to the Administration, indicated that the Grievant did have the files at her (Meyer's) desk that afternoon. While she maintains that her back was turned at the time and she did not see Erickson open the confidential envelope, she did state that she believed the

Grievant viewed the judge's notes at that time. This evidence is further supported by the contemporaneous notes taken by the Employer on Tuesday the 25th (District's Ex. 15). It is also observed that under cross examination at the hearing, Ms. Meyer acknowledged that if a clerk views a family member's file, she is well aware of the fact that anything marked "confidential" therein, is not to be disturbed. Nor could she identify any other clerk who, to her knowledge, has read a judge's notes when similarly marked.

Neither do I find Ms. Erickson's version of the incident credible. She testified that she took her husband's file directly to her own desk, rather than to Meyer's, and furthermore, that she never actually reviewed its contents. This is in direct contradiction to both Ms. Lang's recollections and to Meyer's original version of the incident given to Management the day after the occurrence. The documentation resulting from Annette's investigation indicates that the Grievant stated she pulled her husband's file that day because she had copies of all information at home but wanted to "make sure that <u>we</u> had what (was) in there – nothing more, nothing less" (Employer's Ex. 8; emphasis added). At the hearing Ms. Erickson stated that she was still living with her husband as of March 24th last year, and that at the time, there were no particular domestic problems between the two of them.

Yet there is other evidence indicating that she had signed a lease on another residence on the first of March, 2008, and further that an affidavit had been submitted to the courts indicating that she had separated from her husband effective March 1, 2008 (see also: Employer's Ex. 3). Finally, I note that during the course of her testimony at the hearing, Ms. Erickson explained part of the reason she retrieved her husband's file went beyond mere training; that there were, in her words, "trust issues" with her husband at the time.

In her defense, Ms. Erickson maintains that Ms. Lang may have been less than objective in her recollections of the events that day. More particularly, she claimed that their relationship has been "somewhat stressful." Although she could not say why, the Grievant speculated that it may have something to do with their relative seniority, and that Lang had been unhappy that she (Erickson) had been brought back to work following her fairly lengthy absence. This theory however, went largely unsubstantiated on the record. In contrast to the Grievant's assertions, Ms. Lang testified that her relationship with Ms. Erickson had always been "good;" that she had socialized with her on occasion, and; that she has never had a problem with Ms. Erickson.

While it should not be lightly presumed that the Grievant has fabricated a story in order to preserve her employment, neither can it be denied that self preservation remains the first law of nature. Here, the weight of the evidence presented – the consistency of the Employer's witnesses relative to their observations and investigatory findings – as opposed to the conflicting versions of the incident offered by Ms. Meyer along with the Grievant's own problematic recollections, lead to the conclusion that Ms. Erickson did in fact view the confidential files of Judge DeMay on the day in question; that she was aware this was contrary to the Employer's Code of Ethics, and; that she had been appropriately trained on the subject previously.

The Union has argued that even if it is concluded that the Grievant was guilty of misconduct, the most severe punishment of termination is not warranted in light of the consistent manner in which the Administration has handled similar rule/code infractions in the past. As support, AFSCME presented documentation which summarized all discipline issued to "...any 9th Judicial District employee within the last five years," noting that there is a dearth of evidence substantiating the reasonableness the District's decision to terminate Ms. Erickson's employment. The Union has also cited another arbitration decision (BMS Case. No. 07-PA-0894) which upheld the grievance

of a court employee accused of disclosing confidential information.

A careful review of the examples submitted by the Union in support of their argument of desperate treatment however does not, in my judgment, militate against the decision that was made here by the Administration. None of the other disciplinary actions they cited indicate that the accused employee opened and/or reviewed the case notes of a presiding judge, similar to what transpired in this instance. The comments of an employee in public (in a hair saloon) concerning the disclosure of certain "sensitive information" regarding an upcoming wedding (the subject of the 2007 arbitration decision the Union referred to) does not compare with the egregious misconduct of Ms. Erickson. Nor can any of the other examples referenced by the Union regarding a breach of confidentiality by an employee resulting in a lesser penalty, support their defense of condonation. Rather, the evidence demonstrates conclusively that Ms. Erickson opened a sealed envelope and reviewed the very private and confidential notes belonging to the presiding judge in a case involving her husband, in direct violation of applicable published rules of conduct which she was, or should have been, quite familiar with.[5]

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[5] As previously observed, the Grievant confirmed her attendance at meetings and training sessions where these policies/rules had been distributed and discussed at length.

Finally, while termination is certainly the most serious form of industrial punishment which can be administered by an employer, I find little evidence to support the imposition of a lesser penalty here considering the significance of the Grievant's offense. As was shown, the presiding judge became so upset when notified of the potential breach of confidentiality that she immediately scheduled a disclosure hearing with the parties in light of the very real possibility that her work product had been significantly compromised. Moreover, while the parties have stipulated that the last chance agreement under which Ms. Erickson had returned to work was not the basis of the action taken against her, it is nevertheless appropriate to note that in terms of her overall employment history she was clearly on "thin ice" when she returned to work on March 24th and should have made every effort to pay close attention to the requirements of the Court's Code of Ethics and more particularly its policies and rules regarding confidentially. I find her behavior that day however, exhibited a rather cavalier approach to the expectations of her position.

Award-

Accordingly, for the reasons set forth above, the grievance is denied.

Respectfully submitted this 12th day of January, 2009.

Jay C. Fogelberg, Neutral Arbitrator