

IN RE ARBITRATION BETWEEN:

ITASCA COUNTY EMPLOYEES ASSOCIATION

and

ITASCA COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 08-PA-1115

JEFFREY W. JACOBS

ARBITRATOR

June 15, 2009

IN RE ARBITRATION BETWEEN:

Itasca County Employees Association

and

Itasca County

DECISION AND AWARD OF ARBITRATOR
BMS Case # 08-PA-1115
Garrett Ous grievance

APPEARANCES:

FOR THE UNION:

Mitch Brunfelt, Attorney for the Association
Garrett Ous, Grievant
Donald Piilola, former DNR employee
Paula Johnson Frings, Cleveland Mgt. Group
Scott Dane, Executive Dir, Assoc. of Contract
Loggers & Truckers, ACLT
Bruce Carlson, MN DNR Duluth (by phone)
William Brink, contract laborer Itasca Cty.
Elmer Cone, Cone Construction Co.
Mark Mandich, County Commissioner
Rusty Eichorn, County Commissioner
Michael Gibbons, Staff Forester
Wayne Perreault, District Forester
Loren Eide, District Forester
Steven Aysta, District Forester
Darlene Brown, Lead Land Office Secretary
Meg Muller, Land Office Secretary

FOR THE COUNTY:

Pam Galanter, Attorney for the County
Susan Hansen, Attorney for the County
Louise Koglin-Fideldy, Interim HR Coordinator
Brad Jones, former District Forester
Steve Arbour, Itasca County resident,
Chair of Forestry Affairs Committee
Patricia Topley, former District Forester
Tim Stocker, District Forester
Lori Dowling, County Commissioner
David Marshall, Assistant Land Commissioner
Blair Carlson, District Forester
Kory Cease, District Forester
Perry Leone, District Forester
Craig Enwall, Regional Director Minnesota DNR
Rick Horton, Ruffed Grouse Society, DNR Biologist
Catherine McLynn County Commissioner
Karen Burthwick, County Commissioner

In addition, Mr. Christopher Wirth appeared on behalf of several witnesses as the AFSCME Local 1626 union representative when AFSCME members were called to testify. Mr. Wirth did not give testimony or evidence in the matter.

PRELIMINARY STATEMENT

The hearing in the matter was held over the course of eight days on September 23, 24 & 25, 2008, January 7, 8 & 9, and March 30 & 31, 2009 at the Itasca County Courthouse in Grand Rapids, Minnesota. The parties submitted Briefs which were received by the arbitrator on May 13, 2009 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2007 through December 31, 2009. Article XII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Was the five (5) day suspension of the grievant for just cause? If not what shall the remedy be?

COUNTY'S POSITION:

The County's position was that there was just cause to suspend the grievant for 5 days for his actions in this matter. In support of this position the County made the following contentions:

1. The grievant is the Land Commissioner for Itasca County and has the responsibility for managing a staff of foresters and office personnel. He also must maintain good working relationships with the public, the logging industry and the County Board. Itasca County has a significant lumber industry and the Land Commissioner has a very important role in maintaining and promoting the economic health of the County as well as the responsibility for husbanding land owned by the County.
2. The grievant has had a long and storied history of personnel problems but with his own staff as well as strained relations with some members of the community and the County Board. As will be detailed further below, the County asserted that the grievant has a somewhat belligerent management style which engenders poor morale among his staff, particularly with regard to at least two District Foresters who left employment with the county due to the grievant's poor management style, namely Patricia Topley and Brad Jones. In addition, the County alleged that he has a history of inappropriate communications with staff that on one occasion gave rise to a harassment complaint that costs the County approximately \$60,000.00 to settle the claim brought against him by a Ms. Patricia Topley who was a Forester in the Land Department.

3. The County further alleged that the grievant has a history of retaliation against anyone who disagrees with him. Specifically, when two of his foresters raised questions about the Biophysical program brought to the County by Mr. Donald Prettyman, from Natural Resources Services, Inc. The grievant became angry and would not talk to them and re-assigned them in a way that can only be described as vindictive. He further made it known around the office that anyone who disagreed with him, even on a professional level, was targeted for some sort of retaliation. The County asserted that these actions cannot pass as management and cannot be tolerated. Further, that the grievant's actions in creating an atmosphere of fear and suspicion led to the resignations of some very competent foresters. The grievant's demeanor and actions created mistrust and dissatisfaction that infected the entire Land Commissioner's office.

4. The grievant is gruff and defensive in his personal style but the County's case did not hinge on that. The County's concern is that the grievant is not only owly and angry around co-workers but that he refuses to engage in even professional discussions with his staff about the Biophysical system or to answer the questions of his staff so much so that they avoid asking questions about their job they legitimately need to ask to avoid possible retaliation from the grievant or inciting his ire.

5. The County noted that while the grievant was hired initially to implement the Biophysical program designed by Mr. Prettyman by the Board; the Board changed that policy and decided to go with a different program. The grievant apparently took personal umbrage to this and began working to undermine the decision of the County Board by asking his staff to sign a petition seeking to persuade the Board to overturn the decision to use a different program. In so doing he placed his staff in a terrible position of having to sign a petition to either assuage their immediate supervisor that arguably was in direct conflict with a determination of the County Board.

6. The County provided Board action dated October 23, 2007 wherein the Board took formal action to begin integration of the County's data into the ECS system. Thus there was formal action by the Board and it was the grievant's responsibility to implement that policy. The County asserted that the grievant's actions were, if not in direct conflict with this policy, taken to undermine it.

7. Moreover, there were quite legitimate reasons for the Board's decision. The logging industry, as noted, is quite important to the County. Further, the Chamber of Commerce worked very hard to promote that industry to maintain the economic vitality of the County. The Chamber's Forestry Affairs Committee informed the County that the lumber and paper industry sought certified forestry products in order to better market their products to consumers. Further, the Biophysical program did not lead to such certification. They lobbied the Board to change to a measure that would result in the certification the industry needed to market their products and did not care whether it was FSC, Forest Services Council Certification or SFI, Sustainable Forest Initiative, certification.

8. Eventually the Board did change to a different system and the grievant was very angry about that. He reassigned one of his long-time foresters to a different district as noted above and would not even speak to him in the office. It was well known that the reassignment was done in retaliation for the move away from Biophysical. This in turn led to an atmosphere of fear around the office. The County put on several witnesses who testified that they were fearful of the grievant and did not say or do anything around him that might antagonize him or cause him to focus on them as the target of some form of retaliation.

9. The County further asserted that the grievant discontinued Flex Time and that it was designed to apply to only a few select employees; i.e. those he liked and favored, and was designed to discriminate against those he disliked. The new schedule was also different for employees with young children. This too created an atmosphere of dissatisfaction and fear on the department since employees felt that the grievant had created the new schedule as retaliation against those employees who questioned the Biophysical System.

10. The County also asserted that the retaliation took the form of giving otherwise good employees poor performance evaluations. The county pointed to the evaluation of Tim Stocker and pointed out that the grievant twice indicated that he could use “extra energy” to better perform his job. Both times Mr. Stocker asked for clarification of what that meant and both times he was ignored. He further gave a reprimand to Mr. Stocker in 2005 for the alleged inappropriate use of the radio. When challenged however the grievant indicated that it was not actually discipline. Again, the County alleged, the “reprimand” given to Mr. Stocker was retaliation for criticism of the Pro-Cert system.

11. The grievant changed people’s schedules in what many of the staff believed to be retaliation. The County further alleged that while within his management authority, this was done with the specific intent to create mistrust and fear within the Land Office staff. It was further in direct contravention of ongoing efforts and admonitions by the Board to get the grievant to change his management style.

12. The County pointed to several of the evaluations in which even the grievant’s staunchest supporters noted the deficiencies in his managerial style. As early as 2005, his performance evaluation noted the need for improvement in the areas of “human relations skills with peers and employees.” This was signed by the Board as a whole. Commissioner Dimich, who was on the Board at that time, noted “needs improvement” in the area of subordinate development. Even Commissioner Mandich, who testified on the grievant’s behalf at the hearing and voted against his suspension, indicated, “I would like to see some major improvement in regards to working on his human relations skills with his employees on the job.” Commissioner Klegstad also noted as follows: “Try to form better communication with staff, Garrett could use a more tactful approach when dealing with his staff, more explanation of why certain things are being done, would help.”

13. The County asserted that the above examples are simply a small taste of the overall direction given to the grievant to improve his managerial style and to be more communicative with his staff. Instead, the County argued, he continued to ignore these warnings and continued to treat staff with disrespect, to ignore their questions, refuse to talk to them and even to berate them or cause them to fear retaliation if they dared to question his authority or to question why something was being done.

14. The County asserted that the grievant has a dictatorial and autocratic management style and manages through intimidation coercion and control. The County pointed to the statements by employees in the Department over time, the Soldo Report, done in conjunction with the Topley investigation in 2005, and the observations made by County Commissioners about the way the Land Department is run. As a result, the County asserted that this has and continues to create an atmosphere within the Department of low morale and dissatisfaction amongst the employees. This in turn leads to friction, inefficiency and turnover of competent staff. As the manager of the Department the County asserted that it falls upon the grievant to reverse this situation. Instead he is the person who has created it. He has been directed many times and many ways to correct his behavior but he refuses to do so.

15. The County further assailed the grievant's credibility by pointing out that after the Soldo report, the grievant asked that she be investigated claiming that Ms. Soldo was biased and unprofessional towards him. The County commissioned an investigation of that whole matter and retained Mr. Thomas Fitzpatrick to conduct an independent investigation of how the Soldo report was conducted. See, Employer exhibit 23. This report concluded that nothing improper occurred and that according to the investigator, Ms. Soldo had conducted herself professionally and that her investigation "was appropriate in scope and was unbiased" and that "the complaint filed by Land Commissioner Garrett Ous against County Coordinator Robert Olson is unfounded." See p. 13 of the Fitzpatrick report, Employer exhibit 23.

16. The County further asserted that the grievant attempted to retaliate against Ms. Topley by adding negative matters to her performance evaluation. When Mr. David Marshall submitted Ms. Patricia Topley's 2005 performance evaluation, that indicated she satisfactorily met all her work requirements, the grievant added a narrative piece to it indicating the performance was unsatisfactory. The County reiterated that this was retaliation for the letter of apology he was required to write to Ms. Topley. The County indicated that this is again simply another example of the vindictive nature of the grievant and his lack of understanding of how to appropriately deal with employees in the Land Office.

17. The County countered the assertion about several of the statements allegedly made by Ms. Topley and argued that she did not make the statement that "we like to keep things vague." See, Employer exhibit 4, Soldo Report, at page 22. Thus, the grievant was incorrect in assuming that she made this statement and his comments at the Smart Wood audit meeting were inappropriate since he assumed it was her without performing an adequate investigation. The County alleged that the grievant was told by another staff member she did not make the statement. Soldo report at page 23.

18. The County pointed to the Smart Wood audit that was done in 2007, See Employer Exhibit 25 at page 5, that there were concerns about an "uneasy environment that exists between the land Commissioner and staff." The auditors even recommended corrective action regarding this. The County pointed to this as further evidence of the bad working conditions in the Department even found by an objective outside agency. The auditors made specific recommendations for reducing the friction within the Department but the grievant failed to follow through on these.

19. The County also noted that as a part of the Smart Wood audit the grievant threatened his staff to "tell the truth but watch what you say" or words to that effect, since "it all comes back to me [meaning the grievant]." Staff took this as a threat to be careful about what they said and asked the auditors to remain anonymous. These same staff asked Ms. Soldo to remain anonymous as well, even though pursuant to State law she was required to keep their identities confidential. See M.S. 181.932, subd. 2(2).

20. The County asserted that these are examples once again of the dictatorial and coercive atmosphere fostered by the grievant. The County asserted over and over that this is what the Commissioners have been telling him not to do for years both formally through evaluations and disciplinary warnings and informally but that he just refuses to change his ways.

21. The County asserted that the grievant attempted to sabotage the Board by appointing a Science Subcommittee comprised of other Land Office employees. The grievant gave them impossible tasks in an effort to show that the Land Office did not possess the expertise to carry out the wishes of the Board and would therefore need outside consulting services. Employer Exhibits 17 and 18. The County argued that this was also an attempt by the grievant to thwart efforts to get him to conform to the wishes of the Board and was again perceived by Land Office employees as retaliation for their attempts to create a more collegial and professional atmosphere within the Department.

22. The County further asserted that the grievant has difficulty communicating with other agencies with whom he is required to work. The County called Craig Enwall, Regional Director of the DNR, to testify regarding what he had been told and what his understanding was of the grievant's communication style with DNR staff and staff from other Counties. His statement to Mr. Zalasky showed that DNR staff had told Mr. Engwall that the grievant is suspicious and difficult to work with. See, Employer Exhibit at pp. 24-25.

23. The County further argued that the grievant did not work cooperatively with the Ruffed Grouse Society and had Mr. Rick Horton testify to that effect. He testified that working with the grievant and the Itasca Land office was frustrating. He felt that he was not able to "get anywhere" with the grievant. Even though there was money available through the Ruffed Grouse Society for habitat enhancement and forest management that could have gone to the County, all the grievant was interested in was money for the Prettyman/Biophysical classification system. He further testified that the grievant seems paranoid and suspicious and indicated that the grievant is very opinionated or would simply fail to communicate when challenged or upset.

24. Mr. Horton felt that the grievant seemed to hold a grudge after the Ruffed Grouse Society would not fund the Biophysical classification system. The County asserted that the grievant's attitude soured the relationship with the Ruffed Grouse Society and that this may have actually cost the County grant money for habitat and forest management. Mr. Horton further indicated that he made requests for information to the grievant but that the grievant never made it available to Mr. Horton.

25. The County pointed to the grievant's history of disciplinary trouble as well. In 2005 the grievant was required to give an apology letter to Ms. Topley for his actions toward her. Rather than simply acknowledging that he continued to further harass her and make disparaging statement to and about her to the point where she left the office and filed a claim against the County. See Employer Exhibit 1, Tab 14. As a result of the grievant's continued harassment and retaliation, the County settled the claim Ms. Topley filed against the County for \$60,000.00. The county asserted that this was a large sum especially for one of the poorest Counties in the State of Minnesota and was money they could ill afford to pay.

26. Commissioner McLynn filed several letters expressing her concerns about the Land Office management in March 2006 for very similar kinds of concerns. It is clear from these prior incidents that the grievant has been warned about his conduct, and this specific conduct and knew that his management style and comments and actions were not appropriate and needed to change. The County asserted that they did not.

27. Commissioner McLynn felt she had to send a letter in response to what she termed inappropriate statements about her by the grievant. See Employer exhibit 20. She outlined disrespectful comments made by the grievant that she was undermining his Department. The County argued that she was under no circumstances doing that but merely seeking information or to assure that the grievant corrected his behavior regarding his dealing with his staff and the public. She was exercising her authority in her official capacity as the grievant's immediate direct supervisor.

28. The County further noted it is entirely appropriate for a Commissioner to communicate with any County employee. Thus there was nothing inappropriate at all about discussing the Biophysical system or anything else in the Land Department. In fact, it was Commissioner McLynn's job to do so in order to do her job better as a commissioner and to make sure the Land Department is as efficient and effective as it possibly can be. The County further asserts that it is within Commissioner McLynn's role to make sure that the County retained competent foresters and that the Department's morale remain high so that good people stay and do their jobs well. The County pointed to Commissioner Burthwick's testimony as well. She supported the assertion that it is appropriate for a Commissioner to communicate directly with a County employee and that she encouraged this when she was an AFSCME Steward prior to being elected to the County Board.

29. Based on a letter dated August 7, 2007 from Commissioner McLynn and due to the ongoing complaints about the grievant's behavior and actions in the workplace, the County began an investigation in the fall of 2007. The County retained an outside attorney to conduct a very thorough and painstaking investigation of the grievant's conduct. That report, Employer exhibit 1, known as the Zalasky Report, found significant problems in the Land Office and with the grievant's conduct. Even though only a few of the actions constituted violations of County Policy, they clearly violated the prior disciplinary warnings and notices given to the grievant about his conduct around the office.

30. The County Board met multiple times to discuss the findings and to consider what to do about the ongoing difficulties in the Land Office and the very real concerns about morale in that office. The Board eventually determined that the grievant's conduct warranted a 5-day suspension and took action to suspend him by letter and Board action dated February 5, 2008. See Joint Exhibit 5.

31. This action was based on the Findings by the Board also dated February 5, 2008, which noted two bases for the discipline as follows:

“1. Garrett Ous, Itasca County Land Commissioner, is hereby charged with violating paragraph 2 of the County Disciplinary Policy, conduct for performance on the job which indicates a failure to produce the quality of work the position or classification requires, based on his failure to sufficiently communicate with outside agencies, the conflict with outside agencies and the fact that he is viewed as being opinionated, difficult to deal with and not responsive. 2. Garrett Ous, Itasca County Land Commissioner, is hereby charged with creating poor morale in the Land Department by his management style and the manner in which he treats employees.” Joint exhibit 5.

32. The County asserted that Mr. Ous’ comments at the ECS meeting with Dr. Hutchins were inappropriate. He raised his voice and made it clear that he felt that the Biophysical system was a better system than ECS. The County acknowledged that this was to be a discussion of the various benefits of each such system but that the grievant’s comments were insulting and provocative toward the County’s invited guest, Dr. Hutchins. This was another of the stated reasons for the discipline in this matter and demonstrated again an anger management issue with the grievant. See Joint exhibit 2.

33. The County pointed to the ECS meeting and the CWPP meeting, along with other examples as instances involving hostile and intimidating behavior by the grievant. He has been warned about this in the past yet continues to act out when challenged or when he hears something with which he disagrees, The County argued that this behavior creates tension in and out of the workplace and cannot be allowed to continue.

34. The County countered the Association's evidence that the grievant got along with some employees by asserting that many of the Association’s witnesses did not see the grievant at the office and were not familiar with his management style. Further, those witnesses were employees he liked and so did not treat like other employees in the Department. The County asserted that while not everybody disliked or were afraid of the grievant many of his staff were and it is this problem the County was seeking to rectify.

35. Further, the County stood by its assertion and the testimony of its witnesses that the grievant did not work well with outside agencies and that when those agencies or people within them challenged the Biophysical system he treated them very differently than those who agreed with that system. The County repeatedly made the point that the grievant's demeanor and management style was very different toward those with whom he agreed versus anyone who deigned to question the scientific integrity of the Prettyman system.

36. The County asserted that the degree of discipline is appropriate. The grievant has been disciplined before and was well aware that further violations of policy would result in greater discipline than had been meted out before. See April 8, 2005 letter of reprimand, dealing with the Patricia Topley situation.

37. Further the County gave the grievant yet another letter dated March 14, 2006 regarding inappropriate language and disparaging remarks about employees. This letter was yet another clear warning to the grievant that continued actions of this nature would result in greater discipline. Progressive discipline has therefore been imposed without success and further discipline must be meted out in order that the grievant "get it" and amend his behavior.

38. Further, other options were considered, i.e. demotion or even termination. These were rejected but it was clear that the County considered carefully the appropriate degree of discipline. Because the grievant is considered exempt however, the option of a 5-day suspension was almost the only one available to the County. This lesser form of discipline was given even though a greater degree of discipline probably could have been imposed.

The County seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION

The Association's position was that there was no cause for the suspension here. In support of this position the Association made the following contentions:

1. The Association noted that the grievant has been with the County since 1995 and that he was approached by the County for hire as the County Forester. The County hired him with the full knowledge of his expertise in the Biophysical system. Indeed, when he interviewed for the job the great bulk of the interview process was about his expertise of that system. Over the course of the next few years the Board clearly supported the Biophysical system, including approval of the consultant contract with Professor Prettyman. There was no doubt in anyone's mind that the County fully supported the Biophysical system.

2. The Association asserted that the grievant's performance and knowledge as a forester is not in question and that he does an excellent job. See Association exhibit 28 with multiple attachments. Thus, while one of the stated grounds for discipline is, "... failure to produce the quality of work the position or classification requires, based on his failure to sufficiently communicate with outside agencies, the conflict with outside agencies and the fact that he is viewed as being opinionated, difficult to deal with and not responsive," the Association refuted that piece and notes that the grievant's actual work performance in managing the forest and other land in the County is excellent.

3. The Association asserted that while the grievant has a somewhat stoic and even a gruff management style, he violated no County policy or Rules that would provide the basis for discipline. Further, many of the allegations made against him are the result of Commissioner McLynn's personal vendetta against him. The Association characterized Commissioner McLynn as a loose cannon who fostered dissent over the Biophysical inventory system with the Land Department.

4. The Association noted that for many years the County supported the efforts to implement the Biophysical system. The grievant held many public meetings and tours for various constituencies to demonstrate the effect of that system. All this was done to do a better and more effective job managing the County's forests. The grievant noted that he is not someone who merely does the minimum expected but wants to do more to work in the best interests of the County.

5. The Association asserted that the grievant's management style is not as the County characterizes it and that over time he has imposed discipline on only one occasion. A truly "dictatorial or autocratic" manager would certainly be disciplining people more frequently than that. Instead, the Association asserts, the grievant has attempted to work positively with his staff and to conduct training with them where necessary. The Association further disputed the characterization that the grievant runs his Department by fear and coercion. The Association asserted that these allegations were brought by a small number of disgruntled employees who had the ear of one County Commissioner. The bulk of the employees are satisfied with their jobs and with the grievant's leadership.

6. The Association further asserted that the Soldo report was biased at best and that if one reads it and some of the comments, especially about his health conditions, see Employer exhibit 23, and February 25, 2005 letter from grievant to the Board contained therein at page 2, it is apparent that she stepped outside of her role as investigator and lapsed into the role of advocate and prosecutor.

7. The Association also noted that there were individuals inside and outside of the Department who resisted the scientific validity of the Biophysical system and were engaged in efforts to discredit it. Brad Jones' comments to Mr. Zalasky that the system was "snake oil" matched his demeanor and his efforts to surreptitiously undermine the program even though the Board and the Department were giving clear direction to implement that program.

8. Patricia Topley also was not only generally unwilling to accept the program she was more generally resistant to management's direction in many areas. She was simply a dissatisfied employee who chose the wrong profession and was unhappy with that choice. This unhappiness manifested itself in endless questioning of the same material and a lack of ability to understand it or an effort to provoke the grievant. She was generally a troubled and troubling employee. The grievant indicated that he went out of his way to accommodate Mr. Jones' and Ms. Topley's needs and attitude but they were simply not able to take managerial direction.

9. Specifically, with respect to the Patricia Topley incident in 2005, the Association noted that she was in the field during an annual audit of the forest by the Smart Wood auditors. This audit is critical to the certification of the forest and critical to the need to demonstrate that the County's forests were well managed. It was expected that the foresters be prepared in detail and should know what was going on with their section of the forest. Ms. Topley was clearly not prepared to respond to questions by the auditors. Ms. Topley indicated that she was flippant and demonstrated a clear lack of knowledge of her section of the forest. As examples, in response to specific questions by the auditors she would answer that she "didn't know or care because she would not be here in ten years" or that "we like to keep things vague around here." In another instance she forgot to put in a boundary line in a report. This was a critical error in reporting so loggers know where to go. These comments and others like it were unacceptable and the grievant felt that he had to take action to correct this deficient behavior by one of his employees.

10. Further, the grievant directed Ms. Topley's immediate supervisor to address this with her to get her to correct her behavior. He undertook to get her to improve through appropriate channels to help her improve, see Association exhibits 23 through 26, but she simply failed to change her attitude or to improve her performance or follow through with the suggestions made to help her.

11. The grievant acknowledged receipt of a written reprimand that he did not agree with and submitted a response to that. See Association exhibit 22. As further evidence of Ms. Topley's unprofessional attitude and troublesome work demeanor, the Association argued that after she received the letter of apology required by the County after the Smart Wood audit incident, she ran around the office showing the letter to co-workers as a sort of prize. This action further demonstrates the kind of employee she was and the trouble the grievant had trying to address her negative attitude.

12. At the closing meeting of the Smart Wood audit, the grievant directed Ms. Topley not to argue or debate anything at that meeting and to essentially remain quiet. There was nothing inappropriate or demeaning to her and was intended that she not make the sorts of flippant statements she had made to the auditors out in the field. The grievant testified that he did not want her further embarrassing the Department with those sorts of comments.

13. With regard to the Smart Wood audit, the Association asserted that the comments about low morale and difficult working conditions was again driven by a few employees in the Department who were in disagreement with the Biophysical system and who wanted to undermine the grievant. In addition, many of the recommendations were already in place so no further action was needed.

14. The Association and the grievant argued most vehemently that while there was some friction in the Department there was no reason and is no reason to fear retaliation of any kind. As pointed out herein, the grievant has imposed employee discipline once in over 13 years with the Department and all of the other actions he takes are well within his managerial rights to do so. He never imposed discipline on either Brad Jones or Patricia Topley even though they were the ones who raised many of the concerns about retaliation and reprisal.

15. Moreover, the employees, including Mr. Jones and Ms. Topley's, evaluations were always satisfactory and they passed them all. If the grievant had wanted to retaliate there were certainly ways, i.e. through discipline or through employee evaluations, he could have done it yet he did not. There are simply no grounds for the allegations of retaliation or reprisal. The Association asserted that the Smart Wood auditors cited "several stakeholders" as being concerned about reprisals if they advocated for better working conditions and noted that these "stakeholders" are the same people who had been agitators and disgruntled about their jobs as noted multiple times in the matter.

16. The grievant regretted that the County paid something to Ms. Topley based on her harassment complaint against the County but he denied then and denies now saying or doing anything inappropriate or contrary to policy or the law as the result of these comments. He was giving a directive to an employee whose actions and comments were inappropriate and he wanted it to stop.

17. The Association noted that the Board supported the efforts to implement the Biophysical program until there was a change in the Board and Commissioner Catherine McLynn was elected to the Board. The Association asserted most vehemently that Commissioner McLynn has engaged in a pattern of inappropriate meddling in the Land Department and has gone beyond appropriate boundaries for a Commissioner and has interjected herself into what should be a staff area. The grievant asked her to cease and desist this activity and did so in a professional way by asking that she work out her differences on policy matters with her colleagues on the Board. The grievant denied ever getting unduly angry with Ms. McLynn but remained firm in his position that she did not get to run the Land Department by being "a majority of one." Rather than staying away from micro-managing the Land Department the Commissioner persisted in her attacks and even went so far as to file a formal complaint against him. See Employer exhibit 20.

18. The Association asserted that what in fact was going on was an effort by a Commissioner who found herself in the minority to influence a staff person to do things that were contrary to County Board policy at the time. The grievant simply instructed her that he took his marching orders from the Board as a whole, not one person.

19. Moreover, the Association pointed to the vast difference between the grievant's performance evaluation in 2003, Association exhibit 12, versus his 2004 performance evaluation, Association exhibit 14. See also, Association exhibits 17 and 19, which also show that Commissioner McLynn had a clear negative attitude toward the grievant that was not shared by the rest of the Board. It was not until the make-up of the Board changed and more of Commissioner McLynn's political allies were elected that she was able to make good her goal of threatening the grievant's job.

20. The Association noted that the radical change in her attitude towards the grievant followed closely on the heels of the grievant's resignation from the Chamber of Commerce, an organization to which Commissioner McLynn had very close ties. The Association also noted that Commissioner Dowling also has very close ties to this organization and in fact ran for office on a platform that was quite closely allied with the Chamber's interests. It is clear thus that Commissioner McLynn is leading an effort to undermine the grievant and oust him from his position since he is not willing to be too overtly friendly to the interest with which these commissioners have aligned themselves. The Association asserted that the discipline against the grievant is motivated almost entirely by politics and initiated by Commissioner McLynn since he wouldn't do her political bidding or support the organizations she supports and/or is a member of.

21. The Association pointed to the actions of Commissioner McLynn in particular and asserted that she spoke with individual members of the Land Department about the Biophysical system. In fact, according to the Association, these individuals were lobbying Commissioner McLynn in an effort to get the Board to change from the Biophysical system.

22. While the Commissioner did not characterize their efforts as "lobbying" the Association asserted that the comments made by individual employees fit an almost classic definition of "lobbying." They may not have used that word but they raised concerns about the system and knew well whom they were talking to and the Association asserted that it was clear from the totality of the evidence that these employees were attempting to influence the Board by talking to a Commissioner. The Association further argued that her actions, whether intentional or not, created a disruptive atmosphere in the Land Department and in fact created far more dissension in that Department than anything the grievant did.

23. The Association further noted that while this was going on, the Board's official stance was in favor of the Biophysical system and that the grievant was therefore duty bound to implement that system. Commissioner McLynn's actions cannot be characterized as anything other than to undermine Board and the Land Commissioner's authority to implement the Biophysical system. Her actions were disruptive at best, undermined the grievant's authority and created the very conflict in the Department he is now being disciplined for. That dissension was created by Commissioner McLynn.

24. The Association also pointed to Board minutes from a July 19, 2005 meeting, See Employer Exhibit 1, Tab 16, wherein the Board indicated that it was appropriate for a Commissioner to talk to a Land Department employee. The Association asserted that this Board policy noted that a Commissioner should notify the Department Head when such conversations occur and that in most instances, Commissioner McLynn did not notify the grievant when she had conversations about the Land Department or even about Mr. Ous when doing this.

25. The Association asserted relative to the Flex Time issue that the grievant was within his managerial rights to discontinue that time. In fact the Board has to approve such tie and it never was. Moreover, the Association argued that the same employees who had lobbied Commissioner McLynn about the Biophysical system also complained, i.e. lobbied her about the Flex Time. It was clear that these employees were seriously undermining the authority of the Land Commissioner by going over his head to talk to a sitting Commissioner in order to get a management decision overturned.

26. The Association asserted that the issue with the Ruffed Grouse Society and the conversation between the grievant and Mr. Horton regarding funding was not part of the discipline and should not be considered by the arbitrator in this matter. The Association further noted that it was the Ruffed Grouse Society that determined not to donate money for the Biophysical classification system. While they may have had a desire to donate for other things no money was made available for Biophysical inventory. Further, there was one conversation about funding in 1998 or 1999 and there was never another.

27. With respect to the assertion that the grievant should have remained a part of the Forestry Affairs Committee in the County, the Association asserted that there was never any action taken by the Board or by any other party, public or private, to require Mr. Ous to be a member of the Forestry Affairs Committee.

28. The Association further assailed the allegations raised in the Board's letter of October 24, 2007 placing the grievant on unpaid leave. It was this letter that gave rise to the investigation done by Mr. Zalasky of Iverson & Reuvers. The Association asserted that with one minor exception having to do with the annual cut, the Zalasky report cleared the grievant of any wrongdoing and found no other violations of County policy or Board directives.

29. The Association asserted that the Zalasky report did not find any violations of policy with regard to anger or rage issues. The Association further asserted that the grievant's personal demeanor can be interpreted as rage but that he has a physical condition that makes him appear angry but that he is in fact quite in control. This condition stems from an incident when the grievant was a teenager and results in him getting a red face and a tremor in his left arm.

30. The Association, as will be more fully discussed below, noted that the County Board held 15 closed-door sessions to decide what to do with the grievant in response to the allegations raised by Commissioner McLynn. They then placed him on an almost unheard of 121-day long paid administrative leave and hired an outside law firm to conduct a massive investigation to determine whether the grievant had engaged in misconduct. The Association noted that even though the investigator essentially found virtually no violations of County policy, the Board still went against their own investigator's report and disciplined the grievant anyway. The Association asserted most ardently that after all of this the Board felt it had to do something to justify this enormous expense and waste of time to the taxpayers of Itasca County. The Association argued that this is a witch-hunt and was done so that a few individual members of the County Board could save face after the investigator found almost nothing improper with the grievant's actions.

31. The Association looked specifically at the Zalasky report, which formed the basis of the Board's finding of misconduct and was the factual basis for the discipline here, and noted that with one very minor exception, no violation of Board policies were found. Certainly none were based on anger or rage or inappropriate actions with regard to the employees in the Department. See Zalasky report at page 31, 32 and 37.

32. The Association also asserted that the Zalasky investigation was incomplete since he did not talk to everyone in the Department. The Association further asserted that the investigation was not fair and objective as required by the tenets of just cause since it was not complete. The Association claimed that the County's investigation was only designed to find incriminating evidence against the grievant and did not seek or mention the many positive relationships he has nor did it delve into the great benefit he brings to the County and its constituents.

33. With respect to the morale in the Land Department allegations, the Zalasky report refuted most of these allegations as well. See Zalasky report at page 35 where the investigator concludes that the grievant was not in violation of County policies for his treatment of his employees. Yet, the County decided to essentially overrule its own investigator and impose discipline anyway.

34. Moreover, the sole ground for imposition of discipline in County policy is for "deliberate" creation of low morale. Even the County's own investigator found no such evidence and determined that there was no evidence of a deliberate violation as required by that policy. The fact that morale with some employees may be low is therefore not relevant since the policy requires a deliberate violation in order to be disciplinable. Moreover, some of this low morale may well have been caused by the meddling of Commissioner McLynn in the operations of the Land Department. At the very least, the Association asserted, the question of morale is a two-way street and argued that the employees in the Land Department were actively working to create dissension and dissatisfaction with the grievant.

35. The Association also pointed to the letter of October 24, 2007 and argued that only two instances could be identified as complaints alleging demeaning, embarrassing, disgracing and other unacceptable remarks made by the grievant toward others. These were the ECS meeting and the comments made to Dr. Hutchins and the CWPP meeting and Ms. Miedtke. Both of these were investigated by Zalasky and in both he determined there was no violation of County policy.

36. Regarding the question of changing the Flex Time hours of operation in the Department, the Association also asserted that the investigator again found no violation and indeed that his actions were allowed and warranted under the AFSCME collective bargaining agreement. The change in schedule was in response to the Board's direction to the grievant that he undertake more direct supervision of the District Foresters. The normal work hours set forth in the AFSCME contract are 8:00 a.m. to 4:30 p.m. Over time some employees' hours were flexed but there was no formal agreement as set forth in the contract. He inherited this situation and as manager of the Department the grievant found it necessary to eliminate Flex Time except in very special situations; he wanted to treat everyone the same in the Department. Some employees were dissatisfied with this change and the Association asserted that this too was a motivating factor for this case; some of the employees had the ear of individual Commissioners and helped continue the effort to undermine the grievant's authority.

37. The Association and the grievant further asserted that some employees were dissatisfied with the change in flextime and that they began to resist the authority of the grievant as manager of the Department because he altered their personal work schedules. The grievant attributes this dissatisfaction in large measure for why the complaints leading to this arbitration were made

38. With regard to the allegation that the grievant failed to work cooperatively with outside agencies, the Association put forth several exhibits and considerable testimony that the grievant does in fact collaborate and cooperate with outside agencies on a number of items, not only those related to the question of forest classification systems. See e.g., Association exhibit 35.

39. Moreover, the incident with Dr. Hutchins was determined not to have been in violation of the County's policy and the grievant denied getting out of control there. He was simply having a good faith scientific disagreement with another expert on forestry issues and brought up his concerns at a meeting called to do that very thing.

40. The Association asserted that the County cannot have it both ways by calling a meeting to have an open and frank discussion and then discipline the grievant for having that discussion. The Zalasky Report supports that conclusion as well and found that the grievant's conduct "was not unprofessional." He further found no violation of County policy as a result of the September 27, 2007 incident with Dr. Hutchins. See Employer Exhibit 1, Zalasky report at page 32-33.

41. The Association further asserted that the County's investigator did not even interview everyone and may well have cherry picked the employees to interview and found only those that would give detrimental testimony about the grievant. Despite that, the investigator found no violation of policy on most if not all of the stated grounds for discipline in the actual discipline letter.

42. The Association brought forth a number of witnesses from both inside the Land Department as well as other agencies who indicated that they had a good working relationship with the grievant and that they found him professional, respectful and. Don Piilola, former DNR employee, worked with the grievant on the CWPP efforts at controlling wildfires and found him helpful and very cooperative. The CWPP effort required that many different entities be involved and Mr. Piilola testified that the grievant in fact led the group and worked well and very collaboratively with everyone involved. Mr. Piilola disagreed with Commissioner McLynn's assessment that the CWPP group did not work well together.

43. Further, Mr. Piilola also was present at the CWPP meeting in September 2007 with Julie Meidtke and indicated that she and the grievant got into a discussion about the implementation of the program but he never threatened her or made any inappropriate statements of any kind. See Zalasky report at page 32.

44. The Association asserted that this case is nothing more than a “witch hunt” by Commissioner McLynn toward the grievant based on highly political reasons having little if anything to do with any violation of County policy or Rules. The Association also made much of the fact that the grievant was on administrative leave with pay for months and that the county had literally dozens of closed-door meetings to discuss what to do here. The Association asserted after so much time and money had been spent, they simply “had to do something” to justify the time and expense of the investigation and to finally at long last assuage Commissioner McLynn to “shut her up.”

45. The essence of the Association’s claim is thus that when one boils all this down and examines the facts when compared to the allegations, there simply is no violation here and that the County’s own investigator, despite a somewhat skewed investigation still could not find anything wrong with the grievant’s job performance or conduct.

Accordingly, the Association seeks an award sustaining the grievance and to make the grievant whole for all lost time and accrued contractual benefits.

DISCUSSION

As noted above, the case was tried over the course of 8 days from September 2008 to March 2009. The parties presented a veritable blizzard of conflicting and even diametrically opposed facts on a number of incidents that formed the basis of the County’s charges. It was against this backdrop that the matter proceeds now. The question is limited to whether there was just cause for the discipline based on the stated reasons in February 5, 2008 Findings of the County Board. Joint exhibit 5.

The grievant is the Itasca County Land Commissioner. The County manages 300,000 acres of some of which is owned by the County and some is privately owned and managed. The Land Commissioner is responsible for managing this land and enforcing appropriate land management regulations. The Land Commissioner’s office is also responsible for dealing with loggers and manufacturers of wood and paper products that are vital to the economic health of Itasca County. The County provides approximately one-third of the wood to the mills and paper industry in the area.

The Land Commissioner also deals with outside agencies of various types; i.e. other public entities such as adjoining Counties, the State DNR and federal land management agencies, and private entities, such as the Forestry Affairs Committee of the Chamber of Commerce, the Ruffed Grouse Society and other logging interests, to name a few. The evidence showed that in addition to the management of the wood and trees, the Land Commissioner must also deal with these agencies for other forest management issues, such as the forest floor other flora and fauna and the wood itself.

The grievant has been employed as the Land Commissioner in Itasca County since 1995. Prior to that he was the Land Commissioner for Clearwater County from 1987 to 1995 and was employed as a forester in Clearwater County for 4 years prior to that. The Association asserted that in the past in Itasca County the Land Commissioners have traditionally been hired from within but that there was some residual jealousy and ill feelings as the result of the County's decision to hire from outside rather than promoting from within. The prior land commissioner did not testify at the hearing but there was some evidence to suggest that he remains active in County politics and that he has been actively trying to undermine the grievant's authority. This frankly was unclear and was not strictly germane to the issues at hand but did provide another piece of evidence as to the politically charged atmosphere that surrounded the entire case.

The evidence further showed that the grievant was hired in 1995 and was instructed by the County Board to implement the so-called Biophysical classification system for the County's forests. This was apparently the brainchild of Professor Donald Prettyman, who is a professor at the University of Minnesota Duluth. The evidence showed that the grievant was a supporter of the Prettyman system and that he took very seriously the County's direction to use the Biophysical system.

There was considerable discussion about the differences between this and other land management systems that were not strictly germane to the issue. The scientific differences between these systems was not at the heart of this case. What was relevant was the grievant's actions violated County policy or directives in defending the Biophysical system.

The evidence also showed that there are other land management and classification systems and that various members of the business community in Itasca County wanted the County to use those systems instead of the Biophysical system. Suffice it to say that there was a significant dispute over which land management system to use and that the forest industry wanted a land certification system that would be more palatable to the end consumers of their products. The evidence showed that the Biophysical system did not meet that requirement and that the FAC pushed for the Sustainable Forest Initiative, SFI, or the Forest Stewardship Council, FSC, certification processes for the County's forests.

While it was clear that there was considerable history here and that the grievant's personal style were part of the underlying reasons for this case, it was also clear that the disagreement over which land certification system to use was at least a substantial contributing reason for why this case arose.

The facts are very complex. The formal investigation that led to the grievant's suspension was commenced by Commissioner McLynn in August and September 2007. See Employer exhibit 1, attachments 1 & 2. In those letters Commissioner McLynn alleged insubordination, falsification of data and errors and omissions in the submission of data.

She further alleged that the grievant's actions led to the resignations of two experienced and highly competent foresters, namely Brad Jones and Patricia Topley (these incidents will be discussed more below), the retaliatory re-assignment of foresters who disagreed with the grievant, the failure to maintain an appropriate professional working relationships with various outside agencies, the retaliatory elimination of Flex Time from the schedules of the foresters, asking the employees to sign a letter seeking to persuade the Board to reverse its decision to cancel the Prettyman contract and the general creation of an atmosphere of fear and distrust among the staff within the Department. This report caused the County to engage attorney Jeff Zalasky to conduct an investigation to determine the accuracy of these charges and to give recommendations on whether any rules were broken or policies violated. This report was extensive and involved the interviews with dozens of individuals both inside and outside of the County.

As will be discussed below, while these allegations were first raised in 2007, the underlying facts go back much further than that.

The evidence showed that despite Mr. Arbour's representations to the contrary, the Forestry Affairs Committee, FAC, is highly political. Despite the assertion that there was a "Chinese wall" between the FAC and the Political Action Committee, PAC, of the Chamber of Commerce, the evidence showed there was considerable political and personal pressure placed on the grievant to switch from the Biophysical certification system to one that pleased the FAC. The grievant testified credibly this pressure and that he was criticized for his refusal to do so. He further testified credibly that he felt so uncomfortable at these meetings that he resigned. It was clear that this action did not please the FAC or Commissioner McLynn and that much of the trouble began at about that time.

The evidence showed that the FAC wanted a friendly voice in the County Land Department on their committee. This is certainly understandable but may not have been consistent with the responsibilities of the Land Commissioner's duties. He is not necessarily their "friend," nor is the Land Commissioner there to simply do as the FAC wants. It was clear that the grievant takes his job very seriously, including the implementation of appropriate land management regulations and Board policy. He was hired and specifically told by the Board to implement the Biophysical certification system – that was his job whether the FAC liked it or not. While it was certainly appropriate for the PAC to bring political pressure on the Board or to run candidates for office that would possibly change Board policy it was certainly not appropriate to bring that kind of pressure on the Land Commissioner.

More to the point, the political nature of this organization was verified by the testimony and statements of Commissioner Eichorn, who noted the political nature of the FAC in his statement to Mr. Zalasky. See Zalasky report at page 20. Commissioner Eichorn noted that he attended one of those meetings and that the FAC discussed openly and at some length getting rid of the grievant. This is in stark contrast to the testimony of Mr. Arbour who denied the political nature of the FAC. The totality of the evidence supports the testimony of the grievant and Mr. Eichorn in this regard.

Most importantly, at no time did the County Board ever require or direct the grievant to attend the FAC or to become a member. Commissioner Eichorn at one point recommended to the grievant that he consider rejoining the FAC after the furor over the certification system quieted down but there was never any directive to do so. See Association exhibit 14, at page 18-19.

On balance, it was clear that the grievant was not welcomed by this group and that this was largely motivated by the grievant's adherence to the County policy in favor of the Biophysical system at that time. There was no violation of county policy based on this allegation.

The County further alleged that the grievant failed to maintain appropriate working relationships with the Minnesota DNR, with whom the Land Commissioner's office works closely, as one can imagine. The County called Craig Engwall from the DNR ostensibly to support its case against the grievant and his alleged failure to work cooperatively and appropriately with outside agencies. As the Association pointed out however, his testimony may actually have helped the grievant more than it hurt him.

First, several of the statements purportedly made by Mr. Engwall contained in the Zalasky report were shown not to be accurate. Mr. Engwall himself denied saying that "Mr. Ous is hypersensitive if not paranoid" and that he did not and would not have told Mr. Zalasky that. It is thus entirely unclear where that statement came from. He further testified at the hearing that he works cooperatively with Mr. Ous and further testified to what he regarded as excellent work done by the Itasca Land Department on several projects of mutual interest. The County asserted that Mr. Engwall has never had a direct dispute about the Prettyman certification system with Mr. Ous and that if he had their relationship would be entirely different. Whether that is true or not is almost completely speculative but the question here is whether the evidence showed anything improper about the way in which the grievant works with the DNR. Mr. Engwall did not back up many of the statements attributed to him in the Zalasky report.

Further, as pointed out by the Association, many of the statements are based on hearsay from other individuals who were neither interviewed nor did they testify in this matter. Mr. Engwall did indicate that the grievant can be somewhat suspicious of state and federal agencies but on the whole, indicated that he has a positive working relationship with him. Moreover, the Association called Mr. Carlson, also from the DNR who indicated the he had a positive working relationship with the grievant and his Department.

The County also pointed to the relationship with the Ruffed Grouse Society and called Mr. Rick Horton to testify about that. He testified that he did not perceive that the grievant was very interested in the Ruffed Grouse Society and that when he asked about ruffed grouse trail work done the grievant was not supportive. The Association pointed out that the two only ever met once and that the grievant had some ideas for grant monies from the Ruffed Grouse Society to be used in the County. The evidence showed though that the Ruffed Grouse Society did not wish to donate money to the County if the County stayed with the Biophysical system. The Association also pointed out that Mr. Horton was active with the Forestry Affairs Committee and argued that this explained any animus he may have had against the grievant.

The County's case was largely based on the fact that the grievant was not interested in ruffed grouse or in creating a working relationship with this particular group. but there is no requirement that the grievant agree with every single outside agency or their particular agenda. Further there was no directive to work with the Ruffed Grouse Society specifically any more than there was to work with any other outside conservation group.

Finally, there was no evidence that anything inappropriate occurred in the one meeting between these two had nor was there anything to suggest that the grievant rebuffed Mr. Horton or refused to meet with him at any time after this meeting. On this record there was again insufficient evidence to show that the grievant's actions constitutes a violation of the County's directives or of County policy.

The Association countered the allegation that the grievant failed to maintain appropriate working relationships with these outside agencies by introducing testimony and other evidence from other outside agencies who expressed a good working relationship with the grievant. The Association called members of the Community Wildfire Protection Plan and the Associated Contract Loggers and Truckers, ACLT. These individuals testified that they had a very good working relationship with the grievant and that they never saw him act in any inappropriate way toward them or anyone else. Mr. Cone testified that he believes the grievant to be cooperative and appropriate to work with. Mr. Scott Dane testified similarly and pointed to the incident involving a timber sale wherein the requirement of a Master Logger Certificate was required as a part of the sale. He felt that the grievant's actions in removing that requirement, even though he professed not to know of that requirement being placed as a condition of the sale, was the right thing to do. See, Association exhibit 37. The ACLT gave the grievant and his Department the "Locomotive Award" in recognition of the good work and the good working relationship they have with the Land Department.

The County asserted that these individuals may not have ever had any sort of dispute with the grievant about the Biophysical system and that would explain their testimony about the otherwise positive working relationship. Further, the mere fact that he did not have a dispute with the people selected by the Association does not mean that he had a good working relationship with the DNR, Ruffed Grouse Society or the FAC. That assertion is certainly well taken but the question is whether on this record there was sufficient evidence to show that the grievant's actions with regard to outside agencies rose to the level of being disciplinable. As noted above, there was not and the fact that he did have good working relationships with other agencies simply supported the credibility of the grievant.

There were two other matters raised by the County regarding the grievant's relationships with outside individuals or agencies. The first involved an incident with Dr. Harry Hutchins at a meeting wherein the Biophysical system was discussed. Dr. Hutchins was invited to the County to present his opinions regarding land certification systems. He expressed an opinion contrary to that of the grievant.

The grievant was alleged to have raised his voice and shouted at Dr. Hutchins and accused him of intellectual dishonesty. He further questioned how Dr. Hutchins could possibly espouse a differing theory from the Biophysical system and the County alleged that he did so in a very inappropriate manner that harmed the relationship with an important outside agency and frankly embarrassed everyone in the room. County witnesses felt that the grievant had been overly aggressive with Dr. Hutchins and that as a guest of the County the grievant should have been nicer to him and not confronted him in the way he did.

The Association's witnesses who were there and witnessed the September 27, 2007 incident with Dr. Hutchins did not see anything inappropriate in the grievant's actions in that meeting. Association witnesses testified that they felt that the grievant was simply questioning another scientist on his scientific conclusions and were not embarrassed or offended by what the grievant said or the way in which he said it.

Dr. Hutchins was not called as a witness in the matter and both sets of witnesses had little to hide or to gain from their testimony. Dr. Hutchins did submit a letter complaining of the way he felt he was treated at the September 27th meeting, See Employer exhibit 1, attachment 4, in which he asserted that the grievant's behavior was demeaning and "cannot be tolerated any more." It is clear that Dr. Hutchins may well have felt this given his obvious dislike of the Biophysical system. (It should be noted that Dr. Hutchins also indicated in his letter, "No one knows what 'Biophysical' system is and it hasn't been tested because there is no product available to the public. Habitat typing and DNR Native Plant Communities are well tested and ready to go to be used in the field with little to no additional expense." While this arbitrator cannot possibly assess the qualitative differences between land certification systems nor make any determinations of whether one is "better" than the other, it was clear that the County was still directing the grievant to use the Biophysical system and that he felt he had to implement and defend County Board policy at that time.

On this record it became readily apparent why Mr. Ous became upset and challenged Dr. Hutchins at the meeting – his suspicions of why Dr. Hutchins was there may well have been correct. While this would not excuse bad behavior or shouting and demeaning a scientific colleague, this evidence colors the discussion considerably and provides a backdrop to the rest of the discussion. The question remains whether there was a violation of County policy warranting discipline or whether there was simply a scientist who felt intellectually threatened by another scientist with a contrary opinion.

On this record, the best evidence to determine the issue is the conclusion of the Zalasky report itself. Mr. Zalasky interviewed several witnesses, although did not interview everyone involved in the Hutchins incident. Despite that he found that “I find no violation of County Policy in what happened at that [September 27, 2007] meeting.” This conclusion does not of course mean that the grievant's actions were somehow perfect or that he did not act in a somewhat rude manner. It means simply what it says. It is the remainder of the evidence that shows that the grievant's actions that day were not so out of line as to warrant discipline on this record.

On this record, there was nothing to suggest a violation of County policy nor that there was anything in that relationship worthy of a disciplinary action based on the allegations that the grievant failed to maintain appropriate working relationships with these outside agencies.

Turning now to the relationships the grievant has with internal employees, the County also pointed to an incident involving Ms. Julie Meidtke that occurred on September 25, 2007 at a meeting of the Community Wildfire Protection Plan, CWPP. This meeting was a follow up to a meeting of the Transportation and Land Management, TLM, meeting that had been held on September 17, 2007. At that TLM meeting Ms. Miedtke thanked the grievant for his suggestion that the County become more involved in the committee. See Employer exhibit 1, attachment 10.

At the September 25, 2007 meeting however, the grievant suggested something somewhat different apparently that caught Ms. Miedtke by surprise and she resisted it. The versions of what happened next differed greatly not only from the testimony at the hearing but also in the interviews with Mr. Zalasky, who investigated this incident as a part of his report as well. The County asserted that the grievant became visibly angry, got red in the face and that his hands were shaking when Ms. Miedtke questioned the direction the grievant wanted to go. The County asserted that he became so angry that Ms. Miedtke left the meeting fearing for her safety.

The facts showed a very different story however. The Association witnesses painted a very different picture and indicated that the grievant got red in the face but that he never raised his voice, shouted or used inappropriate language toward her. Several Association witnesses, including Don Piilola, said she was exaggerating and testified credibly that they felt Ms. Miedtke had greatly overreacted and was far too sensitive and that nothing inappropriate happened. More to the point, Mr. Zalasky's assessment was much the same.

This report, Employer exhibit 1, at page 32 contains the following statement: "I have concluded both Mr. Ous and Ms. Miedtke are responsible for what occurred at that meeting. I believe Mr. Ous probably caught Ms. Miedtke by surprise by not telling her ahead of time what he was going to propose. It is my opinion that he was not inconsistent with what occurred at the TLM meeting. Ms. Miedtke, based upon what I have been able to determine from talking to people who attended he meeting, overreacted and was overly sensitive to Mr. Ous' suggestions. This as supported by her comment that Mr. Ous was ready to go postal. None of the other witnesses I talked to, even those that were most critical of Mr. Ous, suggested he was capable of violence or that violence was imminent." A review of this statement reveals some inconsistency between the statement that Mr. Ous should have told Ms. Miedtke of his intentions ahead of time and that there was nothing inconsistent with what he had suggested at the TLM meeting on September 17th.

If the latter was the case, as Mr. Ous testified to credibly, there would have been no reason to somehow warn Ms. Miedtke about what was coming on the 25th as that would have been what he told her on the 17th. More importantly, there was nothing to suggest that the grievant acted inappropriately at either meeting. Based on this and on the rest of the evidence, it was clear that Ms. Miedtke overreacted and that there is no basis for discipline for his actions regarding that incident.

Next there was the more serious allegation, at least on this record, of the grievant's creation of poor morale within the Department. This general allegation was based on a number of incidents, some of which go back several years. Initially it should be noted that the County has been telling the grievant that his personnel skills and the way he deals with his staff needed improvement. The County pointed to several of his prior evaluations that indicated a need to improve in this area. The County further pointed out that even some of the grievant's staunchest supporters, and those who voted against the discipline in this matter, also indicated a need to improve in the area of human relations. They also specifically told him that the morale within the Department was low and that he needed to work to improve it. Now the question is whether on this record, the grievant's discipline was appropriate given the facts here.

The County first pointed to the grievant's general demeanor around the office and argued that he has a tendency to ostracize anyone who disagrees with the Biophysical program. Several employees testified that they felt fearful of disagreeing with the grievant on anything and that they felt that he has retaliated against some employees who did so. The Association acknowledged that the grievant is a very businesslike person and is not a "chatty guy." He does his job and expects that those in his Department will do so as well. The Association put on several employees who testified that they have very appropriate working relationships with the grievant and do not fear retaliation or wrath at all.

This evidence was somewhat subjective in nature, almost by definition, and shows the inherent propensity in some workplaces for suspicion and some dissatisfaction with management to occur. Evidence that the line employees “do not like the boss” is of little value without some specific evidence of actions by the person charged with the creation of the kind of toxic atmosphere the grievant is charged with. The Association argued that this is essentially all the County’s case is and that much of this can be explained by the office politics in hiring from the outside and because of the meddling of one County Commissioner who apparently wants to micro-manage the Department.

The Association also argued that Commissioner McLynn’s obvious vendetta against the grievant is motivated by the FAC’s dislike of him. The Association asserted that both the FAC and its political arm and Commissioner McLynn have worked diligently to get people elected to the Board who will do her bidding.

The Association further argued that any time an elected official engages in discussions about operations within a Department, the risk that such conversations will be duly noted by the rest of the staff and create suspicions about favoritism are great indeed, especially about a matter as controversial as the discussion over the Biophysical inventory system. The inescapable reality is that employees will talk to each other and will indicate they have spoken with elected officials in an effort to get something they want. Thus, argued the Association, while Commissioner McLynn naively believed that she did not feel she was being lobbied by the employees in the land Department, that is precisely what they were doing. Her actions, while perhaps motivated by a desire to protect the County’s interests, had the very real effect of undermining the authority of the Land Commissioner and making it impossible for him to do his job effectively.

On this record some things were apparent. While there was no evidence whatsoever that Commissioner McLynn was intentionally trying to disrupt the Land Department it was clear that some individuals in the Land Department took note of those conversations and continued to discuss the Biophysical system in an effort to get the Board to change it. The employees who were dissatisfied with the Biophysical system, and with the grievant for trying to implement it, drew the Commissioner into this discussion and perhaps took advantage of an elected official who wanted to do what was best for the County. For an elected official who wants to do what they feel is in the best interest of the County it was an easy trap to fall into but should be avoided for the very reasons this case makes clear.

The evidence showed that several of the Land Department employees played upon Commissioner McLynn's good nature and engaged in conversations that were designed to seek her favor for their own particular purposes. This certainly became known to the grievant and the laws of human nature make it likely at that point that rumors would begin to fly around and that only leads to low morale and friction in the working relationships between co-workers. Whether intentional or not, the dissension created was palpable and led to a polarization of the Land Department employees.

If this were the only evidence on the record the result might well have been different. Here however there were a multitude of specific allegations that need to be addressed – there was much more here than a general allegation that “morale was low”; there were very specific allegations of actions that allegedly led to that.

The County alleged that the grievant's actions led to the resignation of two experienced and competent foresters, i.e. Brad Jones and Patricia Topley. Mr. Jones' case will be discussed first. The evidence showed that Mr. Jones was a long time very experienced and able forester. It was also apparent that he had intended to leave the County by age 50 and that he was close to his intended retirement age when he left the County. The County asserted that Mr. Jones was reassigned to a different District in retaliation for his opinions about the Biophysical system and his disagreement with the grievant about that.

Again, testimony from those called from the County was in stark contrast to that from those called by the Association. County witnesses asserted that the re-assignment of a District Forester is a “very big deal” since that forester knows the territory intimately and would then have to reacquaint him or herself with the new area. It would take time and extra effort to do that as well as to establish relationships with landowners and loggers and other businesses working in that area.

The Association witnesses testified that it is not a big deal at all and that in this instance, Mr. Jones was reassigned in order to bring greater experience to Commissioner McLynn’s District. There was some testimony that she had asked for this reassignment as Mr. Jones was a very good forester by all accounts and someone who supported her desire to get the County to change from the Biophysical system. The Association also argued that the reassignment is entirely within Mr. Ous’ managerial authority and that there was nothing to suggest that the reassignment was anything other than that - certainly nothing to show that it was in retaliation for Mr. Jones’ outspoken criticism of the Biophysical system. There was also a considerable body of evidence to suggest that Mr. Jones was at times a disgruntled employee who was a part of a cabal of employees who complained loudly and frequently about Mr. Ous’ managerial style and about a great many of his substantive decisions.

The evidence showed that Mr. Jones was indeed outspoken about the Biophysical system and an outspoken critic of the grievant for his adherence to it. It was also clear that he intended to retire soon since he was able to financially. While there was no explanation given for the decision to re-assign him, none was contractually required and it was clear that the decision was within the grievant’s managerial discretion. There was no evidence that the decision was in direct retaliation for Mr. Jones’ criticism of the Biophysical system. Neither was there sufficient evidence to show that Mr. Jones was the victim of any sort of discrimination by the grievant based on his opinionated nature or his criticism of the Biophysical system.

Whether it made sense to the other foresters or not is not the issue; whether it made sense to Mr. Jones is not the issue either. The question is whether the grievant's actions ran afoul of the County's direction not to engage in acts that were designed to create low morale within the Department.

This is a difficult call. On the one hand it was clear that the decision to re-assign Mr. Jones was entirely within his discretion. It was also clear that the manner in which this was done was abrupt at best and even a bit demoralizing at least it was to Mr. Jones. Mr. Jones though was certainly a difficult employee and may well have created more of an argument if the grievant had tried to talk to him so the grievant may well have thought it best to do it by memo and e-mail in order to avoid a further verbal conflict with Mr. Jones.

Mr. Zalasky determined that no policies were violated but opined that this should have been handled differently. There is some merit to this assessment. The County asserted that the re-assignment by e-mail and memo was inappropriate and that the grievant still had the obligation to treat his employees respectfully and fairly and reasonably. While it was clear that the decision was within the grievant's rights, at the very least he should have spoken to Mr. Jones personally before doing so. It was certainly inconsiderate to do this by e-mail even if it was "proper" to do this under the contract.

Frankly, if this were the only allegation in this matter there would be little question that the grievant would not be disciplined. There would be at best grounds for little more than a short oral or written admonition to do such actions in the future in a slightly different way. Here though, as will be discussed below, even though some parts of the County's case were not shown to be based on sufficient evidence, the way in which this was handled does support the County's case that the grievant's general managerial style needs improvement, just as the Board has suggested over several evaluation periods.

The next matter dealt with the longstanding disputes and issues with Ms. Topley. The County asserted that the grievant's actions with respect to Ms. Topley go back several years. In late 2004 the grievant was given a written reprimand for his actions with respect to Ms. Topley at the Smart Wood audit meeting. The County pointed out that at a meeting on December 16, 2004 the grievant told Ms. Topley in front of a group of people, not to say anything. This was embarrassing to her and several who were there.

The County conducted an investigation and retained the services of an outside investigator to interview all the relevant people and determine whether the grievant acted inappropriately. The investigator determined that he had and the county issued a written reprimand to the grievant for his actions with respect to Ms. Topley. In addition, the investigator found that the grievant manages through coercion and intimidation, refuses to respond to questions from people in the Department with whom he disagrees, limits staff training for those he disfavors and prohibits staff from associating with professionals from other agencies. See, Employer exhibit 4, Report of Michele Soldo.

Nevertheless, the grievant's comments to her as noted above were found to be inappropriate and the grievant was given a reprimand as a result. He was also required to write an apology to her, which he did. The reprimand was not grieved and, as properly noted by the County, the underlying facts of that matter cannot be relitigated. This however, is something of a double-edged sword for the County. While the underlying facts cannot be revisited, neither can the penalty that was assessed. The grievant was already reprimanded for the Topley incident and that cannot now be changed. The Association's claims that this would be double jeopardy are thus well taken as well. Accordingly, the only thing that earlier reprimand can now be used for is to aid in the determination of the appropriate remedy once there has been determination of just cause for the current charges.

Much was made about the Topley incident and whether she then acted inappropriately by flaunting the apology letter around the office and whether the grievant had any sort of medical condition, which was referenced in that letter, that would have led to the redness of his face. Even more was made about why he made those comments to her and that this was based on flippant comments she made to the auditors a few days earlier. None of this was given much weight in this matter. The question now is whether the grievant's actions led to her resignation.

Ms. Topple was also shown to be a competent forester who also had an issue with the Biophysical system and voiced those opinions in sometimes very inappropriate ways. She was by all credible accounts, a difficult employee whose attitude was poor at best. She asked multiple questions and while there is certainly nothing wrong with asking questions, especially in this setting, the overall record demonstrated that her questions were designed to show her dissatisfaction with the Biophysical program.

It was further quite apparent that she tried quite deliberately to undermine the grievant's authority and question the wisdom of the Biophysical program and was something of a thorn in the grievant's side. While that would not excuse truly inappropriate behavior, it was clear on this record that the grievant, as Ms. Topley's supervisor was frustrated by her actions and constant complaining and subtle undermining of his authority. Despite these frustrations he never disciplined her nor took any actions that could be termed illicit retaliation or retribution.

He was warned at that time not to engage in any further acts of intimidation or verbal assaults on employees. The County asserted that he has continued to engage in this type of behavior and refuses to alter his actions to conform to the County's clear direction to him. The County pointed to the 2006 evaluation wherein Ms. Topley's direct supervisor gave her a favorable review but the grievant amended it to include a statement that she "become more proficient" in implementing the Biophysical system.

It was clear that she along with Mr. Jones was not in favor of that system and resisted it at almost every opportunity. As Arbitrator Harry Shulman said: “An industrial plant is not a debating society.” *Ford Motor Co. and UAW*, 3 LA 779, 781 (1944). While that may have been true of a Ford plant the 1940’s, it is only partially true in this setting. The Land Department was shown to be a workplace where some subjective assessment of the operations is needed and expected. There should be questions raised by staff that should be appropriately answered by management.

Here, about all that can be said about the relationship between Ms. Topley and the grievant was that it was a stormy one at best. It was clear that she had professional disagreements with him and that she was not in favor of the implementation of the Biophysical system. Since he had been directed by the Board to do implement the Biophysical System and it was his duty to do so, it was be appropriate for Ms. Topley to leave if she disagreed with the direction of the Department in general.

As testified by several witnesses, the grievant gave her the option – conform to the directives of management or leave. She chose to leave and there was insufficient evidence to show that the grievant engaged in disciplinable actions to cause that. Certainly, the disagreement with him and with his style was the main reason she left but that frankly is no different than any subordinate employee who chooses to leave employment where that employee disagrees with the direction of the operation.

Moreover, Mr. Zalasky noted that the Topley incidents were already dealt with in two prior investigations. The Association argued that he found no violation of County policy nor any direct evidence of retaliation that caused the resignations of either Mr. Jones nor Ms. Topley.

There is further little question that the grievant is gruff and can be opinionated and even disagreeable. That is not disciplinable unless there is a violation of something. Here though the County properly argued that the Board had been telling him to change his managerial style in order to avoid this very kind of scenario.

Several employees who testified that they feared retaliation by the grievant if they disagreed with him. While the Association asserted that they had suffered no ill effects by the grievant, i.e. no re-assignments, no demotions nor even any discipline, they all seemed very sincere. Others testified that they had no problems with the grievant at all and liked working with him. Mr. Zalasky found and the evidence supported that the morale level in the Department was “not very good” and that the grievant’s management style is at the heart of the problem. Several actions contributed to this.

The grievant discontinued the Flex Time practice that had been in place for some time. The evidence showed that he was within his rights to do so but that it did not apply to everyone. This was a troubling piece of evidence and one that conjured up a “chicken and the egg argument.” Was it done in response to the trouble the grievant was having with certain employees, i.e. namely, Mr. Jones, Ms. Topley, Mr. Stocker and Mr. Leone, who were incidentally the main antagonists to the Biophysical system, or was it that change, that affected those four employees differently since they did not have children, that caused them to be so critical of the grievant? The timing suggests the former in that the change in schedule occurred after those employees began questioning the Biophysical system.

While there may not have been anything improper in doing this, under these circumstances it appears that the County’s assertion had some merit here and that this created an atmosphere of mistrust and fear within the Department. The County put on several witnesses who testified that the grievant is not only simply moody and difficult to deal with, he refuses to communicate with them and may only actually have a face-to-face conversation with them 2 or 3 times per year. Some employees have questions about their job duties well others may have questions about their performance evaluation. When they ask questions, if they are on the grievant’s bad side, they may not get an answer for weeks if at all and many times it is in the form of a terse e-mail or written memo. It seems to them as if they have been cut out of the loop. This too was quite subjective but there was some merit to some of these concerns – there was little question that what the auditors found was true – that the morale in the Department is not very good.

The most troubling action by the grievant in all of this was the effort to have Land Department employees sign a letter seeking to have the Board change its policy. The grievant found that the Board was about to change its prior policy and move away from the Biophysical system. He was understandably upset by this as he had been hired to implement that program and was very supportive of it. However, instead of implanting Board policy, as he claimed he was duty-bound to do when the Biophysical was the stated Board direction, he went around the office asking his employees to sign a letter seeking the County Board to “approve continuing a working agreement with Natural Resource Services to provide scientist level services for forest land management and technical support services for the Itasca County Biophysical Project.” This letter was dated May 9, 2007 but was signed by only one Department employee.

The grievant had no valid reason for asking his employees to sign this letter. It placed the Land Department employees in a terrible and untenable position of siding with their direct supervisor or the County Board. No employee should have to make such a Hobson’s choice. It was this action that perhaps more than any other that created some dissension within the Department. Certainly, as noted above, the interactions between Department employees and the County Board members did not help in this regard and the evidence showed a somewhat disturbing mixing of appropriate roles. As a general rule, the Board makes policy and the County employees implement that policy and almost any time those roles get mixed up trouble soon follows. It is not the County Board that is on trial here though.

More to the point here, the grievant’s actions were contrary to the Board’s earlier admonition to improve the human relations atmosphere in the Department. The arbitrator was quite mindful of the difficulty in assessing the “morale” of the Department. Morale is certainly subjective and not easily measured.

If the only evidence had been the employees in the Department that one witness characterized as “yappers” the case would have been different. There are regrettably always those in almost any operation that think they can do it better than the boss and who will complain and whine loudest when they don’t get their way. Still though here there was so much compelling evidence of the grievant’s specific actions that led to the dissension, even though some of that was also clearly caused by the Land Department employees and fed partially by certain members of the Board, however innocently, the County’s case on this one charge has merit.

The final question remains as to the penalty. The County argued that once just cause has been found the arbitrator has no further discretion and must implement the penalty so determined by the County. The Association on the other hand argues that the in fact has had no further infractions and relies largely on the Zalasky report itself in support of that claim. The question of what to do here gave the arbitrator considerable pause here since some of the allegations were proven but a great many others were not or were shown not to be entirely the grievant’s fault given the highly politically charged nature of the dispute over the Biophysical system.

The County’s position results an abdication of the proper role in arbitration and runs contrary to the notion that the arbitrator has the power to fashion a remedy. Still, no arbitrator should simply substitute his or her judgment simply because they do not agree with it. That also runs afoul of the time honored admonition in the Steelworkers Trilogy against “dispensing one’s own brand of industrial justice.” Any time an arbitrator changes the penalty there must be a valid reason for it.

Here, the penalty assessed is too severe. The County made a multitude of allegations but the two main allegations can be paraphrased as follows: failure to work with outside agencies appropriately and failure to properly manage the Department thereby creating low morale. As noted above, there was insufficient evidence to support the first of those main allegations.

Further, only some of the allegations made by the County on the second of those, i.e. creation of low morale in the Land Department, were shown to be supported by the totality of the evidence. The evidence did not support the allegations of misconduct with regard to the Julie Meidkte incident and did not support the allegations that the grievant engaged in misconduct that caused the resignations of Mr. Jones or Ms. Topley. Certainly, those two did not get along well with the grievant but that alone did not constitute grounds for discipline.

The County did show that the grievant's overall management style was causing some dissension in the Department; although there were other reasons outside of his control for that as well. Further, the Flex Time issue appeared to have been directed at only those employees who had problems, and expressed them, with the Biophysical system. Finally, and most importantly, asking the employees to sign the letter lobbying the Board to change its policy was problematic as outlined above.

Accordingly, since the grievant has already been given a written reprimand for prior actions a 3-day suspension is appropriate. If all the allegations had all been found to be true, a 5-day suspension would certainly have been appropriate but it was apparent that the 5-day suspension was based on the totality of the allegations. The arbitrator was mindful of the notion of whether it was appropriate to reduce a 5-day suspension to a 3-day suspension and whether that makes sense in this or any other circumstance. Here however only some of the allegations were shown to be true and the grievant had been given a written reprimand in the past. The evidence showed that the County adheres to the notion of progressive discipline and that discipline should be designed to correct behavior. Hopefully such will be the case here.

AWARD

The grievance is DENIED IN PART AND SUSTAINED IN PART. The five-day suspension originally imposed is reduced to a three-day suspension for the reasons set forth above, which shall be placed in the grievant's official personnel file with the County. The County shall reimburse the grievant for lost pay and any accrued contractual benefits consistent with this Award.

Dated: June 15, 2009

Itasca County Employees Association and Itasca County

Jeffrey W. Jacobs, arbitrator