IN THE MATTER OF ARBITRATION
BETWEEN

SAFE HAVEN SHELTER
FOR BATTERED WOMEN,

Employer,

and

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 5

Union.

OPINION AND AWARD
(J. M. Johnson Discharge)

June 15, 2009

BMS Case No. 09RA0637

A. Ray McCoy
Arbitrator

Appearances

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Jurisdiction

The arbitrator has jurisdiction to resolve this matter pursuant to the Agreement Between Safe Haven Shelter for Battered Women and the American Federation of State County and Municipal Employees Union, Council 5, Duluth and Vicinity, AFL-CIO, effective July 1, 2007 through June 30, 2009. (Hereinafter "Agreement" or "CBA") Article 16.4 of the Agreement directs the parties to select arbitrators from a list provided by the Bureau of Mediation Services or by any other mutually agreeable means. Article 16 (Grievance and Arbitration Procedure) defines the scope of the arbitrator's authority. Article 16.6, Arbitrator Limitations states:

> "The arbitrator shall not have the power to add to, ignore, or modify any of the terms, conditions, or sections of this Agreement. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment contained in this Agreement. His or her decision shall not go beyond what is necessary for the interpretation and application of the Agreement in the case of the specific grievance at issue. The Arbitrator shall not substitute his or her judgment for that of the parties in the exercise of rights granted or retained in this Agreement."(Agreement at p. 24-25)

The Union filed the grievance on December 23, 2008. The Parties notified the arbitrator of his selection by letter dated March 25, 2009. The Parties processed the grievance through all relevant steps outlined in the Agreement and agreed that the matter is properly before the arbitrator for resolution. The Parties selected June 1, 2009 for the hearing. The hearing was held on that date at the Family Justice Center located at 414 West First Street, Duluth, MN 55802. The Parties had a full and fair opportunity to present their cases including the introduction of documents and the examination of witnesses.[1] After presentation of their respective cases, the

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[1] The Employer called three witnesses. They were Ms. Susan Utech, Executive Director of the Shelter, Ms. Bonnie Kolodge, Shelter Supervisor and Ms. Janet Olson, Assistant Shelter Supervisor. The Employer also introduced 23 exhibits. The Union called three witnesses. They were the Grievant Jean Marie Johnson, Mr. Dale Minkkinen, Maintenance Coordinator for the Shelter and Ms. Romona Peterson, Child Advocate for the Shelter. The Union introduced 5 exhibits.

Parties decided to present oral closing summaries rather than post-hearing briefs. Following those summaries the arbitrator closed the record.

Issue

The parties agreed that the issue to be decided is whether the Employer had just cause to discharge the Grievant and if not, what is the appropriate remedy.

Relevant Contractual Provisions

ARTICLE two

MANAGEMENT RIGHTS

2.1 All management functions and responsibilities, whether or not exercised by the Employer prior to the execution of this Agreement, are reserved exclusively to the Employer, except to the extent that the same are expressly restricted by a specific provision of this Agreement. By way of illustration, management rights shall include, but not be limited to, the right to hire, fire, suspend, discipline, lay-off, transfer, promote and demote employees; to require physical examination of employees as an incident to their receiving benefits under any of the Employer's benefit plans; to assign duties to and direct the performance of employees; to recognize, enlarge, reduce, or discontinue an employer function or position, program or department; to promulgate and enforce personnel policies; to introduce new or improved methods of operation or facilities; to establish new jobs or change jobs or change job contents; to determine the manner, means, and methods by which all operations of the Employer shall be carried out; to subcontract work and to take such other actions as it deems necessary to maintain the goals and efficiency of the Employer's operations.

ARTICLE 15

DISCIPLINE AND DISCHARGE

15.2 No employee, after completing her probationary period, shall be discharged or otherwise disciplined without just cause.

15.3 Discipline will be in one or more of the following forms:

Oral Reprimand	Written Reprimand
Suspension	Demotion
Discharge	

The appropriate level of discipline will be determined by the Employer based on the facts of each case. The Employer will abide by principles of progressive discipline although: (1) it is not bound to use all of the above-identified disciplinary forms and (2) it retains the right to terminate an employee without warning for egregious conduct.

Background

Safe Haven Shelter for Battered Women provides shelter, advocacy, information and referral for women and their children who are experiencing domestic violence. The shelter serves seven counties in Northeastern Minnesota. It offers legal advocacy for battered women, helps them develop goals for personal safety and improving their quality of life. In addition, Safe Haven provides programs that help educate the community about domestic violence and has numerous volunteers whose work is aimed at meeting the needs of battered women and their children. Safe Haven collaborates with many organizations to provide a safe and comprehensive set of services to meet the needs of women seeking to escape violence and care for their children.

According to the Executive Director, Ms. Utech, last year Safe Haven Shelter "served a record number of women and children" while meeting its fund-raising goals. Safe Haven reported income for 2007-2008 as approximately $2,000,000 with operating expenses consuming all but a third of that amount. (Employer Exhibit 1, Hereinafter Er. Ex.__) The American Federation of State County and Municipal Employees, Council 5, Duluth and Vicinity, AFL-CIO, is the exclusive bargaining representative for all regularly scheduled full-time and part-time employees of the Safe Haven Battered Women Shelter at is Duluth, Minnesota facility.

Safe Haven hired the Grievant, Ms. Johnson, initially as a casual employee in 2006. Casual employees are not covered by the terms of the Agreement. Safe Haven hired the Grievant to a full-time bargaining unit position in June 2007. Safe Haven hired the Grievant to serve in the position of Women's Advocate/Follow-up. One key function of the Women's Advocate/Follow-up is to bond with the women living at Safe Haven in order to build trust. If done well, the Women's Advocate/Follow-up will build strong relationships with the women during their time in the shelter allowing her to successfully work with the women as they leave the shelter. The goal is to increase the chances for the women to remain safe and improve their quality of life. There is obviously a great deal of report writing involved with tracking the women once they leave the shelter and evaluating the follow-up services provided to them. The reports prepared by the Women's Advocate/Follow-up are used to measure the effectiveness of the follow-up services and inform donors and the community about Safe Haven's progress. Safe Haven secured a grant to support its Pathways project during 2008 and assigned the work of that

program to the Grievant. The Pathways project is designed to help women set goals and work toward the accomplishment of those goals. (Er. Ex. 6) Participants are chosen while they are staying at Safe Haven and continue in the program after they leave the shelter. The Pathway program responsibilities fit perfectly with the essential functions of the Grievant's position. This is especially true since the Grievant's position requires her to develop a strong working relationship with the women during their stay to lay the foundation for trust and advocacy once they make the transition from the shelter to a new living situation.

Sometime during the summer of 2008, the Grievant learned that her mother was gravely ill. The Grievant asked to have as much time away from work as possible in order to care for her mother as well as just to spend time with her. The Grievant's mother lived in St. Cloud, Minnesota. The Employer provided the Grievant a great deal of flexibility with regard to her work schedule in order to allow her to spend as much time as possible with her mother.[2] Between July 13, 2008 and October 20, 2008, the Grievant worked less than 30 hours per week. (Er. Ex.7) During that period, the Grievant sometimes worked as little as 10 hours per week or less. The Employer consented to this flexibility in order to allow the Grievant to spend as much time as possible with her mother. On October 20, 2008, the Grievant returned to her full-time work schedule following the death of her mother.

The Grievant returned to work even though she was still struggling with the loss of her mother. Shortly after returning, the Grievant violated Safe Haven's policy against financial entanglements with clients. The Grievant testified that she lent a client $300.00. The Grievant also testified that she knew she was violating a work rule. The Grievant described her violation of the policy as a "red flag" that she had returned to work much too soon and needed counseling or some kind of support to help her through the grieving process.

The Grievant reported her violation of the work rule to the Employer. The Employer determined that the violation, although self reported, was serious enough to warrant discipline.

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[2] The arbitrator uses the term "Employer" to alternately refer to actions taken by Safe Haven, the Executive Director, Ms. Utech or other supervisors responsible for assisting the Executive Director with the management of employees and programs. The arbitrator will also alternatively refer to managers as supervisors or by their respective names.

Accordingly, the Employer suspended the Grievant for five days without pay beginning November 24, 2008. (Er. Ex. 8) The Employer informed the Grievant that the disciplinary action was just short of termination. In the letter informing the Grievant of the suspension, the Employer said that any further discipline would result in termination. The Employer then provided the Grievant with the number to the employees' assistance program in recognition of the fact that she continued to struggle with her mother's death. The Grievant served her suspension and returned to work on December 3, 2008. The Grievant's immediate supervisor, Ms. Olson assumed all of the duties of the Pathway program between the summer of 2008 and up until the Grievant returned in early October. Ms. Olson had to resume the work with the Pathways program when the Grievant was suspended.

Ms. Olson testified that she was truly burdened by the Grievant's flexible schedule between July and October 2008. Ms. Olson said her main job responsibilities suffered as a result. Ms. Olson said that she needed accountability or assurances that the Grievant could be counted on to be at work and to resume her responsibilities to the Pathway program. In an effort to secure that accountability, Ms. Olson working with the Shelter Supervisor, Ms. Kolodge, decided to put the Grievant on the schedule for December 2008. (Er. Ex. 19) The schedule is used to make certain that the shelter has at least two people on duty 24 hours per day and seven days per week. The purpose of the schedule is to secure coverage of the shelter facility year round. Full-time employees in the bargaining unit are generally only placed on the schedule when it is necessary for them to work in addition to their regular full-time schedule or to work in-house rather than their regular schedule.

For example, the shelter might need coverage during holidays, evenings and weekends throughout the year. When the need arises, in addition to those who are normally scheduled for coverage, the supervisor responsible for preparing the schedule, Ms. Kolodge, might place a full-time bargaining unit member on the schedule. Full-time bargaining unit members have a regular schedule such as 9:00 a.m. to 5:00 p.m. and understand when they are expected to be at work and for how long. However, Ms. Kolodge might interrupt that regular schedule and place a full-time bargaining unit member on the schedule during their normal shift. For example, during May 2008, the Grievant was scheduled to provide coverage from 9-10:30 a.m. The Grievant would

normally be engaged in her regular shift during that time but Ms. Kolodge scheduled the Grievant in order to secure needed coverage. (Er. Ex. 18) When providing that coverage, the work is referred to as "in house." The schedule, therefore, alerts bargaining unit members, such as the Grievant, to when they will be required to work "in-house" so the shelter will always have two individuals on duty to respond to client needs. Ms. Kolodge's practice was to develop the schedule with an eye toward making sure the shelter had the necessary coverage and post it at least one week before the month during which the schedule was to take effect. It was common practice for employees to look at the schedule during that week and to request changes. It was common for employees to request changes of Ms. Kolodge in order to address personal needs for days off, scheduled doctor appointments, vacation, accommodation if they had a second job and any other conflict that might interfere with their ability to work during times as assigned by Ms. Kolodge. (See Er. Ex.17) Ms. Kolodge would receive requests for changes and accommodate as many as possible with an eye toward maintaining necessary coverage. For example, Ms. Kolodge made at least four schedules for December as she processed requests for changes and made other adjustments. (Er. Ex. 19; Union Ex. 5; Hereinafter U. Ex. __)

Ms. Kolodge posted the December 2008 schedule during the week that the Grievant was serving her five day unpaid suspension. Therefore, the Grievant saw the December schedule for the first time on December 3, 2008. The Grievant was upset that she had been placed on the schedule for the purpose of making sure she was at work and performing her regular duties as the Women's Advocate Follow-up. While serving her suspension, the Grievant scheduled an appointment to see a doctor regarding her struggle to come to terms with her mother's death. She scheduled the appointment for December 3, 2008 at 2 p.m.

The Grievant submitted an email to her supervisor informing her of the scheduled appointment. At approximately, 12:30 p.m. that day, the Grievant's supervisor, Ms. Kolodge asked her to transport a client to another facility located a bit more than 8 miles away from the shelter. (Er. Ex. 22) The Grievant refused saying she did not have enough time to transport the client given the appointments she had on her schedule that day, the need to take her lunch break and to get to her doctor appointment by 2 p.m. that same afternoon. The Grievant's supervisor, Ms. Olson, said she would take the Grievant's appointments. Ms. Kolodge told the Grievant the

client was packed and ready to leave. The Grievant insisted that it would take too long to transport the client and arrive at her doctor appointment on time. During that same exchange, the Grievant questioned Ms. Kolodge about the December schedule and voiced her concern that it felt like retaliation.

The Grievant did not transport the client but continued to work until approximately 1:55 p.m. and then left work to go to her doctor appointment. At that appointment, the Grievant's doctor completed an Family Medical Leave Act (FMLA) request form. The doctor diagnosed the Grievant as having "bipolar affective disorder, grief response." (Er. Ex. 14) The doctor also wrote: "Toxic work environment is exacerbating her condition." The doctor recommended the Grievant take a one month leave, then return to work 20 hours or less for 3 months and then increasing the time at work by ten 10 hours per week after the three 3 month period. The Grievant delivered the FMLA leave request to the Employer the following day, December 4, 2008, and left the workplace.

Neither Ms. Kolodge or Ms. Olson told the Grievant that her refusal would lead to further disciplinary action. Ms. Utech testified that she was away on vacation on December 3, 2008 but received a message alerting her to the dispute between the Grievant and the supervisors. When Ms. Utech returned the called the following day she learned of the Grievant's submission of the leave request and decided that since the Grievant was out of the workplace she would commence her investigation when she returned from vacation.

Ms. Utech began her investigation by meeting with Ms. Kolodge and Ms. Olson to hear their version of the events. She also met with the Grievant and her union representative. Ms. Utech testified that when she met with the Grievant she heard a completely different viewpoint from that provided by the supervisors. Ms. Utech also said the Grievant was quiet and cooperative in contrast to how the supervisors described the Grievant's conduct and attitude on December 3, 2008.

Afterwards, the Ms. Utech convened a meeting with the two supervisors to determine the appropriate level of discipline. Ms. Utech concluded that the Grievant's attitude was inappropriate, that she refused a direct order, was uncooperative and expressed an unwillingness to work scheduled hours. Ms. Utech further determined that the Grievant was at the end of the

progressive disciplinary process and termination was the only appropriate form of discipline. Ms. Utech did not consider the Grievant's prior work record. (See Er. Ex. 13)

Supervisor Kolodge evaluated the Grievant's performance on July 9, 2008 just shortly before Grievant was granted a reduced schedule to be with her mother. Supervisor Kolodge wrote that the Grievant is very dependable, could be counted on to provide advocacy to former clients, is able to multi-task, shows interest and enthusiasm for her job and volunteers to work other shifts as needed. (U. Ex. 2) Kolodge also said the Grievant gets along with her co-workers and communicates well with administration. The Employer discharged the Grievant on December 10, 2008. Since that time the Grievant has returned to higher education by enrolling in a weekend course of study. The Grievant supported herself with unemployment benefits, and two unstable part- time positions.

Positions of the Parties

Employer's Position

1. The Employer's decision to discharge the Grievant was reasonable and supported by the Agreement and the standards of conduct spelled out in the personnel manual.
2. The Grievant acknowledged receipt of the personnel manual and her obligation to adhere to the policies contained in it when she was hired as a full-time Women's Advocate/Follow-up.
3. The Grievant received a five day unpaid suspension for loaning a client $300.00 in violation of the personnel policies and understood that further discipline would result in termination. The Union did not file a grievance and the Grievant accepted the discipline of a five day unpaid suspension.
4. Immediately after returning from the five day unpaid suspension, the Grievant refused her supervisor's order that she transport a client from Safe Haven to another facility located a little more than 8 miles away.
5. On that same day, the Grievant told her supervisor that she would not work the December 2008 schedule as posted, thereby refusing a second direct order.
6. Both refusals amount to insubordination. The Grievant failed to provide a reasonable

explanation as to why she refused to follow her supervisors directive to transport the client or to work the December schedule as posted.

7. The Grievant's argument that the directive to transport the client from Safe Haven to a different facility was impossible to do should be discounted. The Grievant had sufficient time to transport the resident. Even if she did not have sufficient time she still did not have the right to refuse the directive.

8. The Grievant's attempt to explain her insubordination by arguing she had other appointments, a lunch break and then a doctor appointment should also be discounted. The Employer offered to take any other appointments the Grievant had scheduled that day. Also, the Grievant had not worked sufficient hours that day to be entitled to a lunch break. In short, the Employer made every effort to make it possible for the Grievant to carry out the transport directive and reach her doctor appointment on time.

9. The Employer granted the Grievant a very flexible schedule to allow her time to spend with her terminally ill mother and to grieve following her mother's passing. But now the Grievant's accountability was in question. The Grievant created a huge burden for her immediate supervisor who had to assume her Pathway duties. The supervisor needed to know that the Grievant could be counted on to work. Placing the Grievant on the schedule therefore was reasonable. The Grievant understood that she was expected to return to a full schedule and to share in the Shelter's need to provide 24/7 coverage year round.

10. The standards and decisions of the Employer are reasonably related to the operation of the business and are justified. The Employer was already short staffed. The staffing shortage created a heightened importance that the Employer's prioritization of work be adhered to by the Grievant. The Grievant cannot be permitted to second guess the decision of her supervisors. The Grievant's failure to follow her supervisors directives creates turmoil, puts residents at risk and leaves work undone.

11. Following the Grievant's insubordination, the Employer conducted a thorough and fair investigation, reviewed relevant policies as well as the Agreement and concluded that discharge was the appropriate response.

12. The Grievant is a short term employee without a long loyal work record. The Grievant committed two very serious policy breaches following a five day unpaid suspension. The five day unpaid suspension was the top of the progressive discipline ladder making discharge the next proper step. Given her brief period of employment there are no grounds to support mitigating the level of discipline imposed in this case.
13. The Grievant's prior good evaluation should be disregarded since her poor performance took place following that evaluation. The Grievant displayed a poor attitude. The Employer needed a reliable team player, and the Grievant failed to provide the same by refusing her supervisors' directives.

Union's Position

1. The Employer did not have just cause to discipline the Grievant.
2. The Employer gave the Grievant a task with impossible time lines and no means to complete. The Employer required the Grievant to transport a client to another facility just 1 ½ hours before her scheduled medical appointment. In addition, the Employer's van was unavailable for use. Transporting the client would have required the Grievant to use her own vehicle which was filled with personal items.
3. The task of transporting a client to a new living situation takes a significant amount of time to complete. There is a good deal of paperwork involved. The supervisor did not know whether or not the paperwork had been completed when she asked the Grievant to transport the client. She only assumed that someone had completed the paperwork.
4. Sometimes there is a period of waiting involved while the client packs personal belongings and then unpacks them when arriving at the other facility. The client who needed transportation to another facility had enough personal property that needed to be packed and unpacked that it would have made it impossible for the Grievant to complete the assignment and get to her doctor appointment on time.
5. The Employer did not consider the Grievant's refusal to be insubordination at that time because neither supervisor told her that she was being insubordinate or that she would be fired for her refusal to transport.
6. The Grievant did not refuse to work the December schedule but simply said she could not

work one particular shift her supervisor assigned to her due to plans regarding a memorial service for her recently deceased mother.

7. The Grievant had never consistently been placed on the schedule and did not learn of the scheduling until she returned from her suspension.

8. Since the Grievant was serving a five day unpaid suspension when the schedule was posted there was no opportunity for her to inform her supervisor of her need for time off until she returned to work on December 3, 2008 and the schedule was already in effect.

9. The Grievant reported to work in a timely fashion at the end of her five day suspension and alerted her supervisor that she had a medical appointment at 2 p.m. that day. She sent out an email informing her supervisor of the appointment because she could not locate her upon arrival at work. There wasn't sufficient time between the time she was given the directive (12:30 p.m.) and her scheduled medical appointment to complete the assignment.

11. The Grievant has a history of volunteering to work holidays, to stay late and to do whatever it takes to support the Safe Haven mission. Her performance review demonstrates her good work.

12. Following the death of her mother, the Grievant loaned a client money against Employer policy and reported herself. The Grievant felt that her poor judgment in loaning the client money was a red flag that she was still struggling with her mother's death and should not be in the workplace. She thanked the Employer for suspending her and followed the recommendations Ms. Utech gave her including changing her cell phone number and seeking medical attention.

13. The Grievant should be returned to her position and made whole because the punishment does not fit the crime.

OPINION AND AWARD

The Parties' Agreement requires the arbitrator to base his decision "solely upon his or her interpretation of the meaning or application of the express terms of this Agreement and the facts of the grievance presented."(Agreement at p. 25) The arbitrator must abide not only by that directive but also by another included in the Agreement. The other directive prohibits the arbitrator from substituting his judgment for that of the Parties in the exercise of rights granted or retained in the Agreement.[3] With that in mind, the express terms of the Agreement impose upon the Employer a just cause requirement for all discipline as well as a requirement to abide by the

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[3]The arbitrator recognizes these directives or limitations on the arbitrator's authority as a plain and simple directive that the arbitrator not deviate from the language of the Agreement. In addition, the prohibitions serve to direct the arbitrator's attention to the Management Rights article. That article typically reserves unto management the right to hire, fire, suspend, discipline, lay off, transfer, promote, demote employees and to assign them duties or otherwise direct their performance. The Parties' Agreement include this language. However, the arbitrator does not read the language of the Management Rights article to mean that if the Employer can demonstrate that the Grievant refused an order that the arbitrator must uphold the discipline. The arbitrator understands that even though the right to discipline is reserved unto management, the Employer also agreed to submit its disciplinary decisions to arbitration for review. That review might lead to a reversal of management's decision. By definition agreeing that all of its' disciplinary decisions must be supported by just cause, the Employer accepts the fact that a review might result in a finding that its disciplinary decision was not supported by just cause. To do so is not to second guess the decision of the Employer or substitute the arbitrator's judgment for that of the Employer. It is, however, designed to carry out the arbitrator's responsibility to review all of the facts and circumstances in arriving at a decision as to whether the Employer's disciplinary action should be upheld. The express language giving the arbitrator the right to fashion a back pay award recognizes that this process is not simply designed to rubber stamp an employer decision but to answer the question whether it was supported by just cause If it was not then a remedy should be provided.

principles of progressive discipline. “No employee, after completing her probationary period, shall be discharged or otherwise disciplined without just cause...The Employer will abide by principles of progressive discipline...”(Agreement at p. 22)

In light of this express language and a careful examination of the facts presented at the hearing, it is the arbitrator’s conclusion that the Employer did not have just cause for discharge. Just cause requires a determination as to whether under all of the facts and circumstances shown, the discharge is reasonable. When all of the evidence and testimony introduced at the hearing of this matter is considered a picture of unreasonableness emerges.

The Grievant had a very limited work history with the Employer. The Employer hired the Grievant to fill a full-time position in June 2007. There simply is not an extensive work record to consider. The Grievant worked for the Employer long enough to receive only one annual performance evaluation. Ms. Kolodge completed that performance evaluation on July 8, 2008. She shared the evaluation with the Grievant on July 9, 2008. (U. Ex. 2) It is without question a very good evaluation. What is clear is that Ms. Kolodge thought highly of the Grievant, felt she was dependable, supportive and enthusiastic. Ms. Kolodge described the Grievant as a team player in that she volunteered to work shifts other than her own, was a good co-worker, took the initiative to enhance her performance and demonstrated a good understanding of her job. (U. Ex. 2) The Supervisor also noted in the evaluation that the Grievant’s attendance was not a problem during her first year on the job.

The only negative statement in the entire performance evaluation is in the section labeled “Amount of interest and enthusiasm in work.” In that section, the Supervisor writes: “Most of the time, [the Grievant] is very good natured and other times seems very frustrated with job and work policies.” (Union Ex. 2, p. 2) The Supervisor, however, does not provide any support for that statement or give examples. At any rate, the arbitrator finds it significant that the Grievant performed admirably during her first full year on the job.

Arbitrators typically look to a long and loyal work record as a mitigating factor. The consideration given the Grievant’s positive work record here is done not for the purpose of identifying mitigating factors. It is considered as one important fact that taken along with others help provide a picture of the context within which the Employer made the decision to discharge

the Grievant. As previously stated, the arbitrator believes that just cause did not exist in this case. The consideration of the positive work record is simply to point out that the Grievant for the majority of the time she was employed was considered by the Employer to be a good and valuable employee. Simply because a lengthy work record is not present in this case does not mean the positive, although brief, work record of the Grievant should be ignored. This is especially true when you consider that almost immediately following Ms. Kolodge's completion of that positive performance review, the Employer granted the Grievant a reduction in her work schedule so that she could be with and care for her terminally ill mother.

The Employer graciously permitted the Grievant to use as much vacation and sick leave as possible so that the Grievant could travel to her mother's home and spend as much time as possible with her before she died. The Employer continued to provide the Grievant with a very flexible work schedule through early October 2008. During the period following her good performance evaluation through most of October 2008, the Grievant worked less than full-time hours. There were several weeks during that time that the Grievant worked less than 20 hours per week. Therefore, shortly after receiving her positive performance review and securing the confidence and support of her Employer, the Grievant was hit with an all consuming personal tragedy. The Employer obviously wanted to and did support the Grievant through that difficult period.

Of course, the Employer is not required to grant an employee unlimited time to recover from a personal tragedy such as the death of a parent. The Employer needed its valuable employee to return to work and resume her duties. The Grievant did return but within less than a month she violated a work rule by loaning money to a client. The Grievant wanted to help the client. The Employer's work rule against such financial entanglements is designed primarily to protect the clients who are victims of battery and other forms of abuse. It is understandable that if these women become dependent on a member of the Employer's staff as a result of a financial obligation that the work of the Employer could be compromised and the client could end up in another abusive relationship.

The Grievant understood both the reason for the rule and that her conduct was a clear violation of a reasonable Employer policy. The Grievant decided to report what she had done to

her Employer. She reasoned that her conduct was in part a product of her continued grieving process following her mother's death. Basically, the Grievant felt she had returned to the workplace before she was mentally ready to resume her duties as fully and completely as she had done throughout her first year of full-time employment.

The Grievant reported the work rule violation. She did not try to hide it or cover up her violation but engaged in a most thoughtful act of remorse, regret and full acceptance of the discipline. The Grievant's conduct, even though improper, was done for a good reason. Ms. Utech, the executive director, determined that a five day unpaid suspension was the most appropriate discipline. Ms. Utech also perceived the Grievant's conduct as a sign that she might need some professional help or grief counseling. It was clear to her that the Grievant was still struggling to cope with the loss of her mother. It was clear at the hearing of this matter that the Grievant was still bursting with emotion regarding the loss of her mother. Ms. Utech felt strongly enough about the Grievant's need to get some help that she referred her to the Employee Assistance Program at the same time that she issued the letter of suspension.

In less than one month following the Grievant's return to work on a full-time basis, she had to step out of the workplace to serve her suspension and to attend to her mental health. Otherwise, during the Grievant's return to full-time work prior to her suspension she obviously performed the duties of her position without complaint from her supervisor. The Grievant served her suspension and returned to work on December 3, 2008. It was on that day, her first day back following the suspension, that the Grievant argued with Ms. Kolodge and Ms. Olson about whether there was sufficient time between 12:30 and 2:00 p.m. for her to transport a resident approximately 8 miles away to a different shelter. The Grievant had a 2 p.m. medical appointment and was concerned about the timing of the Employer's request. The Grievant was also upset after finding that her name was placed on the December schedule in a manner that she felt was retaliatory. Supervisor Kolodge had clearly deviated from her usual practice in placing the Grievant on the December schedule as she did.

During the discussion with Supervisor Kolodge, the Grievant told her she felt singled out. The Grievant testified that she felt retaliated against. The Grievant's concerns were not unreasonable. Ms. Olson, the Grievant's immediate supervisor, testified that she was upset with

the amount of time the Grievant had been given away from the workplace between July and October of 2008. More specifically, Ms. Olson said she had to assume all of the Grievant's duties with regard to the Pathways program and felt overloaded and unable to perform her usual job duties. She testified that she wanted the Grievant to be accountable. In other words, she wanted to make sure the Grievant came back to work on a full-time basis and resumed all of her duties, particularly those associated with the Pathways program.

According to the Grievant, however, Ms. Olson was very angry and expressed her anger in no uncertain terms. During the investigation conducted by Ms. Utech, the Grievant submitted a summary of a telephone call she had with Ms. Olson the first evening of her five day unpaid suspension. The Grievant reported that on that evening she called Ms. Olson to let her know which of her tasks would need to be completed by the supervisor or someone else during her suspension. Here is how the Greivant described the telephone conversation with her supervisor.

> "I was calling to tell her thanks and also what I had going on @ work since I would not be there for a week.. She proceeded to tell me that she didn't think I would ever understand the magnitude of the situation or how many "f---king" people this affected. She also told me that I would now be "watched"- and this would never happen again. She told me that now <u>she</u> has to do my "f--king" job again-and she would never do it again. She also hoped that I would be f--king "happy" to have time off." (Er. Ex. 12)

Ms. Olson did not dispute this story during the hearing of this matter. But, even if embellished the basic message is consistent with Ms. Olson's testimony. Ms. Olson was feeling overwhelmed because she had to ignore or let her regular responsibilities go unattended while taking care of the Grievant's Pathway program responsibilities. She said she needed accountability and worked with Ms. Kolodge, who was responsible for scheduling to see to it that the Grievant was placed on the schedule in such a manner as to secure the accountability she needed. In other words, Ms. Olson intended to "watch" the Grievant. In order to watch the Grievant, Ms. Olson convinced Ms. Kolodge to list the Grievant on the schedule but rather than listing her to make sure the shelter was covered, Ms. Olson listed the Grievant to make sure she was performing her normal duties on days and times that matched her regular schedule. In other words, the only purpose for listing the Grievant as Ms. Kolodge did was to secure what Ms. Olson called accountability. She wanted to make sure the Grievant was at work during regular

hours and performing her Pathway duties so that Ms. Olson would no longer have to pick up those duties.

The version of the schedule for December 2008 that the Grievant saw when she returned to work on December 3, 2008, shows that Ms. Olson and Ms. Kolodge the Grievant approximately 15 times for a 9 to 5 shift. That is the Grievant's usual shift and therefore not one that would normally be placed on this schedule. The initials "FU" are placed after the Grievant's name. "FU" stands for follow-up. Ms. Olson and Ms. Kolodge acknowledged that placing the initials "FU" after the Grievant's name was designed to let her know she was not expected to work "in-house" but to perform her regular duties. Ms. Olson and Ms. Kolodge obviously intended the schedule to make sure the Grievant was at work and performing her duties on the days and times specified on the schedule. In short, it seems clear that Ms. Olson and Ms. Kolodge viewed their scheduling of the Grievant as a warning or admonishment. In other words, the supervisors created a situation which appeared to all who understood the purpose of the schedule that the Grievant was being singled out or disciplined in some way. The testimony of Ms. Kolodge and Ms. Olson made the same point quite clearly. Ms. Kolodge testified that it is her practice to prepare and post a draft schedule for the upcoming month about one week before the schedule is to take effect. During that week, bargaining unit members and others subject to the schedule can let her know of leave requests, personal conflicts such as doctor appointments or family events in addition to other kinds of commitments such as a second job. Ms. Kolodge tries to accommodate as many of the requests as possible with an eye toward making certain that the shelter had two staff members on duty 24/7. The purpose of the schedule, in other words, was to make sure that the shelter had two staff on duty throughout the night, weekends, holidays as well as during regularly scheduled hours. Ms. Kolodge and Ms. Olson admitted during testimony that placing the Grievant on the schedule as they did in December 2008 was not the normal practice. Ms. Olson's testified that she wanted the Grievant listed in that manner in order to hold her accountable.

This act, in other words, was provocative and in the nature of discipline. Ms. Olson and Ms. Kolodge had to conclude that the Grievant could not be relied upon to do her job. However, Ms. Kolodge and Ms. Olson never alerted the Grievant to a performance issue. There is nothing

in the Grievant's personnel file that suggests she did not do her job when she was at work. The problem was that the Grievant had not been at work for a significant enough period of time since learning of her mother's terminal illness to fully carry out her responsibilities. However, by all accounts when she was there with the exception of loaning money to a client she actually performed her job and did it without a supervisor complaining about her performance.

The Grievant was not at work most of the time between July and October because the Employer permitted her a flexible schedule. The Grievant returned to work for less than a month before being suspended. During that brief period the Employer apparently had no complaints about the Grievant's work. It was the Grievant who alerted the Employer to the fact that she had violated a work rule and possibly should not be back at work due to her struggle to contend with the loss of her mother. By the time the Grievant returned to the workplace on December 3, 2008, her supervisor was fed up with having to do her work and had secured a change to the normal scheduling practice designed to make her feelings known to the Grievant.

It is against this backdrop that the arbitrator examines the reasonableness of the supervisors' demand that the Grievant transport a resident at 12:30 p.m. just 90 minutes before her scheduled appointment. With regard to whether it was in fact possible to carry out the order in that period of time, the arbitrator finds that it is questionable. There was testimony all over the map on that point. However, it is unnecessary to determine whether it was possible. Even if impossible, the arbitrator agrees that unless the directive posed a threat to the safety of the Grievant or others, she should have tried her best to comply with the directive and alerted the Employer to any barriers or challenges to full compliance.

But here, the context provides a different view of the directive and gives rise to the conclusion that it was not meant as a reasonable order to meet the needs of a client. Ms. Kolodge and Ms. Olson engaged in an act that was designed to either provoke or punish the Grievant. Transporting the resident was not a part of the Pathway program duties Ms. Olson so desperately wanted to give back to the Grievant. In order to make it possible for the Grievant to comply with the order, Ms. Olson said she would take over any appointments the Grievant had that day. According to the Grievant a part of her scheduled activities that day included appointments regarding the Pathway program.

The arbitrator finds that both Ms. Kolodge and Ms. Olson, in light of their testimony regarding the need for accountability, are not credible when they say, that the Grievant was the only one available to transport the client and that it had to be done right away. Their actions, (issuing the directive on the Grievant's first day back and placing the Grievant on the December schedule in order to secure accountability) show that the heightened scrutiny promised by Ms. Olson was immediately put into action upon the Grievant's return to work.

The heightened scrutiny that Ms. Olson and Ms. Kolodge subjected the Grievant to was in the nature of discipline. It was tantamount to an oral and written warning. The order and the use of the schedule against the backdrop of the events leading up to December 3 amount to discipline in violation of the Agreement. The order, in short, was bogus. Testimony revealed that neither Ms. Olson or Ms. Kolodge had actually seen the required paperwork necessary when transporting a client or resident from one facility to another. Although Ms. Olson testified the client was ready to be transported, she acknowledged that she had not actually seen the required paperwork. By all accounts, the Grievant would have had to use her car but that doing so was not discussed. No one told her that the shelter van was unavailable and that she would have to use her personal vehicle to transport the resident. By all accounts, the conversation focused only on whether there was sufficient time to carry out the directive to transport the client. This fact is important because a thoughtful conversation designed to help the Grievant understand that the order was reasonable would have included consideration of more than just the distance that needed to be traveled. It would have included a confirmation that the required paperwork was ready for the Grievant, whether the shelter vehicle was available and if not whether the Grievant's personal vehicle was available. Both Ms. Kolodge and Ms. Olson simply testified that they told the Grievant they could handle her appointments and that the client was packed and ready to leave. As it turns out the client was not moved to the new facility until days later. There was absolutely no testimony suggesting that the delay created problems for the client or the Employer. The arbitrator finds that the lack of concern shown by Ms. Kolodge and Ms. Olson with regard to whether the Grievant could have carried out the directive within the limited amount of time available demonstrates that they were more concerned with provoking the Grievant or at best seeking the Grievant's willingness to be held accountable.

Given the context, as described above, the arbitrator concludes that the directive to transport the client was not only unreasonable but designed to, along with the manner in which Ms. Kolodge scheduled the Grievant for December 2008, punish and/or humiliate the Grievant. By all accounts, it is clear that Ms. Kolodge and Ms. Olson were fed up with the Grievant's lengthy mourning process and determined to express their displeasure. While, as the Employer argued at the hearing, it is reasonable to expect accountability, it is unreasonable to impose upon the Grievant a public process of admonishment. In other words, Ms. Kolodge and Ms. Olson's decision to place the Grievant on the schedule in order to achieve accountability, was a public pronouncement that the Grievant could not be counted on to show up for work and needed to be publicly reminded. Their public expression of concern and displeasure with the Grievant was not unlike a written reprimand. As such, the Agreement requires that it be in writing and that the employee receive a copy of it. Ms. Olson should have given the Grievant an oral or written warning that she felt the Grievant was intentionally failing to show up for work and resume her Pathway program duties. Likewise, if Ms. Olson felt the Grievant was using her mother's death as an excuse to stay on the payroll but out of the workplace she should have documented her concern as an attendance issue, required a physician's statement or taken other steps consistent with the Agreement's requirement of progressive discipline or corrective action as that term is defined in the personnel policies. (See Er. Ex. 3)

The Employer also argued that the Grievant demonstrated an unwillingness to work the December 2008 schedule as posted. The Employer points this out to demonstrate that the Grievant was also insubordinate by challenging Ms. Kolodge the manner in which she was placed on the schedule. Had the Grievant willfully failed to show up on one of the days she was placed on the December schedule without a proper excuse, the Employer's argument might be valid. But as explained above, the manner in which the Grievant was placed on the schedule was in an of itself provocative, unsupported discipline and out of line with requirements in the Agreement. Moreover, the Grievant never had the opportunity to behave in an insubordinate manner with regard to the December schedule. On the following day, December 4, the Grievant delivered a FMLA form asking for unpaid leave. While the Employer is not subject to the FMLA, it does provide for emergency leaves. Article 12.5 provides for unpaid emergency leaves

of up to two months for purposes of medical necessity, death in the family, mental health and similar personal challenges. Moreover, Article 12.5 states that if the emergency situation prevents the employee from providing prior notice that the employee must give notice within 24 hours of learning about the emergency. The Grievant fully complied with the requirements of Article 12.5. Having complied with the emergency leave requirements of the Agreement, the Grievant never had an opportunity to refuse to work the December schedule because she never returned to the workplace following her first day back on December 3.

The arbitrator's task is to determine whether the Employer's discharge of the Grievant, when examined in the context of the facts established at the hearing, was supported by just cause. The arbitrator finds that the Employer discharged the Grievant without just cause and that the true motive for the disciplinary action stemmed from the supervisors' hostile campaign against the Grievant. That hostile campaign resulted from the Employer's approval for the Grievant to have a flexible schedule that led to Ms. Olson having to do double duty with regard to her regular duties and the Pathway program. Ms. Olson's response to that burden violated Article 15 of the Agreement in that it bypassed the required progressive disciplinary steps and went straight to punishment.

The arbitrator is mindful of the important work of Safe Haven and its commitment to women suffering from abusive relationships. It is understandable that the burden of serving women with such incredible needs and challenges can weigh heavily on those providing the services. It is admirable that Safe Haven chose to support the Grievant when she was most in need given her loss. But to punish her for having taken advantage of the opportunity offered her by the Employer does not comport with the mission and vision of Safe Haven or the just cause requirement of the Agreement.

Award

The Grievance is SUSTAINED. The Employer must within one work week of this award reinstate the Grievant to the position of Women's Advocate/Follow-up. Also, the Employer must restore the Grievant's seniority. The calculation of her seniority will be based on an uninterrupted period of employment dating from the Grievant's original hire date. Furthermore,

the Employer must give the Grievant full back pay and accrued contractual benefits. The back pay award is to be mitigated by any unemployment compensation benefits received by the Grievant between her termination and reinstatement as called for herein. However, the wages earned by the Grievant in part-time positions since the date of her termination are not be included in the calculation of the back pay award owed the Grievant. It is the arbitrator's conclusion that those earnings were minimal and not inconsistent with her full-time position at Safe Haven. Moreover, the only disciplinary action that should appear in the Grievant's official personnel file should be the five day unpaid suspension. Otherwise, the Grievant's personnel file must be made consistent with this award. The arbitrator retains jurisdiction to clarify the award and to resolve any disputes associated with the Parties' efforts to comply with the award.

Respectfully submitted

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A. Ray McCoy
Arbitrator

Dated: June 15, 2009