BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between **LINCOLN, LYON AND MURRAY HUMAN SERVICES** and **AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES**	**Grievant:** **BMS Case No. 09-PA-0006** **Arbitrator: Sharon K. Imes**

APPEARANCES:

Quarnstrom & Doering, PA, by **William J. Toulouse**, appearing on behalf of Lincoln, Lyon and Murray Human Services, Marshall, Minnesota.

Teresa L. Joppa, Staff Attorney, AFSCME Council 65, appearing on behalf of AFSCME Council 65 and the Grievant.

JURISDICTION:

Lincoln, Lyon and Murray Human Services, referred to herein as the Employer or the Agency, and the American Federation of State, County and Municipal Employees, referred to herein as the Union, are parties to a collective bargaining agreement effective January 1, 2007 thru December 31, 2009. Under this agreement, the undersigned was selected to decide two disputes that have occurred between them. Hearing was held on February 12, April 9 and June 9, 2009 in Marshall, Minnesota. The parties, both present, were afforded full opportunity to be heard. Briefs in this matter were submitted by both parties and forwarded to the Arbitrator on June 30, 2009. The parties agreed to extend the due date for the decision if time is needed by the Arbitrator and the matter is now ready for determination.

STATEMENT OF THE ISSUE:

> Did the Employer have just cause to issue the Grievant a notice of final warning which included a five day suspension without pay on May 8, 2008? If not, what is the appropriate remedy?

Did the Employer have just cause to terminate the Grievant on May 19, 2008? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE VI – EMPLOYEES RIGHTS – GRIEVANCE PROCEDURE

6.1 DEFINITION OF A GRIEVANCE

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT.

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6.5 ARBITRATOR'S AUTHORITY

A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not so submitted.

B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations have the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the UNION and shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to (sic) the facts of the grievance presented.

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ARTICLE X – DISCIPLINE

The EMPLOYER will discipline employees only for just cause. Discipline will be in one or more of the following forms: oral reprimand, written reprimand, suspension, demotion, or discharge.

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OTHER RELEVANT DOCUMENTS:

LINCOLN, LYON, AND MURRAY HUMAN SERVICE
PERSONNEL POLICY NUMBER 0025

EFFECTIVE DATE: 04-17-91
REVISION DATE: 08-15-07
AUTHORITY: Lincoln, Lyon, and Murray Human Services Board
Minnesota Merit System
MN Rules 9575.1180

--- CORRECTIVE ACTION/TERMINATION POLICY ---

Causes for Corrective Action or Termination

Causes for initiating corrective action are classified as *Gross, Serious, Minor,* or *Other,* including but not limited to the actions and examples noted. Causes may fall into different categories or apply to more than one category, depending upon the severity of the infraction and outcome of the situation.

***Gross: May Result in Termination**

1. Possession, sale, distribution, or use of alcohol or other controlled or illegal substances on agency time, property, or in agency vehicles
2. Conviction of a felony or gross misdemeanor or conviction of a misdemeanor that would directly relate to the employee's position with the agency
3. Insubordination affecting outcomes of services to stakeholders
4. Dishonest or fraudulent behavior affecting stakeholders or agency resources
5. Misuse of employment relationship or of agency property, credit, or services; may include acceptance of a gift under circumstances from which it could be inferred that the giver expected or hoped for preferred or favored treatment in an official or departmental matter
6. Absence for 3 days without leave may be deemed as a resignation unless conditions warrant that leave may be granted
7. Unauthorized possession of weapons, explosives, or other dangerous implements
8. Failure to maintain required licensure
9. Violation of the MN Merit System Code of Ethics
10. Reckless conduct
11. Detrimental behavior

***Serious: May result in: 1) Written Warning 2) Final Warning, including suspension with or without pay 3) Termination**

1. Incompetence or inefficiency in the performance of duties
2. Failure to maintain regular attendance/tardiness (not designated as FMLA)
3. Smoking/tobacco use in unauthorized areas or agency vehicles
4. Disorderly conduct
5. Negligent conduct

***Minor: May result in: 1) Verbal Counseling 2) Written Warning 3) Final Warning, including suspension with or without pay 4) Termination**

1. Unauthorized solicitation
2. Failure to follow instructions
3. Unauthorized work
4. Dishonored checks written to the agency
5. Reporting to work in an unfit condition
6. Loafing
7. Violation of agency policy

***Other: May result in: Corrective Action as described above in any order of progression**

1. Physical, mental, or emotional disability that interferes with the performance of basic job duties for which reasonable accommodations cannot be provided
2. Discourteous, insulting abusive, or inflammatory conduct or language toward the public, a fellow employee, or fellow employees
3. Unsatisfactory work performance
4. Aiding or abetting any of the above categorical offenses
5. Multiple violations of the above categorical offenses

<u>Corrective Action</u>

Although a supervisor and/or the director may initiate the corrective action process with any employee in any sequence at any time, the supervisor shall make reasonable effort to identify or remind the employee of any performance problem which may lead to corrective action and to assist the employee in eliminating problem areas

before corrective action becomes necessary. Corrective action should be implemented only for reasons which are communicated clearly to the employee.

Corrective action may include the following methods: Verbal Counseling, Written Warning, Final Warning (including suspension with or without pay), and/or Termination. Although the sequence of corrective actions may be administered in any order, supervisors are encouraged to use corrective actions progressively when applicable.

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BACKGROUND AND FACTS:

The Grievant, a social worker, began working for Lincoln, Lyon and Murray (Counties) Human Services in April 1998 and began telecommuting in September 2006. Her caseload, approximately eighty-six cases, focused on chemical dependency clients and MSHO cases (nursing home care cases).

In 2003, AFSCME was elected as the exclusive representative for employees, including the Grievant. Following that election and Employer efforts to decertify AFSCME as the exclusive representative for employees, an initial collective bargaining agreement between the two was ratified in 2005. The second contract was ratified in late 2006. Between 2003 and 2006, the record reflects that no employees who would have been members of this bargaining unit were disciplined. Between 2006 and 2008, however, thirteen employees in the unit were disciplined. In addition, approximately five to eight employees, primarily social workers, have resigned each year since 2003.

The Grievant's problems with the Employer began in 2007 when she failed to submit MSHO reports in a timely manner in January and February, reports she needed to complete in order for the Employer to be paid for services provided. At that time the Grievant's Supervisor discussed this problem with her.

The next problem occurred in April 2007 when a county judge complained to his court administrator about being billed by the Agency for a chemical dependency assessment that had not yet been received. This assessment was to have been done by the Grievant but the billing for the assessment was done by the Agency. When the Grievant's Supervisor learned of the complaint from the judge on April 16, he drafted a letter to the judge and met with the Grievant on April 20 to have her sign it.[1] After the Grievant indicated that she needed time to

[1] During their discussion about this billing, the Supervisor also learned that there were three other chemical dependency assessment reports that had not been completed although the assessments had been done.

read the letter the Supervisor provided her with the letter and rescheduled the meeting to Monday, April 23. On the 23rd, when the Supervisor met with the Grievant, she requested union representation before they discussed the matter further and the supervisor left stating that he would "move to the next step." On the 24th, the Grievant, her supervisor and the Union Representative met. At that time, she was given a notice of written warning and corrective action plan and she signed the revised letter. In the warning, the Grievant's Supervisor cited "inefficiency in the performance" of her duties as the reason for the action.

In the notice, the Supervisor cited the Grievant's "not being willing" to meet with him on the 23rd to discuss the letter to the judge and her "excessively late" chemical dependency assessments; her "dereliction of care coordination duties" regarding the assessments, and her failure to provide the MSHO reports discussed earlier as cause for the "formal action". In the corrective action plan, the Grievant was directed, among other things, to complete all reports to the court, probation and the consumers within ten days following the assessment date; to e-mail the court administrator "when a consumer fails to come to his/her scheduled appointments" and copy the supervisor when the appointment has been rescheduled, and to review her reports "or send them to support staff to make sure they say what you want them to say." The Grievant was also told that the plan was in effect for a year; that her compliance with it would be reviewed in three months and that failure to correct this deficiency would be "considered grounds for discipline, up to and including termination" of her employment. At that time, the Supervisor also recommended that the Grievant's telecommuting privileges be revoked but the recommendation was rejected by the Human Services Director.

When the Grievant, her Union Representative and this Supervisor met in August to review her compliance with the corrective action plan, the Supervisor advised the Grievant that she had complied with all six areas addressed in the plan. He also advised her that telecommuting was no longer an issue. The parties differ, however, about whether they discussed if the corrective action plan would have any effect on the Grievant's performance evaluation to be completed in October with the Grievant asserting the Supervisor told her it would not.

In early November the Grievant received her performance evaluation and scored lower in all areas evaluated except the skills; competency and knowledge, and attendance and

punctuality factors.[2] In those areas where she was scored lower, the Supervisor referred to her failure to complete the January and February MSHO case management reports; the chemical dependency assessment report problem with the court and her questioning of the Supervisor's assignment of a Pipestone assessment to a back-up worker as cause for lowering each score one step. The lowered scored reduced the Grievant's overall rating and the result was that no salary increase was recommended. Upon receiving the evaluation, the Grievant indicated that she wished to file a rebuttal and in mid-November she sent a letter to her Supervisor challenging his statements and ratings. In response she received notice from him that he would not be making any changes to her scores "because it reflects the provision of services for the period of the past year".

As follow-up to her Supervisor's response, the evaluation was grieved as provided for in the collective bargaining agreement and in early December the Grievant and her Union Representative asked to meet with the Grievant's Supervisor and the Human Services Director.[3] The Union followed up this request with several e-mails to the Human Services Director between December 2007 and March 2008 which questioned why a meeting had not been scheduled but the requested meeting never occurred since the Director took the position that the Grievant needed to discuss the matter directly with her Supervisor.

In mid-February 2008, at the request of this Supervisor who had concluded that he was unable to effectively supervise the Grievant, the Grievant was assigned to a new Supervisor. In a letter giving her notice of that assignment, the Grievant was told that the new Supervisor would handle the Grievant's requests for time off, comp time earned and expense reimbursement; that she should submit her time sheets for approval to this Supervisor, and that this Supervisor would provide the Grievant's annual review. The Grievant was also told in that letter that her previous direct Supervisor would continue to sign the "CDTF form for treatment funding". The Grievant's new Supervisor did not talk with the Grievant on the day

[2] The six areas evaluated include service; skills, competency and knowledge; communication skills; attendance and punctuality; cooperation and teamwork, and initiative.

[3] Appendix A to the collective bargaining agreement allows evaluations to be grieved but provides that they are not arbitrable under the grievance procedure.

the change in supervision occurred but states that she talked with the Grievant "sometime thereafter".[4]

In early March, the new Supervisor and the Grievant's previous direct Supervisor conducted an SSIS system review to make sure case management was being done. During that review, they discovered that one of the Grievant's cases concerning a client who had moved to Pipestone County in August 2007 was still open although normally such clients are followed for only sixty days after such a move.[5] Following this discovery, the Grievant's new Supervisor sent the Grievant an e-mail directing her to close out the case and advising her that another of her cases would be transferred to another mental health worker. In response, the Grievant sent her Supervisor an e-mail stating that Lincoln, Lyon and Murray Human Services was still the rep payee on the Pipestone case since the new case worker assigned to the client did not know she was responsible for making the change. The Grievant's Supervisor, again by e-mail, responded "That is quite a liability to do that for someone who is not our responsibility. Dale has instructed marlene (sic) to make that change as of april (sic) 1st. Thanks." In a further exchange of e-mails, the Grievant asked why her Supervisor was not closing the case now and the Supervisor responded that she was "assuming it takes a while with the switch through social security."

The Grievant's Supervisor checked the SSIS system again on April 1st and discovered that the Pipestone case had not yet been closed. She discussed this fact with the Grievant's prior direct Supervisor and asked him to close the case since he is in charge of the mental health program. Sometime thereafter, most likely April 30th, the Grievant discovered that the Pipestone case had been closed by her prior direct Supervisor and called him to discuss the matter. Following their conversation, he e-mailed the Grievant's current Supervisor and stated in that e-mail that the Grievant had called and was upset about the case being closed. In it he also stated that he had told the Grievant that she "appeared to be resistant to closing the case and was holding on to her".

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[4] It is unclear as to when the two actually met face to face, if at all. According to the Union Representative the Grievant told her she and this Supervisor had never had a formal supervisory meeting and the Supervisor testified that she had seen the Grievant when she stopped into the office but that they had never met face to face regarding any transfer of cases.

[5] The record reflects, however, that the Grievant attempted to transfer the case to Pipestone County on December 6, 2007 but told Pipestone County that Lincoln, Lyon and Murray Human Services would continue to carry out rep payee responsibilities until the Pipestone agency processed the paperwork.

On May 1st, the Grievant e-mailed a court administrator inquiring about the outcome of a client's appeal regarding her assessment stating that she had a bed reserved for that client and needed to know if the bed was still needed. Following that inquiry, the Grievant e-mailed her previous direct Supervisor a copy of her inquiry to the court and a series of e-mails were exchanged between them with a copy to a co-worker to whom the client was being transferred at the client's request. In one of the e-mails the Grievant told the Supervisor that she would transfer the case to the co-worker but that she wanted to finish her case notes prior to the transfer. In response, the Supervisor wrote "That's great. . ." and "Thanks".

The next morning, the Grievant's immediate Supervisor sent the Grievant and the Supervisor with whom the Grievant had been exchanging e-mails regarding the transfer, an e-mail in which she advised the Grievant that she could complete the case notes "even when the case is transferred". In response, the Grievant e-mailed her Supervisor the reason for her request to prepare the case notes prior to the transfer. It is unclear as to what transpired next but the record establishes that following this exchange of e-mails, the Grievant called this Supervisor to discuss her response to the request. A heated exchange between them occurred during which the Grievant's Supervisor charged the Grievant with being "resistant to transferring a case" and with continuing "to follow a pattern of refusals to follow directives". As support for her charges, the Supervisor stated the Grievant had acted inappropriately with respect to the case she had been directed to close on April 1st and then told the Grievant she needed to meet with her to discuss her work performance. During that part of the conversation, the Grievant advised the Supervisor that she felt her Union Representative should be present at the meeting. In response the Grievant's Supervisor told the Grievant that she had the "right and responsibility to discuss" the Grievant's work performance "informally at any time" but that it was fine with her if the Grievant wanted her Union Representative present. The telephone conversation ended with the Supervisor advising the Grievant that they would meet at 1:00 p.m. on Monday.

Following the telephone conversation, the Grievant sent her Supervisor an e-mail advising her that she had an appointment at 1:00 p.m. on Monday and through an exchange of e-mails they agreed that they would meet on Wednesday at 10:00 in the morning with the

Grievant stating "This will be a good opportunity to talk." In response to that e-mail, the Supervisor sent the Grievant an e-mail in bold, italic type which stated:

> ***"You had an opportunity to talk with me this morning and chose to put up the barriers with your attitude and not accepting supervisory direction for case closures and transfer. Again, I have the right and responsibility as your supervisor to discuss you*** (sic) ***work load, case load and job performance in-formally at anytime and at my request. I am and have been available for all my staff to talk at anytime. I will not be talking informally with your union rep present. It will be a very formal discussion."***

More e-mails then followed. Among them was one from the Grievant stating that she had called her Supervisor to clarify something she had not understood; that the Supervisor had told her she had had a temper tantrum over a case closed by her prior Supervisor and that she had told her Supervisor that she had not. She also asked the Supervisor to clarify what she meant by "formal discussion". In another, in response to the fact that the Grievant's Supervisor would not answer the Grievant's question as to what she meant by "formal", the Grievant sent the Supervisor an e-mail in which she wrote "Does 'Formal' mean I should wear a suit and tie then?" On Wednesday evening, the Grievant's Union Representative received an e-mail from the Human Services Director advising her that the Grievant was going to receive serious corrective action in the morning. He also told her that the Grievant had asked him what the meeting was about and that instead of telling her he had told her she needed to talk with her Supervisor.

When the parties met the morning of May 8 the Grievant was given a notice of final warning with a five day suspension without pay. After reading it to her, the Employer left to allow the Grievant and the Union Representative time to discuss it and when they returned they told her the suspension was effective immediately. Ultimately, however, they allowed the Grievant to remain at work on the 8th and the suspension became effective May 9th.

The notice of final warning cited five violations of Employer's personnel policy, two "Gross" violations, insubordination and detrimental behavior; one "Serious" violation, incompetence or inefficiency in the performance of duties; one "Minor" violation, failure to follow instructions, and one "Other", discourteous, insulting, abusive, or inflammatory conduct or language toward the public, a fellow employee, or fellow employees. More specifically, the Grievant was told that the disciplinary action was result of the Grievant's refusal to comply with directives from her supervisors and her refusal to follow supervisory instructions. Among the

incidents cited were the warning the Grievant received in April regarding the incident with the court and the subsequent corrective action plan; the Grievant's 2007 evaluation which stated that she appears "to struggle with supervision" and does not "seem to be open to work direction"; the assignment of a new supervisor in February 2008; the directive to close the Pipestone case on March 4, 2008, together with a list of dates when the Grievant had continued to provide services to this client following her move to Pipestone; "unprofessional behavior" toward her prior direct Supervisor regarding closing the Pipestone case on April 30, 2008; an e-mail exchange between the Grievant, a co-worker and her prior Supervisor regarding the transfer of a chemical dependency case and talking to her current Supervisor in a "belligerent tone of voice" on May 2nd, and responding with "a very inappropriate email" after failing to be told by the Supervisor what she meant by "formal". In addition, the Grievant was told that upon her return to work the agency would monitor her performance in several areas for up to one year and beyond if necessary. Among the areas cited were that "insubordination to any supervisor" or "any detrimental behavior, incompetence or inefficiency in the performance of duties, failure to follow instructions, discourteous conduct, or unsatisfactory work performance" would result in immediate termination; that her telecommuting privileges were being revoked permanently and that she would have an office on site in Marshall; that she would be required "upon return to work to have all your files in the Marshall office"; that her job duties and job description would be changed and she would no longer work in the chemical dependency unit but have 100% MSHO consumers for care coordination; that her hours of work would be between 8:00 a.m. and 4:00 p.m., Monday through Friday with a one hour lunch break and two fifteen minute breaks daily; that she must meet with her immediate supervisor every morning at 8:00 a.m. to discuss her weekly schedule or send an e-mail if her supervisor is not available, and that the earning or use of comp time and the use of vacation time will not be approved without pre-authorization. Finally, the notice said that "failure to comply with the directives contained in . . . (it) will be considered insubordination and will be grounds for your immediate discharge from employment." This suspension was grieved on May 13, 2008.

While suspended, the Grievant attempted to call her Supervisor to determine which files she should bring in when she returned to work on May 16 but was told she was out on a medical emergency. As a result she contacted her Union Representative and asked her if she could find out which files she was to bring in and if she would secure personal leave for her on

Friday, the day she was to return to work, since she had a medical appointment that day. On Wednesday, the Union Representative talked with the Director of Business Management about the Grievant's questions and was told that the Grievant was to bring in all the files. Later that day the Director of Business Management called the Union Representative and told her that the Grievant could have personal leave beginning at 9:30 that morning but that she should stop in the office first and bring in the files. This information was given to the Grievant, however the next day she again tried to call the Director of Business Management to talk about the files but was unable to talk with her since she was out of the office for the day.

On May 16th, the Grievant arrived at the Marshall office about 8:00 in the morning. The Grievant's Supervisor was still on leave so the Director of Business Management and the Grievant's prior Supervisor met with her in her prior direct Supervisor's office about 8:10. When the Grievant informed the Director of Business Management that she did not have the files, the Director of Business Management reiterated the things she had been told she needed to do to come back to the Agency and the Grievant became upset; left the office and went to the telecommuting pod. When the Grievant left, the Director of Business Management called the Human Services Director to tell him that things had not gone well.

At that point the Human Services Director came to the Supervisor's office and the Director of Business Management and the Supervisor reviewed with him the requirements that had been listed in the suspension notice and told him what the Grievant had said when they had talked with her. All three then went to look for the Grievant and found her in the telecommuting pod where she was crying and behaving emotionally distraught. Because she was acting inappropriately, in his opinion, the Human Services Director told her she should leave the office and asked the Grievant's previous direct Supervisor to assist her in leaving. Shortly thereafter, after composing herself and collecting boxes in which to pack the files, she left to keep her medical appointment. After the appointment, the Grievant called the Director of Business Management and offered to bring in the files but was told that it was not necessary since they would be picking up the files. When the Union Representative attempted to confirm this with the Human Services Director by e-mail, she was told by him that the Agency was going to have its "IT folks" pick up the Grievant's computer hardware and her files. He also told her that the Grievant's Supervisor would be meeting with the Grievant on Monday morning and that given the circumstances the Union Representative should also be present.

On May 19th, when the Grievant and the Union Representative met with the Grievant's Supervisor the Grievant was given a notice of termination and she was immediately relieved of her duties. In the notice the Grievant was told that she had not returned her case files "as repeatedly directed to do"; that her conduct was unprofessional and detrimental; that she had failed to follow instructions and work direction specifically identified in the final warning, and that her "continued failure to follow instructions is insubordination and negatively affects outcomes to stakeholders served by LLMHS". On May 27th, the termination was grieved. In filing this grievance, the Union sought to move to Step 3 of the grievance procedure, mediation, but the Employer responded that it did not wish to move to Step 3 and was ready to proceed to arbitration. It is these two disciplinary actions that are now before this Arbitrator.

ARGUMENTS OF THE PARTIES:

Addressing the Notice of Final Warning (the five-day suspension) first, the Employer states that the Union grieved the suspension stating that it was "excessive and punitive", and argues that there is no evidence to support the Union's assertion; that progressive discipline is not required by the collective bargaining agreement or by the personnel policy, and that its only requirement is that the issued discipline be consistent with the collective bargaining agreement and the policy. Further, it rejects the Grievant's belief that punitive action was taken against her for requesting union representation. As proof of no union animus, the Employer declares that, instead, it made several accommodations for the Grievant and did not take disciplinary action until it became clear the accommodations failed to remedy the Grievant's shortcomings. According to the Employer, the accommodations included a notice of written warning and corrective action plan; a no performance based pay increase; continuation of her telecommuting privileges although her immediate Supervisor had recommended revoking them, and a change in supervisors.

As support for its position, the Employer asserts it had just cause to issue the final notice of warning and suspension and, citing the seven tests set out by Carroll Daugherty in *Enterprise Wire Co*., 46 LA 359 (1966), argues that just cause exists since it can positively answer each question set forth. More specifically, it declares that the Grievant was adequately forewarned concerning her deficiencies and told that improvement needed to be made and that she knew the "probable consequences of her continued insubordination, detrimental behavior,

inefficiency, incompetence and failure to follow instructions." Continuing, it cites the second test and states that its rules and expectations are reasonably related to an orderly, efficient and safe operation of the Agency and that the Grievant knew that she must follow directives given by supervisors regarding cases and that she could not continue to work on a case for her own personal satisfaction.

Further, addressing the third test, the Employer declares it made reasonable efforts to check into whether the Grievant had violated rules by reviewing the SSIS system and determining the Grievant had not closed the Pipestone case. The Employer also asserts that it conducted a fair and objective investigation by seeking the Grievant's input into the matter.

With respect to the fifth test, the Employer states it investigated the Grievant's performance as an employee back to March 9, 2007 and even prior to that and determined the Grievant had not documented MSHO cases for two months and that she had failed to close out the case of a client who had moved to Pipestone County although she was directed to do so. It adds that these findings are substantial evidence and proof that the Grievant did not act as instructed.

As for the sixth test, the Employer declares that it has applied its rules, orders and penalties evenhandedly and without discrimination. As support for its assertion it states that the discipline imposed mirrored some of the same reasons for disciplinary action taken against other employees. And, last but not least, the Employer, asserting that the Grievant repeatedly failed to follow instructions and demonstrated continued insubordination to her supervisors, concludes that the discipline imposed upon the Grievant was reasonable and related to the seriousness of the Grievant's misconduct.

In summary, the Employer states that based upon it having met the standards set forth in the seven tests that establish just cause it had just cause to issue the Grievant a notice of final warning and five day suspension without pay. It also declares that the Grievant's termination was within its authority and the labor agreement.

As support for its position with respect to the termination, the Employer cites the fact that the Grievant was given a notice of final warning with a five day suspension without pay on May 8, 2008 and that the Employer had thoroughly reviewed the requirements for returning to work contained in that suspension with the Grievant and had read it line by line to the Grievant

and to her Union Representative at the time she was suspended. It adds that both were also given a copy of the notice.

The Employer also declares that the notice specifically stated that insubordination to any supervisor; any detrimental behavior; incompetence or inefficiency in the performance of duties; failure to follow instructions; discourteous conduct or unsatisfactory work perform would result in immediate termination and that the Grievant was informed of that. Continuing, it declares that the Grievant failed to comply with the directives in the suspension by not returning all the files as instructed on the morning of May 16 and that her "intentional and/or negligent conduct was a serious violation of the standards" the Employer reasonably expected; was clear insubordination, and had a "significant negative effect" on the agency.

Further, the Employer rejects the Grievant's assertion that she was unclear as to the expectations and cites the fact that the Union Representative talked with the Director of Business Management about which files the Grievant should bring in midway through the Grievant's suspension and was told "all" meant all of the files. It adds that given the fact that the Grievant had an unpaid suspension and was repeatedly warned verbally and in writing that any failure to comply with the requirements set forth in that suspension would result in immediate termination its actions were consistent with the warning.

The Union, citing the same seven tests used by Carroll Daughtery which the Employer cited, declares the Employer has failed to show that the discipline it administered is supported by just cause and, consequently, has failed to meet its burden of proof in this case. Providing a test by test analysis, as the Employer did, the Union charges that, first, the Grievant did not understand the rules nor the consequences of those rules and that her supervisor's expectations "seemed to be a moving target" requiring her to focus on chemical dependency cases one day and then setting MSHO cases as a priority the next day. It adds that there was no way for the Grievant to know that asking to explain to a supervisor why she felt she needed to hang on to two files or how a file was to be transferred would result in a five day suspension and a threat of being fired. Citing the second test, the Union declares that while the Grievant's Supervisors may have had a reasonable expectation that the Grievant follow his or her directions regarding the two cases the Grievant's actions demonstrated that she "was careful to insure that client's needs were taken care of first" and concludes that the Grievant should have been "praised, not punished".

With respect to the third test, whether the employer made an effort to discover whether the employee had violated or disobeyed a rule or order, the Union charges that the Employer gave the Grievant no opportunity to explain or defend her behavior and since it did not there was no way for the Employer to know whether the Grievant "was trying to comply with her supervisor's directives and was seeking clarification of those directives versus actually trying to obstruct their intentions." It continues that "had a less biased person actually interviewed . . . (the Grievant) shortly after the dispute about transferring files arose . . . the interview . . . could have either, a) resolved the issue without discipline because the parties would have come to an understanding about what was going on, or b) the employer would have developed documentation of . . . (the Grievant's) actual uncooperativeness, if that was indeed what she intended."

The Union also argues that the Employer did not conduct a fair or objective investigation prior to disciplining the Grievant. As support for its position, it cites testimony from the Grievant's supervisors "that they did not see the need to conduct <u>any</u> investigation" since "in their view, (the Grievant had) committed the offense of asking questions concerning their directives" and declares that "it appears the Employer believes that asking questions of your supervisor is the same as insubordination".

Citing the fifth test, the Union asserts that since there was no investigation and there were no clear rules or clear consequences, the Grievant was "ambushed". Continuing, it states this is proven by the fact that when the Grievant asked questions about her Supervisors' directives and requested union representation, her Supervisors became irate giving her a corrective action plan and an evaluation on one occasion and a five day suspension without pay that included revocation of her home office privileges and a threat that she might be terminated on the second occasion.

Finally the Union declares that based on evidence of past discipline of other employees it cannot be determined "if the employer treated other employees who asked questions of their supervisors in a similarly harsh manner". It also asserts there is not much evidence regarding revocation of home work privileges or the rationale for suspension or termination of the other two employees so that it can determine whether the Employer has acted discriminatorily. Further, the Union argues that the Employer acted arbitrarily when it meted out discipline that did not match the seriousness of the Grievant's alleged misconduct and

when it failed to consider the Grievant's past good evaluations; her ten year service record and other mitigating factors such as "burn-out" by social workers who specialize in chemical dependency and mental health and both the Grievant's health issues and that of her husband when it decided the degree of discipline to impose.

In summary, the Union states that the Employer did not have just cause to either suspend or terminate the Grievant. As remedy, it seeks that the Grievant be reinstated and that she be made whole, including receiving back pay and benefits and medical costs incurred due to lack of insurance coverage while absent from work if the insurer won't reinstate the Grievant's coverage to the date of termination. It also seeks that the suspension be reversed.

DISCUSSION:

In this dispute, the Employer states that there are two legal issues, first, whether issuing the Grievant a notice of warning that included a five-day suspension without pay was within the agency's authority and, secondly, whether issuing the Grievant a notice of termination was within its authority and the labor agreement. Subject to a challenge of reasonableness or conflict with provisions in a collective bargaining agreement, arbitrators, including this Arbitrator, generally accept that an employer has the right to establish reasonable rules to aid in the efficient operation of its business and to discipline employees for violation of those rules. Since the Union has not challenged the reasonableness of the rules the Employer alleges the Grievant has violated and since there has been no evidence that the misconduct cited in the policy is contrary to any provision in the collective bargaining agreement there is no question that the Employer has the authority to discipline the Grievant provided it proves the Grievant violated its rules. A finding that the Employer has the authority to discipline employees for violating its rules does not mean, however, that the Employer has the authority to discipline the Grievant unless it can also prove that it has just cause to impose the discipline since the collective bargaining agreement states that no discipline may be imposed without just cause. Consequently, the questions before this Arbitrator are whether the Employer had just cause to issue the Grievant the five-day suspension without pay and/or to terminate her.

Before addressing the merits of the disciplinary actions that are in dispute in this case, however, some discussion of the interplay between the collective bargaining agreement and the agency's personnel policy is necessary. In the Notice of Final Warning, the Employer

charges the Grievant with several types of misconduct which are described as conduct which is prohibited under the policy. To the extent that the personnel policy identifies conduct which may result in disciplinary action, the Employer may cite violation of the policy when imposing discipline upon an employee covered under the collective bargaining agreement. Merely citing the conduct identified in the policy or imposing discipline the policy states may be imposed for certain types of misconduct, however, does not establish just cause for discipline.

In order to establish just cause, the Employer is obligated to show that the employee was not only guilty of the misconduct identified in the policy but that it did not act in an arbitrary, capricious or discriminatory manner in making that finding or when it decided the degree of discipline to impose for that misconduct. The degree of proof and the standards that must be met when establishing just cause vary depending upon the arbitrator but, generally, arbitrators, including this Arbitrator, require the Employer not only to show that it complied with due process standards necessary for establishing just cause when it determined that she was guilty of misconduct; that the Grievant was treated no differently than other employees in similar situations, and that any factors pertaining to the incident, either specific or mitigating, were considered in determining the degree of discipline to impose.[6]

Also inherent in a finding of just cause is proof that the Employer either applied progressive discipline or, in the alternative, that the misconduct was so egregious that a more serious discipline was warranted. This requirement is based upon the premise that discipline is intended to rehabilitate a potentially satisfactory employee and deter similar conduct while protecting the employer's ability to operate its business successfully and efficiently and that both the employer and the employee benefit when an employee is rehabilitated.[7] In this

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[6] **Discipline and Discharge in Arbitration**, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Washington, DC, 1999, Chapter 2; **Management Rights,** BNA Books Arbitration Series, The Bureau of National Affairs, Inc., Washington, DC, 1986, pp. 95-104; **How Arbitration Works**, Sixth Edition, Elkouri and Elkouri, The Bureau of National Affairs, Washington, DC, 2003, pp. 931-933; *Arbitral Discretion: The Tests of Just Cause",* John E. Dunsford, **Arbitration 1989 The Arbitrator's Discretion During and After the Hearing, Proceedings of the Forth-Second Annual Meeting, National Academy of Arbitrators**, The Bureau of National Affairs, Washington, DC 1990, Chapter 3, pp. 23-64; **Labor and Employment Arbitration,** Second Edition, Bornstein, Gosline, Greenbaum, Lexis Publishing, 2000, Volume 1, Chapter 14; Chapter 15, p. 15-7; 613 F.2d 716, 103 LRRM 2380 (8th Cir.), *cert. denied,* 446 U.S. 988 (1980); **The Common Law of the Workplace, The Views of Arbitrators**, Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Washington, DC, 2005, Chapter 6, and **Just Cause, The Seven Tests**, Second Edition, The Bureau of National Affairs, Washington, DC, 1992.

[7] **Labor and Employment Arbitration,** Second Edition, Bornstein, Gosline, Greenbaum, Lexis Publishing, 2000, Volume 1, Chapter 14, p 14-13; **Discipline and Discharge in Arbitration**, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Washington, DC, 1999, p. 87.

respect, the Agency's personnel policy conflicts with the collective bargaining agreement's just cause provision since it does not provide for progressive discipline. Instead, the policy not only determines that certain types of misconduct warrant certain types of disciplined but states that while supervisors are encouraged to use progressive discipline they are allowed to administer the sequence of corrective action in any order.

Because the Employer cited Daugherty's seven tests as proof it had just cause to discipline the Grievant and because the Union used the same seven tests as evidence that the Employer failed to meet its burden of proof, the following discussion may include reference to the seven tests, at times, even though a decision as to whether the Employer had just cause to impose both forms of discipline will not be based upon a finding that the Daugherty tests were relevant. While it is undeniable that these tests have been incorporated in training materials for management and union representatives; have been considered by some arbitrators in determining whether just cause has been established, and have greatly improved the fairness of the disciplinary process, the tests, in and of themselves, generally are not rigidly applied by arbitrators since they are formulaic and urge that a finding of "no" to one or more of the questions means that proof of just cause was either not satisfied or was seriously weakened by some arbitrary, capricious or discriminatory behavior on the part of the employer. Agreeing that these tests for formulaic and may result in a finding that is not quite accurate, this Arbitrator relies, instead, upon proof that the standards required to establish just cause which were identified earlier in this discussion have been met.

As stated at the beginning of this discussion, there are two disciplinary actions that have been challenged in this dispute. The first challenge is whether the Employer had just cause to issue the Grievant a five-day suspension without pay and the second is whether the Employer had just cause to terminate the Grievant. For clarity purposes, each will be discussed separately.

<u>The Final Notice of Warning and Five-Day Suspension Without Pay:</u>

After reviewing the record with respect to the first issue, it is concluded that the Employer failed to provide the Grievant due process rights to which she in entitled in order establish just cause and that it also failed to sufficient proof that it had just cause to discipline the Grievant on the merits. While, generally, a finding that an Employer has denied a Grievant

due process when determining just cause for discipline is sufficient evidence to overturn an Employer's actions, both the denial of the Grievant's due process rights and the merits of the dispute are being discussed in this grievance since it is apparent that the Employer believes it acted in good faith but appears to have little experience in knowing what proof is needed to establish just cause for discipline.[8]

In this case, the conclusion that the Employer lacked just cause to discipline the Grievant is based not only on the fact that the Employer arbitrarily disciplined the Grievant for conduct that was either not relevant or was no longer timely but on the fact that it violated her industrial due process rights when it failed to give her notice that her conduct was subject to discipline; when it failed to fairly and objectively investigate the allegations of misconduct, and when it failed to interview the Grievant to determine her version of the events in an effort to gather sufficient proof that the Grievant did that which was alleged prior to concluding that discipline should be imposed. It is also based upon the fact that the evidence submitted as proof of just cause does not support a finding that the Grievant did that which was alleged and Indicates that the Employer arbitrarily decided upon a five-day suspension as appropriate discipline for the Grievant's alleged misconduct.

Normally, when an Employer decides to discipline an employee, it is required to promptly inform that employee of the charges it is making against that employee and to provide reasonable detail with respect to why it is making these charges. Unless that is done, it is impossible for an employee to raise a reasonable defense. In this case, the Final Notice of Warning has not promptly informed the Grievant of conduct for which she is being disciplined nor does it provide the detail needed for the Grievant to adequately defend against the charges that are relevant. If one relies upon the argument advanced by the Employer during the hearing, one would conclude that the Grievant was being disciplined primarily for inappropriate conduct relevant to a case that should have been closed prior to March 2008; for failure to follow directions on March 4th to close that case, and for the telephone conversation she had with her prior direct Supervisor on April 30th when she discovered he had closed the case. If one relies upon the Notice of Final Warning itself and arguments advanced by the Employer

[8] The record establishes that the current collective bargaining agreement is only the second collective bargaining agreement between the parties and that there has had little experience in dealing with challenges to its actions as they pertain to employee rights contained in the collective bargaining agreement.

during the hearing regarding its having met the Daugherty tests, however, it becomes clear that the Grievant was disciplined not only for failing to close the file as directed on March 4th but for a "past pattern of behavior" and that the Employer considered all seven items listed in the "outline" provided in the Notice as misconduct warranting discipline. The items listed in the "outline" allege misconduct occurred on April 24, 2007 when the Grievant was warned of misconduct and given a corrective action plan; in October 2007 when the Grievant received a poor performance evaluation; when the Grievant was assigned a new supervisor on February 12, 2008; when she continued to provide service to a client whose case should have been closed and failed to follow directions to close that case on March 4, 2008; when she talked with her prior direct Supervisor regarding the closing of that case on April 30, 2008, and on May 2, 2007 when she talked on the telephone with her direct Supervisor regarding the transfer of a case and when she sent this Supervisor an e-mail that the Supervisor considered "very inappropriate".

Based upon these itemizations, but without specifically identifying the Grievant's actions that resulted in a finding of misconduct in each itemization, the Notice indicates the Employer concluded that the Grievant's behavior was "inappropriate and unacceptable" and that she had refused "to comply with directives from supervisors" and "to follow supervisory instructions". The Notice also states that these itemizations are proof of the Grievant's "continued insubordination, detrimental behavior, incompetence or inefficiency in the performance of duties, failure to follow instructions, discourteous conduct toward fellow employees and unsatisfactory work performance" which continues to be "an extreme hardship to this agency" and which "creates a work environment that is hostile and unproductive", and "prohibits consumers from consistent and respectful assistance from county advocates who should be working to support them." Consequently, each of the itemizations were considered in determining whether the Employer had just cause to issue the five-day suspension.

The first incident cited in the Notice of Final Warning occurred on April 24, 2007. While this incident might be evidence of "poor work performance" and might be relevant in determining the degree of discipline to impose if the only charge against the Grievant was "poor work performance", it is not evidence of misconduct for which the Grievant should now be disciplined. Not only did this incident occur more than a year prior to this discipline being imposed but the record establishes that the Grievant received a Notice of Warning and

Corrective Action Plan for that misconduct; that within three months following receipt of the Notice she had complied with the Corrective Action Plan's requirements, and that, due to her compliance, the Notice expired in April 2008. Consequently, since there is no evidence that the Grievant has repeated this type of misconduct, disciplining the Grievant, now, for that misconduct would constitute double jeopardy.[9]

The Employer also unreasonably relies upon the Grievant's 2007 performance evaluation as cause for discipline. Here, as with prior discipline, a poor evaluation may be relied upon in determining the degree of discipline to impose if the current alleged misconduct is consistent with the areas identified in the evaluation as areas in which an employees needs to improve. It may not be used as cause for discipline, however, since an evaluation is intended as a periodic review to determine whether an employee is performing satisfactorily and to inform that employee of perceived deficiencies where improvement is expected. Further, even if an employee could be disciplined for a poor evaluation, the Employer could not impose discipline for the 2007 evaluation. Not only did the evaluation occur more than a year before the current discipline was imposed but the record establishes that evaluation in this dispute was challenged by the Grievant and her challenge was never resolved. In this respect, the record indictes not only that the Grievant refused to sign the evaluation; provided her immediate Supervisor with a rebuttal; grieved it as provided for in the collective bargaining agreement, and that the grievance was never resolved.[10]

Neither can the Employer cite the assignment of a new supervisor to the Grievant as evidence of misconduct; cause to discipline the Grievant or evidence of refusal to follow orders or poor work performance. Not only does the record indicate that this reassignment was made at the request of the Grievant's previous direct Supervisor who had concluded that his working relationship with the Grievant was poor but there is no evidence as to how that conclusion was reached or that it was caused by any misconduct on the part of the Grievant. Further, while

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[9] For a discussion of double jeopardy see Section 15.07[2], **Labor and Employment Arbitration,** Second Edition, Bornstein, Gosline, Greenbaum, Lexis Publishing, 2000, Volume 1, Chapter 14, pp. 15-25 – 15-29.

[10] While the agreement does not indentify the procedure that will be followed when an evaluation is grieved, the fact that the agreement allows an evaluation to be grieved indicates that the parties intended any challenge to the reasonableness of the evaluation to be evaluated by someone other than the person who prepared the evaluation. In this case, the record establishes that although a higher up sustained the Supervisor's recommendation that the Grievant not receive a pay increase, it does not indicate that the evaluation, itself, was ever reviewed by anyone other than the Supervisor who completed the evaluation.

there is evidence that the Grievant complained about this Supervisor and his actions and that she challenged his directives, there is no evidence that the reassignment was caused by the Grievant's inability to perform her duties or by any failure or refusal to follow instructions. Without this proof, reassignment, in and of itself, is not evidence of misconduct. In addition, even if it were evidence of misconduct, it would be arbitrary to rely upon it as just cause to discipline the Grievant, now, since this action also occurred nearly a year earlier.

The fourth item cited as cause to discipline the Grievant in the Notice is the same alleged misconduct the Employer argued was cause for discipline during the hearing. While the Employer asserts that the Grievant continued to provide service to the client identified in this case long after the case should have been transferred and that the Grievant failed to close the case despite receiving a written directive on March 4, 2008 and "multiple" other directives to close the case, there is no evidence that the Grievant ever received notice that she would be disciplined for any of the actions she took prior to March 4th or that she would be disciplined if she did not close the case on March 4th or very soon thereafter. Instead, the record indicates that following receipt of this directive, after learning from the Grievant that the Agency remained the rep payee for this client, the Grievant was advised by her Supervisor that the Grievant's previous direct Supervisor had directed the person responsible for making the Agency's payments to make the change in rep payee from this Agency to Pipestone County as of April 1st. The record also indicates that when the Grievant asked her Supervisor why the case was not being closed out now, she was told that her Supervisor was "assuming it takes a while with the switch through social security." This evidence indicates that the Employer did not act as though the Grievant had violated the March 4th directive and, in fact, expected some time to pass before the transfer could be accomplished. It also indicates that the Employer had no intention of disciplining the Grievant at the time the incident occurred. Without such evidence, a delay of nine weeks before deciding the Grievant's actions in the incident warranted discipline, without a valid reason for the delay, violates the Grievant's due process regarding prompt notice was violated and, therefore, the incident cannot, now, be considered cause for discipline.

The remaining three items listed in the Notice's outline allegedly occurred on April 30, 2008 and May 2, 2008 and are recent enough allegations of misconduct that they may be considered relevant in determining whether the Employer has just cause to discipline the

Grievant. In the Notice's "outline", the Grievant is specifically charged with having "exhibited unprofessional behavior" toward a Supervisor on April 30th and with "speaking . . . in a very belligerent tone of voice" being "inappropriate, disrespectful, insubordinate and resistant to . . . (the Supervisor's) inquires" during a telephone conversation with her immediate Supervisor and for continuing a "pattern of inappropriate detrimental behavior" by sending "a very inappropriate email" to her immediate Supervisor on May 2nd. While these charges, if proven, could support a finding of exhibiting "discourteous, insulting, abusive, or inflammatory conduct or language" toward a supervisor, there is no way that the specifics of the allegations would support a finding that the Grievant failed to comply with directives from her supervisors; that she failed to follow supervisory instructions or that her actions reflected "continued insubordination, detrimental behavior, incompetence or inefficiency in the performance of duties, failure to follow instructions . . . (or) unsatisfactory work performance" or that her actions "continue to be an extreme hardship" on the agency; "creates a work environment that is hostile and unproductive" or "prohibits consumers from consistent and respectful assistance from the county advocate who should be working to support them."

Before addressing the specifics of these three allegations in greater detail, it should be noted that here, as with the other allegations of misconduct previously discussed and rejected as charges which should be sustained, the record indicates that the Employer violated the Grievant's due process rights. In these instances, the Employer violated the Grievant's due process right when it failed to put the Grievant on notice that her conduct in either telephone call or her attitude demonstrated in the "snippy" e-mail would not be tolerated; when it failed to fairly and objectively investigate whether the allegations were accurate, thereby allowing the Grievant's Supervisor to be witness, prosecutor and final judge.

The more egregious of the two due process violations is the Employer's failure to conduct a fair and objective investigation, a failure the Employer has been guilty of not only with respect to these three allegations but regularly with respect to charges of wrongdoing against this Grievant. The need for management to conduct a fair and objective investigation prior to disciplining any employee, let alone the Grievant, cannot be stressed enough. Not only does it assure that as much available evidence as possible is collected, thus, eliminating any concern about after-acquired evidence being considered, but it promises that the evidence will get a careful look, not from partisan management perspective but from the perspective of a

disinterested third party which assures employees that the employer is acting in good faith and intends to be fair. Further, it tends to lessen the likelihood of impulsive and arbitrary decisions by supervisors; allows tempers to cool and permits deliberate judgment to prevail.

If the Employer had conducted an objective investigation into the misconduct alleged in these three incidents, it would have discovered that the Grievant's Supervisor concluded that the Grievant had acted "unprofessionally" during a telephone call with her prior Supervisor without evidence to support her conclusion and that the Grievant's Supervisor was partially at fault for the exchanges that occurred between she and the Grievant on May 2nd. Further, based on those discoveries, it might have used the information gained to recommend that the proposed discipline was not warranted based upon the conduct that occurred and it might used the incidents as an opportunity to provide further supervisory training.

The evidence the Employer submitted as proof of the Grievant's misconduct on April 30th was an e-mail which the Grievant's prior direct Supervisor sent to the Grievant's current Supervisor. In that e-mail he stated that the Grievant had found out that the case she had been directed to close out had been closed out by him and that she was upset; that he had told the Grievant that she "appeared to be resistant to closing the case" and that she had responded that "nothing she did mattered and that it was no big deal and why do I always do that to her. How the Grievant's immediate Supervisor could conclude from that e-mail that the Grievant had acted "unprofessionally" is questionable since there is no evidence that the Grievant's previous Supervisor had stated that the Grievant had acted unprofessionally or that he believed her behavior warranted discipline. One must also question her conclusion since the record does not establish that the Grievant's Supervisor investigated the incident either by talking with the Grievant's prior direct Supervisor or the Grievant to determine what was actually said and how both sides acted during the exchange. Without proof to support her conclusion that the Grievant acted "unprofessionally", it must be concluded that the Grievant's Supervisor acted capriciously when she decided that the e-mail was proof of wrongdoing.

The lack of an objective investigation and a conclusion based upon less than adequate proof of the Grievant's wrongdoing is just as apparent when the May 2nd incidents are considered. In the first incident, the Grievant's Supervisor charged her with "speaking in a very belligerent tone of voice"; with acting "inappropriately" and with being "disrespectful, insubordinate and resistant to . . . (her) inquiries". Here, as with the April 30th allegation, there

is no evidence that the Employer had a neutral party interview either the Supervisor or the Grievant to determine the accuracy of the Supervisor's allegation but, instead, relied solely upon her assertion as proof of wrongdoing.[11] While, certainly, such an investigation would result in "she said, she said" assertions and would require the Employer to determine the credibility of each, the investigation would have shown that while the Grievant initiated the exchange between the two of them, the call was in response to the Grievant's Supervisor countermanding a decision that had already been made by the Grievant's prior direct Supervisor; that both had acted unprofessionally during the exchange of words, and that there was no evidence of insubordination.

It is undisputed that on May 1st, the Grievant initiated an exchange of e-mails with her prior direct Supervisor regarding the status of a case that was being transferred from her to another co-worker as a result of the client's appeal of an assessment. A review of the e-mails indicates that the exchange began when the Grievant e-mailed the court asking about the outcome of the client's appeal; stating that she had a bed tentatively held for the client, and that the hospital wanted to know if the bed was still needed and forwarded a copy of that inquiry to the Supervisor responsible for the case. In subsequent e-mails, the Grievant and this Supervisor discussed the appeal and the reason for her inquiry. During this exchange of e-mails, the Grievant indicated to this Supervisor that she would transfer the case to the co-worker and told him that she would like to finish her case notes first to which the Supervisor responded "That's great. . ." and "Thanks. . ."

Despite the apparent agreement reached by the Grievant and her prior direct Supervisor, the record establishes that the next morning, unsolicited, the Grievant's immediate Supervisor took it upon herself to send the Grievant an e-mail advising her that she could complete her cases notes after the case was transferred. As with the April 30th incident, one must question why this Supervisor felt compelled to insert herself into the discussion and to

[11] From a review of the record, in general, it is apparent that the Grievant's Supervisors have consistently considered the Grievant's practice of raising question regarding the performance of her duties; of giving explanations for why she would prefer to do a task differently from their directives, and of involving union representation when they asked to meet her to discuss her work performance as a challenge to their authority ans supervisors and have reacted accordingly. It is also apparent that when allegations of misconduct have then been made, the Employer has relied solely upon each Supervisor's version of the events as proof of misconduct without conducting a full investigation into the allegations. Why this relationship has developed is unclear but it is evident that it does exist and that it causes both parties to be frustrated and to respond unprofessionally.

countermand the decision apparently made by the Supervisor who has oversight over the case in question since that Supervisor did not appear to have an objection to the Grievant completing her case notes prior to transferring the case and had not asked for her intervention. Nonetheless, the Grievant responded to her Supervisor's e-mail by stating that she knew the notes could be completed after a case was transferred; explaining why she wanted to complete the notes before the case was transferred, and asking for permission to do it the way she was proposing.

Although there is no evidence that the Supervisor responded to this e-mail, it is apparent that there must have been a response based upon the Supervisor's assertion that following the exchange of e-mails she received a telephone call from the Grievant who in a "belligerent" tone of voice started the conversation by asking her "why this is such a big deal and why is everything such a big deal". Given the fact that the last e-mail submitted into the record indicated that the Grievant was calm and cooperative just prior to the telephone call, it is difficult to believe that the Grievant, unprovoked, would then call her Supervisor about the initial e-mail and essentially "lambast" her for no reason at all. This is especially true since the Grievant's Supervisor states that she believed the Grievant's reason for asking to complete the case notes first was an "excuse" and that she told the Grievant while they were on the telephone that she was being "resistant to transferring a case"; that her behavior continued a "pattern of refusals to follow directives for closing or transferring cases"; again, referenced the March 4th case as proof of her assertions, and, finally, told the Grievant that they needed to meet so that she could talk with her about her work performance.[12] There is no question that this exchange between them was heated but there is no evidence as to what the Grievant actually said and, without that evidence, it must be concluded that both reacted improperly and that both were responsible for the heated exchange that occurred between them.

From a review of the record it is evident that the Grievant's Supervisor was primarily responsible for the "snippy" and inappropriate e-mail the Grievant sent her Supervisor later that day. They were exchanging e-mails in an attempt to agreed upon a different time to meet since the time initially set conflict a work appointment the Grievant had. During that exchange

[12] This conclusion is based upon the fact that the Supervisor indicated in the charge that there was some discussion about the Grievant's Union Representative being present at a meeting to discuss her work performance and the e-mail exchange following the telephone call related to setting a time for the meeting convenient to both.

of e-mails, the Grievant asked, at least twice, what the Supervisor meant when she indicated that the meeting would be a "formal" one. While the Supervisor states that she did not answer the question, it is obvious that she was refusing to answer the question and that this refusal caused the Grievant to send an e-mail which stated "Does 'Formal' mean I should wear a suit and tie then?"[13] While there is no question that this e-mail was "snippy" and inappropriate, a conclusion as to whether she should be disciplined for it must be tempered by the fact that the Grievant's Supervisor had a responsibility to answer the Grievant's question and that her refusal to answer the question caused the Grievant to react as she did.[14]

Finally, it is noted that the Grievant's Supervisor charged the Grievant with continuing a "pattern of inappropriate detrimental behavior" after she received the e-mail in question. Again, while the content of the e-mail is discourteous, there is nothing in the e-mail that indicates the Grievant intended to cause harm to the Supervisor or to the Employer's property. Consequently, a charge of detrimental is excessive and without cause.

In summary, based upon the above discussion, it is concluded that items one through four were not considered in determining whether the Employer had just cause to issue the five-day suspension since they either do not represent action that is cause for discipline or the delay between the occurrence and notice to the Grievant was not timely. Further, it is concluded that with items five, six and seven, the Employer denied the Grievant her due process rights by failing to put the Grievant on notice that her conduct would not be tolerated and by failing to fairly and objectively investigate the allegations of wrongdoing and that these violations of the Grievant's due process rights are sufficiently egregious to overturn the discipline imposed. In addition, it is concluded that even if the Employer had conducted a fair and objective investigation the investigation would have shown that the degree of discipline imposed was too harsh since there was no proof of misconduct on April 30th; since the evidence establishes that the Grievant was only guilty of behaving discourteously, if that, during her telephone

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[13] It is assumed that this is the e-mail which the Supervisor referenced although no e-mail was attached to Employer Exhibit 6 which is the Notice of Final Warning.

[14] The Supervisor's refusal to answer this question is particularly troublesome since the record indicates that she meant that she intended to discipline the Grievant when she told the Grievant the meeting would be "formal" and the Grievant under *NLRB v. J. Weingarten, Inc.*, 95 S.Ct., 88 LRRM has the right to know that discipline is likely and to have union representation present when the meeting or interview will result in discipline or when the employee reasonably fears that this meeting with management could result in disciplinary action and requests union representation.

conversation with her Supervisor on May 2nd and that her Supervisor was partially responsible for the heated exchange that occurred during the conversation, and since the e-mail the Grievant sent her Supervisor on May 2nd was "discourteous" and inappropriate but not "detrimental" behavior. And, finally, based upon these findings, the most egregious of which is the Employer's denial of the Grievant's due process rights, it is concluded that the Employer did not have just cause to issue the Grievant a five-day suspension and the grievance is sustained.

The Notice of Termination:

The second issue before this Arbitrator is whether the Employer has just cause to terminate the Grievant for insubordination and will still be addressed although it has been concluded that the Employer did not have just cause to issue the Grievant the Final Notice of Warning and the discipline imposed in that notice is being overturned. That finding does not make work-related directives contained in the Notice moot. Consequently, in determining whether the Employer has just cause to terminate the Grievant, the questions to be addressed with respect to the termination are whether the Employer complied with the due process requirements needed to establish just cause and whether, on the merits, the Employer's work order was reasonable and, if the order was reasonable, whether the Grievant was guilty of the misconduct alleged and whether guilt of that misconduct warrants termination.

Specifically, the Grievant is charged with having failed to comply with three directives set forth in the Notice of Final Warning[15] and that she had been warned that failure to comply with any of the directives in the Notice would be considered insubordination and grounds for immediate dismissal.[16] Two of the three items listed as directives state that the Grievant will be terminated if she is insubordinate to any supervisor or if she exhibits any detrimental behavior, incompetence or inefficiency in performing her duties; if she fails to follow instructions or if she exhibits discourteous conduct or unsatisfactory work performance. The third item advises the Grievant that her telecommuting privileges have been revoked

[15] Although four items are listed as directives, there are only three relevant items since the fourth item is a repeat of item three. Further, while they are identified as directives items one and two are more properly identified as a warning to the Grievant that she will be disciplined for certain behavior in the future and only item three is an order, which if violated, could be considered grounds for insubordination.

[16] While an employer may appropriately warn an employee that future misconduct will be considered as grounds termination, it is not reasonable to make that assertion when there is no evidence that the employee has been guilty of similar misconduct or that the employee has an extensive disciplinary record. Consequently, although the

permanently; that she will work on site at the Marshall office and that upon her return to work she is required to have all her files in the Marshall office. As support for its position that the Grievant violated these directives, the Employer stated that the Grievant violated them when she did not return her case files on May 16, 2008 "as repeatedly directed to do so", and when she exhibited unprofessional and detrimental conduct upon her return to work and failed to follow instructions and work direction identified in the final warning. While there is a third bullet which states that the Grievant's "continued failure to follow instructions is insubordination and negatively affects outcomes to stakeholders served by . . . (the Agency)" it appears that the Employer intended this bullet to summarize the two previous bullets and that it is terminating the Grievant for failing to obey a direct order to bring in her files when she returned from her five-day suspension on May 16th and for her behavior on May 16th in response to being told that she had been required to bring in all the files and that she should leave the office immediately.

Just as with the Notice of Final Warning, the Employer is quick to label the Grievant's actions by using the misconduct terms identified in the personnel policy as cause for discipline and fails to provide reasonable detail as to the specific actions, with the exception of the Grievant's failure to bring in the files, it believes supports a finding of the alleged misconduct. At hearing, the Employer argued that the Grievant's emotional reaction to being told that she had been directed to bring in the files and had failed to do so and her behavior in the telecommuting pod when the Agency's Director attempted to talk with her were also cause for the charge of insubordination although no reference to this conduct was made in the Notice of Termination. Consequently, just as with the Notice of Final Warning, the Grievant, the Union and the Arbitrator have been left with trying to decide what actions the Employer is specifically relying upon as proof that it has just cause to terminate the Grievant. In that respect, since the Notice references "unprofessional and detrimental" conduct, this Arbitrator has decided to consider the charges made in the Notice as well as the charges asserted by the Employer during the hearing in determining whether the Employer had just cause to terminate the Grievant.

Again, as with the previous discipline discussed, the record indicates that the Employer violated the Grievant's due process rights in its charge against the Grievant when it failed to

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Employer made this assertion in the Final Notice, the warning is overly broad and does not grant the Employer the

conduct a fair and objective investigation and when it failed to gather all the relevant information by granting the Grievant an opportunity to relate her side of the story before it decided to terminate. Of special concern as it relates to an investigation, is the Employer's arbitrary response to the fact that the Grievant had failed to bring in the files as directed and its conclusion that the Grievant was guilty of insubordination without making any effort to determine whether the Grievant willfully and deliberately disregarded the directive to bring in the files or the directive to leave the office issued later that morning; whether the directive regarding the files was clear and explicit or whether it was so essential that the Grievant immediately comply with the directive that it could not grant the Grievant sufficient time to comply with the directives.[17] This failure to conduct a fair and objective investigation and lack of reasonable response is a serious violation of the Grievant's due process rights which requires that the Employer's decision to terminate the Grievant be overturned.[18]

Here, as with its previous disciplinary action involving the Grievant, the Employer relied upon the fact that an incident occurred as sole proof that it had just cause to discipline her when, in reality, it is obligated to provide proof of intentional wrongdoing and not just mere assertions of wrongdoing. As the facts relevant to this incident are unraveled, the record establishes that although the Grievant failed to bring in the files as directed, the order to bring in the files was not clear and explicit; that the Grievant attempted to clarify that order but was stymied in her efforts to do so; that the Grievant did not refuse to bring in the files; that she did not refuse the Agency Director's order to leave the office later that morning, and that her emotional reaction that morning, while inappropriate, was not serious enough misconduct to warrant discharge.

Since both the Agency Director and the Director of Business Management testifed that the Grievant's failure to bring in the files when she returned from the five-day suspension was

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right to discharge the Grievant for action it considers as misconduct.

[17] **Discipline and Discharge in Arbitration**, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Washington, DC, 1999, pp. 156-57 sets forth these criteria, as well as the need to show that the directive was work-related and that the employee knew the consequences of violating the directive, as proof needed to support a charge of insubordination.

[18] While the Employer did tell the Grievant that she was entitled to request an opportunity to "hear an explanation of the evidence against . . . (her) and to present . . . (her) side of the story while still in pay status," this hearing was intended to provide the Grievant her right under Loudermill to hear the specific charges and evidence against her and to give her an opportunity to tell her side of the story and differs from the Grievant's

proof of insubordination and the primary reason they decided to terminate her, this issue will be discussed first. While both asserted that the Grievant's failure to bring in the files as directed was insubordination, there is no evidence that either investigated whether the criteria required to establish proof of insubordination existed.[19] Instead, the Agency Director testified that he authorized the recommendation to terminate the Grievant based upon his conclusion that she had not brought in the files as directed but that he did not know the reason why she had not brought them in, obvious proof that he relied solely upon information given him and did no investigation on his own.

There are problems with the Director of Business Management's testimony also. With respect to this charge, she testified that she had concluded the Grievant was insubordinate since she had not brought in the files and that all she she after discovering that the Grievant had not brought in the files they had talked about the fact that she had not brought in the files and that she had re-read the Notice of Warning to the Grievant as evidence that she had been required to do so. She also testified that the Grievant offered no excuse, other than she didn't realize which files she was to bring in, for why she did not have the files and that she knew that the Grievant "was having a problem taking directions".[20] This Director further testified that the Grievant had made no effort to contact her prior to her return to work to say that she could not bring in the files and that the Grievant had made no offer to bring in the files in order to resolve the problem and relied upon this as proof that the Grievant did not intend to bring in the files.

If either Director had made an effort to investigate why the Grievant had not brought in the files, they would have discovered that the order to bring in the files was not explicit; that the Grievant did make an effort to talk with management, more than once, regarding which files she should bring in prior to arriving at work on the 16th without them, and that she did offer to bring in the files later that day. While a conversation with the Grievant concerning the files prior to her return to work on the 16th might have helped, there is evidence in the record

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right to tell her side of the story during an investigation conducted by the Employer in order to prove guilt of wrongdoing.

[19] In order to prove insubordination, the employer must show not only that the employee did that which was alleged but that the employee willfully and deliberately refused the directive; that the directive was clear and explicit; that the directive was given by someone with appropriate authority; that the employee knew the consequences of failing to obey the directive, and that the employee had given time to correct the insubordinate behavior, if practical.

[20] This conclusion was certainly based upon unproven hearsay since she testified that she was not involved in drafting the five-day suspension; that she not talked with the Grievant about what had happened before the suspension and had not reviewed her earlier performance evaluations.

which should have put the Employer on notice that its directive, despite the Director of Business Management's reiteration of that directive to the Grievant's Union Representative, was not as clear and explicit as the Employer asserts. While the Notice states that the Grievant will be required to bring in the files immediately upon her return from suspension and the Employer asserts that they told her, both at the meeting when the Notice was issued and when the Grievant's Union Representative inquired as to which files the Grievant should being in, that she was to bring them in upon reporting to work that morning, this directive conflicts with another directive also contained in the Notice of Final Warning which states that during her suspension the Grievant "may not act in any capacity as an employee of . . . (the Agency) nor may . . . (she) access . . . (her) office or any equipment owned or leased by the Agency" and that violation of this directive would result in "further disciplinary action". This conflict certainly is a cause for confusion and makes the directive to bring in the files less than clear.

Evidence in the record also establishes that the Grievant made an effort to clarify this directive at least three times while on suspension and before she returned to work on Friday, the 16th. The record establishes that the Grievant first attempted to contact her immediate Supervisor regarding this issue on Tuesday only to find out that she was not the office due to a medical emergency. It also establishes that the Grievant then talked with her Union Representative and asked her to talk with the Director of Business Management regarding which files she should bring in and to see if she could be granted personal leave on Friday so that she could keep a medical appointment and that the Union Representative did talk with the Director of Business Management and relay her response to the Grievant. Finally, the record establishes that the Grievant, still unclear about the files after talk with her Union Representative, attempted to call the Director of Business Management to discuss the issue on Thursday only to find out that this Director was out of the office for the day. This evidence hardly indicates that it was the Grievant's intent to willfully disregard the directive to bring in the file but, instead, shows a confusion about when the Grievant needed to bring in the files.[21]

[21] It is noted that the Grievant advanced others arguments that did nothing to help her case. Among them was that she didn't know which files to bring in because she had files for two different departments and that if she gathered the files together to bring in on Friday she would have needed to work overtime and the Employer had made no offer to pay her overtime. These arguments are specicious and certainly shed light on why the Employer is less than willing to work with her.

Finally, the record establishes that the Grievant did offer to bring in the files and that the offer was a timely one. While it is undisputed that the Grievant did not offer to bring in the files during her morning meeting prior to her leaving for her medical appointment, the evidence establishes that she called the Director of Business Management immediately after her appointment and offered to bring them in but was told that it would not be necessary. While the Director testified that this type of conversation did not take place, an e-mail from the Grievant's Union Representative to the Agency Director confirms that the Grievant called the Director of Business Management and that she offered to bring in the files.

A fair and objective investigation would also have shown that the Grievant was charged with arriving late for work on the 16th; that she was charged with refusing to leave the office after being told to do so without evidence to support the charges and that her emotional response while in the office that day was inappropriate but not insubordinate. While both the Agency Director and the Director of Business Management charged the Grievant with arriving late for work that morning, the Agency Director's testimony that he did not know how late she had arrived for work indicates that his conclusion was based solely upon a statement made by the Director of Business Management and not upon any evidence to that effect which he had gathered. Further, the Director of Business Management reached her conclusion based soley upon the fact that she went to the telecommuting pod at 8:00 a.m. and did not find the Grievant there and that she then first saw the Grievant at 8:10 that morning.

Reliance upon these evidence, as proof that the Grievant arrived late for work is arbitrary, at best since there is evidence that there is reason to question that conclusion. In reaching her conclusion, the Director of Business Management testified that she was asked to talk with the Grievant since the Grievant's direct Supervisor remained absent from work that morning; that she went to the telecommuting office at 8:00 a.m. that morning to find the Grievant; that, when she did not find the Grievant, she went to the office of the Grievant's previous direct Supervisor to ask him to sit in on the meeting with the Grievant, and that when saw the Grievant as she exited his office about 8:10 a.m. she asked her to come into the previous direct Supervisor's office. Based upon this testimony, the only conclusion that can be reached is that this Director did not see the Grievant between 8:00 and 8:10 that morning since there is no other evidence to support the Director's assertion and since the record establishes that an investigation into this assertion could have confirmed or denied the Grievant's assertion

that she had arrived on time that morning by talking with other employees in the Department. In this respect, the Grievant testified that she arrived at 8:00 that morning and went to look for her immediate Supervisor only to find out that she remained absent from work; that she then went to the office of the Director of Business Management to talk with her and found out that she was not in her office, and that as she passed the office of her previous direct Supervisor on her way back to the telecommuting area, she saw the Director of Business Management and was told to come into the office of her previous direct Supervisor. Since it would have been easy to verify that the Grievant had talked with other employees about the whereabouts of both her Supervisor and the Director of Business Management and since there is no testimony disputing the Grievant's assertion as to where she was been 8:00 and 8:10 a.m., it is concluded that the Grievant's testimony is credible. It only makes sense that one would search out one's immediate Supervisor upon return from a suspension and that it would take some time to find out that she was not in the office and to find out that the Director of Business Management was not in her office before the two saw each other at 8:10 that morning.

This same lack of objectivity and failure to investigate is apparent in the Employer's charge that the Grievant refused to leave the office that morning after being directed to do so. The record establishes that the only thing both the Agency Director and the Director of Business Management knew when they concluded that the Grievant had refused to leave the office as directed is that the Agency Director met with the Grievant in the telecommuting pod sometime after 8:45 a.m.; that he had told her based upon her emotional state of mind that she must leave immediately, and that she was still there when they both went to a meeting at 9:00 a.m. Not only is there no evidence that the Grievant was told that if she did not leave immediately she would be disciplined but there is no evidence that the Grievant indicated she was not willing to leave the office and the record establishes that the Grievant's prior direct Supervisor who was also at the meeting work with the Grievant was asked to help her leave and that she did leave after by no later than 9:30 a.m. after composing herself and collecting boxes in which to pack the files. Since neither the Agency Director or the Director of Business Management provided any evidence, other than their assertions, this charge is rejected since their assertions are no sufficient proof that the Grievant deliberately refused to leave the office as directed.

Finally, there is no evidence that the Grievant's emotional response during her meeting with the Agency Director in the telecommuting pod is cause for a finding of insubordination or for termination. Although the Agency Director states that the Grievant was very loud, upset and discourteous and charged her with "put(ting) out salacious things in a public environment" the record establishes that the Grievant was emotionally distraught and that she was crying and probably loud. It does not establish, however, that she said anything "salacious" or threatening. Instead, the Agency Director testified on cross-examination that he believed the Grievant had said "salacious" things when she accused the agency of a plan to get rid of her and of being unethical but that he did not know if she had sworn during the exchange and that she had not made any threats. This conduct and her comments, while inappropriate and cause for discipline, certainly do not warrant termination.

Based upon the above discussion and review of the record pertaining to termination, it is concluded that the Employer did not have just cause to terminate the Grievant for insubordination since it denied the Grievant due process rights to which she was entitled and since it failed to prove that the Grievant deliberately intended to disregard the directive to bring in the files; that she refused to leave the office as directed; that the order to bring in the files was clear and explicit, that the Grievant was informed that she would be disciplined if she did not leave the office as directed, and that the Employer failed to show that there was a valid reason for not giving the Grievant adequate time to comply with either directive. Further, while there is evidence that the Grievant failed to follow instructions with respect to the files and that she over-reacted the morning of the 16th when she was told that she had been required to bring in all the files, no lesser discipline is being imposed since it is obvious that the Employer never intended to conduct an adequate investigation into whether the Grievant had been insubordinate but, instead, intended to rid itself of an employee whom it viewed as a troublesome employee, a position a neutral can understand but cannot accept as reasonable when there are procedures established by a collective bargaining agreement that must be followed.

Given the fact that the Employer is intent on finding problems with the Grievant's work performance and that it consistently relies upon assertions rather than evidence as support for its position and the Grievant appears intent on continuously questioning her Supervisors' directives, this Arbitrator is hesitant to order reinstatement since the working relationship

between the two will not be a good one. The record, however, does not support a finding by this Arbitrator that the Grievant should receive back pay with no reinstatement. That remedy is generally reserved for situations in which the Employer had denied an employee procedural due process but the employee was, in fact, guilty of the alleged wrongdoing. In both grievances in this dispute, not only did the Employer denied the Grievant her procedural due process guarantees but it failed to provide proof sufficient to establish that the Grievant did that which it alleged. Consequently, based upon the record, the arguments advanced by the parties and the discussion above, the following award is issued.

AWARD

The Employer failed to establish it had just cause to issue the Grievant a Notice of Final Warning with a 5-day Suspension without Pay on May 8, 2008 and the grievance appealing this action is sustained. Consequently, the Employer is ordered to remove the Notice from the Grievant's personnel file and to make the Grievant whole for any wages and/or benefits she may have lost as a result of the five-day suspension.

The Employer also failed to establish it had just cause to issue the Grievant a Notice of Termination on May 18, 2008 and the grievance appealing this action is sustained. Consequently, the Employer is ordered to remove the Notice of Termination from the Grievant's personnel file and to make the Grievant whole for any wages and/or benefits she may have lost between the time she was terminated and the time when she is reinstated, less any interim earnings. Although the Union has requested that the Grievant be reimbursed for any medical costs she may have incurred as a result of the termination, that request is denied.

Further, while the Arbitrator ruled during the hearing that she would allow the Employer to submit after-acquired evidence for the purpose of addressing damages should the Grievant be reinstated, this award is being issued without considering such evidence. Accordingly, the Arbitrator is retaining jurisdiction for the purpose of timely determining the amount of back pay to which the Grievant is entitled should the parties be unable to reach agreement on that amount.

By: _____
Sharon K. Imes, Arbitrator

September 2, 2009
SKI