IN RE ARBITRATION BETWEEN:

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFSCME COUNCIL 5

and

STATE OF MINNESOTA

DECISION AND AWARD OF ARBITRATOR

BMS 08-PA-1396, 08-PA-1397, 09-PA-0461

JEFFREY W. JACOBS

ARBITRATOR

October 27, 2009

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AFSCME Council 5,

and

State of Minnesota

DECISION AND AWARD OF ARBITRATOR
BMS Case #'s 08-PA-1396, 08-PA-1397, 09-PA-0461
Diane Haller grievances

APPEARANCES:

FOR THE UNION:
Gladys McKenzie, Union Field Representative
Diane Haller grievant
Pam Richardson, former HIMS OAS Sr.
Diane Firkus, Union Field Representative

FOR THE STATE:
Rebecca Wodziak, Labor Relations Specialist DOER
Ralph Schmidt, Director of OSI
Melissa Gresczyk, Human Resources Director MSOP
Sara Rose, Criminal Intelligence Analyst OSI
Beth Virden, Investigator OSI
Thane Murphy, Investigator OSI
Jamie Jungers, Supervisor OSI

PRELIMINARY STATEMENT

The hearing in the above matter was held on October 12 and 13, 2009 at the DHS Facility in Moose Lake, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties waived post hearing Briefs.

ISSUES PRESENTED

The parties stipulated to the issues as follows: Did the Employer have just cause to issue a five (5) day suspension, a seven (7) day suspension and dismiss the grievant? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2007 through June 30, 2009. Article 17 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

STATE'S POSITION:

The State's position was that there was just cause for the disciplinary suspensions and discharge of the grievant. In support of this position the State made the following contentions:

1. The State acknowledged that the grievant was a long time employee with the State and that she has nearly 24 years of service. The State further acknowledged that the first 23 years of that service met or exceeded expectations. Despite that, she bid from a job she was doing into a job she was simply not capable of doing. The grievant bid into the position of Office and Administrative Specialist Intermediate, OAS-I at the Moose Lake DHS facility. As an intermediate she was expected to know computer systems, data entry and various computer programs upon their entry into the new job. It was further expected in a bid situation such as this that the successful bidder be able to "hit the ground running" so to speak and been performing the job almost immediately. While there is always some orientation and acclimation necessary in a new job, the State argued that the grievant was never able to master the essential duties of the job. The State asserted that this is a sad situation but that the fact remains that the grievant was unable to perform at even an elementary level and further that she made a multitude of mistakes that could not be tolerated.

2. The State pointed out that the grievant works in a secure facility housing the Minnesota Sex Offender Program, MSOP, and that her new position was with the Office of Special Investigations, OSI. That office is responsible for investigating various kinds of rule infractions and even criminal activities by patients and staff. This requires a high degree of security and further requires that confidential information be kept strictly confidential. The grievant was aware of this "culture" within the OSI office and knew or should have known of the seriousness with which that office treated such information.

3. The State asserted that there is not a “no harm no foul” attitude within that office. OSI and its employees must be extra vigilant about security given the sometimes highly sensitive nature of the information and the investigations it undertakes. The Director and several employees of OSI even indicated that the culture within OSI is literally to handcuff dead people, as a somewhat backhanded way of saying that they take nothing for granted and that security is of the highest priority. It was into this environment that the grievant voluntarily placed herself.

4. The grievant’s job entailed, among other things, data entry, which on its face is a relatively simple job but which requires attention to detail and security. Information the grievant was privy to was thus very sensitive at times and must be protected. She should have known given the atmosphere of extreme security consciousness not to release any information, even inadvertently, to anyone not specifically authorized by her supervisor to receive such information. The State also asserted that despite the fact that mistakes of this nature, i.e. information being disseminated in error may occur in other areas of the facility, such errors were not treated lightly at OSI.

5. Within a few days of her employment, the State asserted that the grievant made a serious security breach by releasing two separate pieces of information where confidential information regarding patients was released in error. In one instance information was given in error to a patient, whom then shared that information with yet another patient. She was issued a 3-day suspension for this oversight. This was not grieved and is now part of the grievant’s official disciplinary file.

6. The State further asserted that the grievant was granted the job only because of her seniority due to the bidding process found in the labor agreement. OSI is a relatively new department at the Moose Lake facility and the supervisor was concerned when he noted that the grievant had been hired into the job that she may not be able to handle the rigors of this new position. He met with her along with one of the investigators a few days before she started the new job.

7. What he saw and heard from her disturbed him. Her desk in the medical records position she held immediately prior to the OSI position, was disorganized and a mess. She tended to blame this on deficiencies with her supervisor and other matters. He informed her quite clearly at that meeting that she could not blame the supervisor or anyone else in her new job and would need to be organized and accurate in her now position. She claimed to have understood this but, as will be argued more below, it became obvious she did not fully understand or appreciate the seriousness of this admonition and was unable to "catch on" to the new duties.

8. The grievant was given training on October 3, 2007 with Ms. Sarah Rose, who worked at the St. Peter facility but who came to Moose Lake specifically to train the grievant. The State asserted that Ms. Rose had grave concerns about the grievant's ability to learn the computer skills necessary to perform the duties of her new job. She was unable to use a mouse and instead used CTRL or ALT or "F" keys instead. These slowed her down considerably and caused inaccuracies. Ms. Rose sent messages detailing her concerns to the grievant's supervisor, see State Exhibit 6, E-mail from Rose to Jungers dated October 4, 2007.

9. The grievant's co-workers also raised concerns. The investigators were quite pleased and anxious to have the grievant take over the data entry duties, as they had been doing them until she arrived. Within a few days however, they began noticing how slowly the grievant worked and raised concerns about the length of time it was taking her to complete the data entry functions. The State further indicated that these entries are time critical since the data entry functions must be completed so the investigators know where to start and take their investigations. The job should be done within a few hours yet the investigators noticed that it frequently took until mid or even late afternoon for her to complete her job.

10. The State asserted that the grievant continued to make errors and failed to show any aptitude for the job. While it is a sad situation, the grievant simply has no facility for this position and despite repeated coaching and training from Ms. Rose, her supervisor and the investigators in the office she was unable to learn the job. She failed to ask questions or get help when needed from the investigators or from Ms. Rose, who was but an e-mail or phone call away yet the grievant continued to make mistake after mistake on crucial data entry functions.

11. She provided no viable excuses or explanations for this. The State asserted that while the grievant was struggling to learn the most basic functions of her job, another employee who was hired into the OSI office in St. Peter to perform the identical function was learning her job within a few days and performed in an exemplary fashion. See State Exhibit 26, showing the number of tasks the grievant was able to perform versus those that were completed by other staff at Moose Lake. It also shows the tasks performed by the person in St. Peter and provided documentary support for the State's assertion that the other OAS-I in St. Peter performed her job without errors on time and with a minimum of learning time. The grievant was never able to match that performance level.

12. The State argued that the Union never introduced any evidence as to why this was the case and it can be assumed that the failure to learn the job was entirely the grievant's fault. The State further asserted that the grievant acknowledged the need to work faster and acknowledged the errors she made but was unable to correct these deficiencies despite the help the employer provided to her.

13. The State countered the Union's claim that in November the grievant lost a full week due to equipment problems and an inability to log onto her computer. She was in training for one full day of that week and the State made every effort to get her back on the system after she returned from her 3-day suspension. The State further asserted that it is normal to "red tag" a person's keys in such a situation so they do not have access to the facility and it is further normal to lock them out of their computer while on suspension. While she was locked out for a short time she still demonstrated no alacrity for her job and took little or no initiative to learn the tasks or details of it.

14. After the grievant served the 3-day suspension referenced above and after the supervisors began noticing the slowness with which the grievant performed her job the supervisor met with the grievant and gave her a Letter of Expectations. That letter contained very specific work direction, including a specific direction that her hours were form 8:00 a.m. to 4:30 p.m. and that she was not to deviate from that. It further required her to enter all the necessary information into the OSI database by 9:45 a.m. each day. The letter further indicated that the grievant's supervisors would meet with the grievant on a bi-weekly basis. Once such meeting was held but before much more time passed, the grievant had committed a further breach of security and her job performance had slipped even further from what was expected of her.

15. The grievant sent a confidential report about a staffer to that person's supervision. This was in direct contravention of security protocols and presented a potential danger to the staff person and perhaps others within the facility. It may also have jeopardized any investigation by OSI in the event one was needed. The grievant was already well aware of the need for security and her actions in releasing that report presented a serious breach of work directives.

16. In addition, the State noted that her supervisor audited some 79 data base entries and found significant errors on 40 of them. These were not "minor" errors, such as typos or some minor grammatical error but rather were significant mistakes. Some of these included data that a weapon was used in an incident where none was used, failure to enter all of the patients involved even though those patients were identified in the narrative portions of the report, indicating there was a fire when none was and others. The State noted that accuracy is critical so that OSI can conduct an appropriate investigation. In other instances the Attorney General's Office or the legislative offices may contact OSI to request certain statistical data and it is crucial that the information entered by the grievant on the Intel Database system be accurate so that the proper information can be given to these and other State or Federal agencies.

17. The grievant was given a 5-day suspension for the second serious breach of security in releasing data to the staffer's supervisor, her ongoing inability to meet expectations, i.e. taking too long to compete tasks, errors and for her unwillingness to ask if she is unsure where to place something on the data entry forms and for leaving 15 minutes later than her scheduled hours. She was specifically told not to stay later than 4:30 p.m. and yet she deliberately disobeyed that direct order as set forth in the Letter of Expectations referenced above.

18. The State noted that the grievant was on an FMLA leave and was limited to working no more than 4 hours per day. Her employer accommodated that limitation and again specifically directed her not to work more than that in order to comply with her doctor's recommendations. On January 28 and 29, 2008 she was directed to assist in setting up a training session in an offsite location. This training had nothing to do with her job and was on drug recognition techniques. She was allowed to arrive at 7:30 to set up but was specifically told not to stay more than 4 hours that day. She returned to work but stayed there until 1:30 p.m. well after the time she had been directed to leave work and in direct contravention of her supervisor's order to her.

19. Moreover, on the second day she was again directed to return to work after she finished setting things up but returned and stayed the entire day at the training. When confronted with this insubordination her response was that the building where the training was held was public and that she could attend as she pleased.

20. By the time of the 7-day suspension in February 2008 her supervisor had so completely lost confidence in her that she was taken off everything except the most rudimentary tasks. In fact, she told her supervisor she hated the job, knew it was a bad fit and was actively seeking another position elsewhere in the State system. Mr. Jungers went through the grievant's job description, See Joint Exhibit E, and indicated that he only had her doing a fraction of the tasks listed there.

21. Despite being given only the most menial tasks the grievant took no further initiative to learn her job or do additional training to learn it. She was apparently content to coast along doing only a portion of the job for approximately 4 months. Finally, the supervisor tried one more time to train the grievant to do the job. Again she failed and demonstrated no ability to do the job or to learn it. She committed the same errors and the same lack of understanding of the essential duties of the position.

22. The State asserted that there is no disparate treatment here and that while some errors were treated differently in other departments, OSI is different and the grievant knew that. Thus, the consequences for other employees' errors in other areas do not apply here.

23. Further, the grievant's job search efforts were not hampered by the State but rather by the terms of the labor agreement and the 6-month bid ban in place to cover the grievant's exact situation. The State did nothing to prevent the grievant from getting another job.

24. The State asserted finally that it is not reasonable to retain an employee who cannot do the job. The grievant has been given multiple chances to perform and she has not. In these circumstances, the only reasonable solution is to uphold the suspensions and the dismissal.

The State seeks an award sustaining the 5-day and the 7-day suspensions and the dismissal and denying the grievances.

UNION'S POSITION

The Union's position was that there was not just cause for any of the discipline involved in the matter. In support of this position the Union made the following contentions:

1. The Union asserted that the grievant is a long-term and valued employee who has been with the State of Minnesota for nearly 24 years. The Union further noted that her evaluations show an exemplary employee whose evaluations showed a motivated, dedicated employee who worked hard and was quite competent.

2. The Union countered the allegation by the State that the grievant is disorganized or incompetent by pointing to the evaluations from years of excellent service. They show in many cases that the grievant is both organized and very competent. She demonstrated her motivation to perform her job under several different supervisors over many years. At no point did she ever fall below "meets expectations" and in most cases, exceeded expectations in almost every category. There is thus no reasonable basis to assume that the grievant is unmotivated or uninterested in doing her job.

3. The grievant has received numerous laudatory comments from coworkers both inside and outside of her department and from outside the agency. It is clear, asserted the Union, that her dedication to excellence is unparalleled. She has been descried as hard working and conscientious by many people with whom she has worked. The Union painted a very different picture therefore of the grievant's workplace demeanor and work ethic than did the State.

4. The Union pointed to Mr. Jungers as a new supervisor who was not familiar with the position and sought somehow to talk the grievant out of the job. It was obvious that he did not want her there, commented that the only reason she got the job was because of her seniority and tried at every turn to make her feel unwelcome. He showed up announced a day early in her workstation in Medical Records and grilled her in a way that was designed to make the grievant feel unwelcome and uneasy about the job. When she tried to explain why her workstation was disorganized the day he and Ms. Virden appeared, i.e. because their supervisor was gone and they were in the middle of a reorganization of the department, he dismissed her answers and replied in a terse and disrespectful tone to her. The Union asserted that the grievant was on a "failure track" from the first day.

5. As an OAS-I she was deemed qualified for her job under the labor agreement however, the supervisor expected her to know every minute detail of the job even though the OSI position was newly created and despite the fact that the grievant had not been trained. The Union asserted that it is unreasonable to expect that a person coming into a new job, and a newly created position no less, be able to perform everything all at once.

6. The Union further pointed out that the grievant started her job on September 19, 2007 and almost immediately went on vacation. This was approved and had been planned for many weeks. She did not even receive any training on the new Intel Data Base until October 3, 2007 with Ms. Rose. The feedback she received from Ms. Rose was positive even though Ms. Rose was not even certain what she was to train the grievant for. See State Exhibit 6, e-mail from Sara Rose to Jamie Jungers.

7. Moreover, the Union pointed to e-mails sent directly to the grievant, see Union Exhibit 4, and asserted that the feedback Ms. Rose gave to the grievant was in fact positive. Unbeknown to the grievant however, Ms Rose was disparaging the grievant behind her back to the supervisor. The grievant never saw these until months later and was unaware of how Ms. Rose was trashing her. She was further unaware of how her co-workers were trashing her and never saw the e-mails between Ms. Virden and Mr. Murphy until months later.

8. The Union also pointed out that there were various sorts of technical and equipment problems the grievant faced that her counterpart in St. Peter may not have. As the e-mail from Ms. Rose dated 10-4-07 shows, the grievant did not even have access to several of the databases she would be working with at OSI. The Union also noted that Ms. Rose is already in St. Peter so that a comparison to the work performance between the grievant, who is in Moose Lake, and her counterpart are unfair. The person in St. Peter has ready access to Ms. Rose and can simply ask a question and get hands on training virtually whenever she wanted. The grievant had to get special dispensation from a supervisor who was already openly hostile toward her to get any training at all.

9. The Union also argued that the only documented training the grievant received was with Ms. Rose. She was only there for ½ day on October 3rd and again in November but even then did not spend much time with the grievant. On that second day of training, the grievant was in the process of meeting with Mr. Jungers getting the Letter of Expectations and had to attend another training session. Thus, Ms. Rose was not able to spend even ½ day with the grievant on that day.

10. As discussed more below, the Union noted that by the time Ms. Rose was there for the 3rd day of training in June 2008, the die was already cast and the grievant's fate was already sealed. The Union further asserted that the investigators did not spend anywhere near the time with her they said they did and even then the meetings were hardly to be considered training.

11. The Union also disputed the amount of time Mr. Jungers spent training the grievant as well. The Union contended that he was rarely there to train her and did not follow through on the promised bi-weekly meetings to give feedback and further coaching as set forth in the Letter of Expectations. They met only once for that purpose.

12. The Union asserted that the supervisor never truly wanted the grievant to succeed and thus never met with her as promised. Instead he accumulated mistakes that the grievant had made, many of which she was unaware of or had valid explanations for, and dumped them in her lap in November 2007 as part of the 5-day suspension.

13. The Union acknowledged that the arbitrator did not have power to overturn the 3-day suspension now but argued first that this was simply too much discipline too soon. In any other place in this facility the grievant would have faced a warning at most. Here the supervisor went immediately to a 3-day suspension. This was unheard of in this facility and should not be relied upon by the arbitrator in assessing the degree of progressive discipline for any further work rule violations. Simply because the first such discipline is 3-days does not necessarily mean that the "next" such discipline must by definition be greater than that. The arbitrator has the power to determine the appropriate degree of discipline even if just cause for further discipline is found.

14. The Union pointed to the multitude of other technical problems the grievant had that delayed her opportunity to learn her job and made it far more difficult than might otherwise be expected. She had problems with her keyboard; she only had one monitor for months and did not get a second monitor until near the very end of her employment.

15. The Union asserted most vehemently that the grievant could certainly use the mouse and that to insinuate otherwise is insulting. She simply found faster more efficient ways to use the keyboard to do the same thing. In fact some of the "F" and CTRL and Alt keys make it faster to do the job and Ms. Rose is too young to remember how they worked. The grievant, whose employment history pre-dates the advent of widespread computer use, does know how to use those keys – the Union asserted that this is an asset not a liability.

16. The Union acknowledged that the grievant did send some information inadvertently as alleged in support of the State's case for the 3-day suspension. She did not do so intentionally and asserted that these mistakes were simply an extension of the hostile work environment. Moreover, as noted above, these kinds of mistakes occur frequently and no one has ever faced such harsh discipline for such an offense and even though OSI is obviously more security conscious, this does not supplant the requirement of progressive discipline. Such progressive steps starts with warnings; not an immediate 3-day suspension. The Union asserted that this amounted to disparate treatment by the supervisor and should be treated as "too much too soon" by the arbitrator.

17. The Union pointed to similar information that Mr. Jungers sent out to new employees which contained confidential and sensitive data on patients while these people were going through their orientation and may not have even lasted long with the State. This information was given to them to take home yet he faced no discipline even though the grievant questioned him about it.

18. The Union then moved to the 5-day suspension given to the grievant and argued that to hold onto the errors in the way Mr. Junger's did was unconscionable. The Union further argued that this explanation that he did not have time rings hollow given the obvious attempt to make life miserable for the grievant. The Union asserted that the supervisor simply let these accumulate without telling the grievant what she was doing wrong, gave her no notice of these issues and dropped them all on her at once. He met with her only once after the Letter of Expectation, despite his clear promise to do so bi-weekly.

19. The Union pointed to several other problems the grievant had after she returned form her 3-day suspension. She found herself locked out of her computer for an entire week and tried desperately to get back in. See Union Exhibit 7. This took her away from the system at a critical time when she was still learning the new system. The State conveniently ignored this "lost week" in their case yet seeks to punish the grievant for the fact that their own Help Desk department was unable to get the grievant access to her own job duties.

20. Further, the Union characterized the charge that she disobeyed an order by staying some 15 minutes late after work one day to chat with friends as ridiculous. The order regarding her work shift can be reasonably interpreted as requiring her to be at work by 8:00 a.m. and stay until 4:30 p.m. The idea that the grievant would be subject to discipline if she showed up one minute before 7:59 a.m. and was not literally sprinting out the door at 4:31 p.m. is preposterous. The Union's witnesses also characterized this piece of the State's case in similar fashion and further asserted that at no point has anyone ever been disciplined for such an "offense" and indeed characterized the grievant's willingness to stay the full measure of her work day as admirable. A person must be allowed to appear for work a few minutes early to get ready for work and prepare for the workday so they can in fact start work at their appointed time. Likewise, it would be a sorry state of affairs if people were not allowed to chat for a few moments with co-workers after work, as long as they are outside of the secure area. The Union noted that at no point did the grievant ever request overtime nor except the one time when she was in the middle of a phone monitoring call. That overtime request was granted.

21. With regard to the assertion that she disseminated confidential information about a co-worker who was potentially being stalked by a patient, the Union asserted that in this facility people have to watch out for each other. The grievant made the decision to send this information to the staffer's supervisor in order to avert a potentially serious safety violation and to keep that staffer safe. She was never advised not to send this information out and did so innocently enough to prevent a problem; not to create one.

22. The Union asserted that the 5-day suspension should therefore be reversed since it is based on an ambush when the supervisor waited to dump 40 errors on the grievant without providing the meetings he promised, and is based on one of the most ridiculous charges anyone at the facility has ever seen, i.e. staying 15 minutes later than her scheduled time.

23. The Union turned to the 7-day suspension and again asserted that these charges were not only not true but also preposterous. The charge was for working more than 4 hours on January 28, 2008. The Union asserted that the grievant in fact worked 4 hours that day because she had asked for and was granted time off that day by her supervisor. She then returned to work in order to make up that time. Thus there was no violation of any order.

24. With regard to the incident on the 29th the Union again asserted that the grievant worked only 4 hours that day. She showed up at the church to set things up for the conference, performed that task and then returned to her work at OSI. She was interested in the seminar and returned to the church to hear the rest of it. She was not working at that point and did not violate either her doctor's restrictions or a direct order. The building is public and there was nothing to prevent her from sitting in on the seminar.

25. The Union further noted that while the grievant was on a light duty work restriction by her doctor not to work more than 4 hours, that was to keep her away from the work environment; it was not to be on bed rest or the like. Thus, the "order" of her supervisor, even if there was one, was not reasonable as required by the test of just cause.

26. With regard to the discharge, the Union reiterated many of the assertions above and noted that the overall atmosphere was toxic at best for the grievant. She was taken off some of the duties in her job description and is now being punished for not doing those jobs.

27. Further, the Union asserted that the State cannot claim on the one hand that the grievant could not perform the duties listed by Mr. Jungers as not being performed since it was clear that the grievant was never given the chance to perform them. She did as directed by her supervisor; a supervisor who was apparently on some sort of power trip. She should not now be punished for doing exactly as she was told.

28. With regard to the phone monitoring the Union asserted that the grievant was performing as one might expect. The Union pointed out that Mr. Jungers must not have known what was entailed in doing this task since he indicated it should take less than 16 minutes to listen to a call and write down a synopsis of it. The Union asserted that the calls could be up to 16 minutes but that in order to transcribe it one must listen to it all and then transcribe it as the call is going along. Even a trained transcriptionist like the grievant cannot type as fast as a person usually talks making for stops and starts. Thus a 16-minute call will by definition take longer than 16 minutes to transcribe. Further, the grievant was trained as a medical transcriptionist and had to write down every word. While the grievant was shown summaries of those phone monitoring transcripts done by the investigators, the grievant would have had to listen to those actual phone calls in order to know what was being summarized and she simply did not have time for that. The grievant thus did the best she could with this in an effort to be accurate, which was a great part of the critique leveled against her all along here. The Union pointed to this issue as yet another example of the grievant being "damned if she did and damned if she didn't."

29. The Union further noted that the grievant in fact worked very little with the Intel Database and that if the FMLA leave, the time spent trying to deal with the technical glitches and the time she was pulled away from her duties by her supervisor is taken into account, she worked with that system approximately 30 days.

30. By June she had been away from that system for nearly 4 months yet her supervisor still expected proficiency in a Database she had had little training on, was denied access to for days on end due to no fault of her own and had been denied the opportunity to become proficient at by the very supervisor who wanted her to fail. Ms. Rose came on June 12, 2008 to train the grievant but by this time the work environment was so tainted there was little chance she could have ever successfully completed the training to her supervisor's satisfaction. Ms. Rose made the same comments she had earlier about the grievant's skill and inability to pick up the nuances of the Intel Database System.

31. The Union argued finally that management could have worked with the Union to find the grievant another suitable position yet they did not. There could have been a waiver of the bid ban yet the grievant's applications for jobs she was qualified for were turned down. The Union asserted that the State has a responsibility to protect workers like this yet they did not do so here.

32. Finally, the Union argued that discharge is far too severe. The supervisor moved to suspension far too early and never gave her a chance to truly succeed. He poisoned the work environment and never protected or supported her when her co-workers trashed her behind her back. The Union argued that to cashier Diane Haller after 24 years of service is too harsh and argued most vehemently that she should be reinstated to an equivalent OAS-I position in another department.

The Union seeks an award overturning the suspensions and the dismissal and making the grievant whole in every way.

DISCUSSION

The grievant was with the State for nearly 24 years. The evidence showed that for the first approximately 23 of those years her work record was quite good. It was devoid of any discipline and her evaluations showed that she was motivated, dedicated and hard working. She met or exceeded expectations in every one of the evaluations and never fell below "meets expectations" in any of her evaluations. She had three separate supervisors over time all of whom were quite pleased with the grievant's performance.

The grievant did work with computers in her previous positions and none of her supervisors ever raised any concerns about her ability to operate computers at work. See Union exhibit 1 and 2. These both showed the grievant's work ethic and abilities to be quite good. Union Exhibit 1 is a series of evaluations going back as far as 1990, all of which were satisfactory or above evaluations. Union exhibit 2 are a series of letters and memos to the grievant from various sources lauding the merits of the grievant's abilities and in many cases thanking her for effort above and beyond the call of duty.

In the summer of 2007 the grievant exercised her rights to bid for an open position in OSI. It was a lateral move and the classification did not apparently change from the Office and Administrative Specialist Intermediate, OAS-I, class she had previously held. The evidence showed that due to the nature of this transfer she was deemed qualified for the position but her supervisor had concerns about the fact that the position at OSI was different from the position previously held by the grievant.

The supervisor contacted the grievant about setting a meeting to discuss the requirements of her now job. Rather than meeting with her at the time they had set, he showed up a day early with one of the investigators to discuss the new job. The grievant was surprised by this and claimed that she did not have time to adequately prepare for it. Her desk was disorganized and she appeared nervous and somewhat disheveled by this. The evidence showed that the grievant is a very detailed person in some respects and needs to be prepared for meetings like this. It was not clear why the supervisor decided to show up unannounced but it was perhaps to get a better sense of the work habits of the new employee.

It was abundantly clear from the evidence that this meeting did not go well. The grievant felt as though she had been ambushed and subjected to a sort of adverse cross-examination by her new supervisors and felt unwelcome at least and as if she were being talked out of the job at worst. Mr. Jungers felt that the grievant was disorganized and not a good fit for the new OSI department. He knew that the security culture there was very different from what the grievant had experienced in her years with the State in her previous position and wanted to impress upon her the rigors of the new job. He felt that she would not be able to cut it at the new position.

The atmosphere was poisoned on both ends almost immediately and even before the grievant started in the new job.

Things did not improve once the grievant started the job. She began work in mid-September 2007 and took a pre-planned and pre-approved vacation within a few days. As a result she did not receive training on the Data Entry functions of her job until October 3, 2007. At that time Ms. Sara Rose came up from the St. Peter facility to train the grievant on the computer system. There was some evidence that she was not completely certain what the training was about. There was also some indication that she was less than forthright with the grievant about the shortcomings she saw in her job performance. The e-mail message sent October 3, 2007 from Ms. Rose to Mr. Jungers expresses some confusion about what the training was to be for. See State Exhibit 6. The message sent the next day between the same two parties was quite critical of the grievant's abilities.

In stark contrast to the messages referenced above however were the ones being sent to the grievant. These messages were quite different in content and character from those that she was sending to the grievant's supervisor. See Union exhibit 4. The messages sent to the grievant on October 4, 2007 did not mention any of the problems referenced in the messages to the grievant's supervisor and were positive in tone. One such message even references the needs to get the grievant access to some of the databases.[1]

Despite this, it was clear from the evidence that the grievant struggled to learn the new system and had great difficulties "catching on" to the system. She claimed that the drop down menus did not always work properly and that she did not realize that if one stopped at a particular entry on the drop-down menu that entry would automatically be placed in the appropriate line on the data entry sheet.

[1] There was a recurrent theme in the Union's case. The Union asserted that the grievant was thwarted from even accessing some of the databases she was supposedly responsible for from the very start of her employment. The evidence showed this to be true in many cases and that this was due to technical glitches or simply a delay in getting the grievant access and was not, at least at first, due to the supervisor making a conscious decision to block that access due to the difficulties the grievant was having in working with those Databases and other entries.

The evidence showed that this may well have been true but the evidence also showed that she could have and should have checked to see what in fact was going into the box on the data entry sheet. I she had it would have been obvious that an incorrect entry had been made.

At the same time, the investigators in the office were noticing the long time it was taking for the grievant to complete her work. They had been doing these tasks and both were quite pleased to learn that OSI was going to add a staff person to perform these data entry functions so they would not have to. the evidence showed that they continued to do these functions due to the grievant's delays in getting the work done and that they continued to work with and train the grievant on those functions as well. Both Ms. Virden and Mr. Murphy testified credibly that they tried to teach the grievant the system but both became quite concerned when the grievant was still doing data entry functions well into the afternoon on many days when those functions should have been completed by mid-morning. There were some days when the data entry portions of her job were not completed until well into the mid-afternoon. The evidence further showed that the data entry functions were important not only for data collection and retention purposes but also for the purpose of commencing the actual investigations of allegations of misconduct etc. that OSI was responsible for investigating. Thus, a delay in data entry could delay the investigation. The State provided credible testimony that in many cases time is of the essence in commencing and completing the investigation, especially in a facility like MSOP.

The Union asserted that the office became a toxic atmosphere for the grievant and further asserted that this was due to the unwelcoming attitude by the grievant's co-workers and supervisor and a lack of adequate training. As in all things of this nature there is another side to the story. The evidence showed that while the supervisor did seem to go out of his way to make the grievant feel ill at ease even before she started, the grievant's own shortcomings in learning the system and in understanding the extreme security consciousness of OSI were also at work here.

Thus while it was certainly true that the work environment was not at all good for the grievant, the stark reality is that this was in large part due to the fact that the grievant was having such difficulty performing her job. These deficiencies were noted even before the event, discussed below, that gave rise to her 3-day suspension. As the old adage goes, it takes two to tango.

3-day suspension:

The parties agreed that the arbitrator did not have jurisdiction to overturn or review the 3-day suspension the grievant was issued in November 2007. They did however spend considerable time discussing the underlying reasons it was issued and argued over whether this was the appropriate degree of discipline for purposes of continuing on a progressive disciplinary track toward the two further suspensions and the discharge meted out later. Accordingly, some discussion of this suspension is appropriate for that limited purpose.

The evidence showed that the grievant sent out two pieces of information that were inadvertently sent to the wrong people within the facility. The first was a supplemental report dated October 11, 2007 that was sent to a person inside the facility via in-house mail. The report was apparently mistakenly stapled to other documents that were to go to that person. The documents were returned to OSI. The Union witnesses testified credibly that this does happen on occasion and that simply returning the documents is the standard way of dealing with this type of error.

The Union asserted that the grievant was subjected to disparate treatment since her supervisor disseminated information regarding sex offenders to some 60 new hires at the facility. The Union claimed that the grievant questioned whether this should be given out to these people since it contained confidential information on patients. The Union further argued that there was no guarantee at all that these people would stay with the facility, since most if not all were still in probationary status. Moreover they were actually given the information to keep and take home. There was no control over what they did with it after they left that particular meeting.

The evidence showed however that the information was not truly confidential but was rather publicly available data on convicted sex offenders. There was thus no disparate treatment on these facts. As noted below, though, there was some evidence to suggest that others who had disseminated confidential information to the wrong people were not subjected to such harsh discipline. This will be discussed more herein.

The second involved a cover sheet with confidential information on it that somehow went to a patient. The cover sheet pertained to another patient. The evidence showed that this too was an inadvertent error made by the grievant. The patient returned the information a staff person. There was no question in each of these cases that the grievant made the errors and that both were simple oversights. Still, both could have had serious repercussions even though these particular instances did not result in any adverse consequences. The State witnesses testified credibly that this is not a "no harm no foul" situation. The potential exists for real damage and that is the need for such strict confidentiality rules.

The third issue upon which the 3-day suspension was based pertained to the failure to maintain the OSI database. There were errors noted and delays in getting the entries completed on time. There was some evidence to suggest that it took hours to complete tasks that should have taken someone less than an hour to complete. There was also some evidence that the grievant was being tutored quite frequently by the investigators, who were tiring of that task as they felt that the grievant had been hired so they would not have to do this data entry task any longer.

Finally there was an issue with approval of overtime. This was not discussed much at the hearing but the written documentation provided at State Exhibit 2 shows that the supervisor merely advised the grievant that overtime requests would have to be approved by him prior to working the overtime. The documentation alleged that the grievant attempted to circumvent this directive by going to the program manager to get overtime approved but there was no direct evidence of this at the hearing.

There was some dispute about how well communicated the security culture was at OSI. The State argued that OSI is extremely concerned about security and takes any breach of security protocols and the inappropriate dissemination of information very seriously. This is certainly true and the State's witnesses testified credibly that any security breach could jeopardize people's safety and could well jeopardize any ongoing investigation and compromise that effort. The question though here is how well that was communicated to the grievant.

The Union asserted, and their witnesses testified credibly, that security in a place like Moose Lake is always a high priority but that occasional inadvertent security breaches do occur and that at times information is sent to the wrong people. In those circumstances, up until this point, those transgressions have been dealt with by a warning of some sort, at least initially and that it is unheard of to impose a 3-day suspension as the first step in a progressive disciplinary scheme.

On balance the Union's assertions were more persuasive on this record. While security and confidentiality of information is a high priority, the history of progressive discipline in this facility is more akin to what the Union described. Further there was no clear notice to the grievant or to the Union that this would be so radically different at OSI.

As noted above, the arbitrator is without jurisdiction to affect the 3-day suspension. However, there was some merit to the Union's assertions that this was too much too soon given the offenses for which the grievant was charged. Further, progressive discipline does not necessarily mean in all circumstances that the "next" discipline must by definition be greater than the one before it. It is against this backdrop that the other suspensions and the discharge must be measured.

Letter of Expectation:

By November 5, 2007, the supervisor had grown increasingly frustrated with the grievant's progress in learning the database and the entry system. He met with the grievant and gave her the letter of expectations dated November 5, 2007. In that letter the expectations for performance and conduct were outlined. There were a number of requirements. Among these showing initiative in becoming proficient at all tasks within the position description, no further breaches of security, timely completion of supplemental reports by 9:45 each day. He further admonished the grievant to adhere strictly to her assigned shift of 8:00 a.m. to 4:30 p.m. Any time outside of that shift would have to be approved by him. Further, no non-OSI work was to be completed during that assigned time.

Since that latter requirement was the focus of considerable dispute in this case it is important to examine what the notice was and what it was not. Contrary to the State's assertions the document does not prohibit the grievant from staying a few minutes late to chat with coworkers nor does it prohibit her from finishing up a task as long as she did not put in for overtime for that without prior approval. The Union provided credible evidence and argument that the real import of this last admonition was to make sure the grievant did not come late or leave early; it was not the contrary, as the State later asserted and for which the grievant was later disciplined. See discussion below.

The supervisor committed to bi-weekly meetings to review progress and to provide necessary direction on the quality and timeliness of her work.

The evidence showed that this letter was given to the grievant on the same day as the second day of training was being done by Ms. Rose. There was also another training on an unrelated issue the grievant was required to attend that occurred on the same day.

This presented something of a mixed bag. On the one hand it was apparent that the grievant did not get the full measure of the promised training by Ms. Rose. On the other, it was troubling that she still needed so much training when it was apparent that the other person hired in St. Peter did not or that the grievant was still having such difficulty learning the requirements of the data entry system.

While it was true that she had been in the job for a short time, some of which was spent on vacation, the evidence showed that this system was not terribly difficult to master. Further, while the grievant had not been specifically told this, it was apparent that there is a need to be very detailed and accurate in completing the Intel data entries in order to present correct information on those reports.

The evidence showed that the bi-weekly feedback sessions occurred once. There was another one scheduled but canceled for some reason. Mr. Jungers testified credibly that he was pressed for time and when he finally sat down with the reports he had by the end of November to go through them he was shocked by what he found. See State Exhibit 12, which shows errors on 40 reports out of the 79 he reviewed.

The State relied heavily on the Letter of Expectations and asserted that the grievant failed or refused to comply with it on a number of points. The letter did set forth some of the expectations clearly while others were not, as noted above. Further, while the bi-weekly meetings did not occur exactly as promised, the evidence showed that the grievant was in fact getting some feedback on an almost daily basis from her supervisor and the other employees in the department. Based on this it was clear that she knew her performance was still lacking in material ways.

The Union did not dispute that the grievant was given the Letter of Expectations but raised the issue that she was prevented from even gaining access to the database for an entire week after returning from her 3-day suspension. The evidence supported this allegation. See Union exhibit 7. The e-mails there show increasing frustration by the grievant ifsn not being able to gain access to several of the databases and the failure of the technical staff to correct this problem. She was essentially locked out of the system for an entire week in early November 2007.[2]

[2] The State pointed out that on at least one of those days, November 8, 2007, the grievant was at another training session and would not have been able to do any data entry work that day anyway. This however supports the Union's view that there were many days when other tasks assigned made it difficult or even impossible for the grievant to live up to the expectations set forth in the November 5, 2007 letter.

While there was evidence to show that the grievant was not able to work on the data entry system for all of the days between her hire date and when the suspensions were meted out, the evidence still showed that she was unable to perform many of the essential functions of the job. Moreover, she was given coaching by others, i.e. the investigators, who did know the system on an ongoing basis Thus, while Ms. Rose was not there every day, as she may well have been in St. Peter with the other OAS-I hired to perform the same job there, there were other resources available to the grievant to assist her.

The State further provided credible testimony, which was another "thread" running through this case, that the grievant did not ask for help in determining where certain entries should go. There was evidence to suggest that there were times when the decision as to where to put things was not clear. In those cases the grievant was directed to ask if she was not sure. She rarely did this and this resulted in incorrect entries being placed on reports; errors which were caught only later and which could well have resulted in inaccurate information being given to outside agencies.

5-day suspension:

The grievant received a 5-day suspension for again releasing information without the approval of her supervisor. The report dealt with the allegation that a patient had begun sexualizing a staff person. The grievant released the report to that person's supervisor. The essential difference between this allegation and the one that led to the 3-day suspension was that she did so in this instance intentionally; this was not an inadvertent act where something got stapled by accident to the back of another document.

The grievant claimed that was done to keep people safe. Her understanding was that people watched out for each other in this facility and that she sent the report out to protect the other staff person. This was a serious breach of security and could have jeopardized an investigation of that allegation and placed people in possible danger.

By this time, the grievant should have "gotten it" with respect to the need for confidentiality. She should never have assumed that sending out what she should have known was a confidential report to a person outside of the department without her supervisor's approval was acceptable. If this had happened in the first few days of her employment one could perhaps understand it but by the time this report was sent out she had been told to maintain strict confidentiality and had been disciplined fairly severely for a breach of security and confidentiality. If the grievant had questions about whether it was acceptable to do so she should have checked with Mr. Jungers. Her failure to do so was a serious breach of protocol.

Moreover, as noted above, in early November 2007 the supervisor checked on her data entries and found that 40 out of 79 had errors. The evidence further showed that these were not simple typos or grammatical mistakes but were substantive errors or omissions. Several had "weapons" in the boxes were no weapons were involved. Others listed "fire" and there was no fire. Others missed names of material persons involved in the report. There was evidence to suggest that the narrative portions of the report frequently contained information that should have been placed on the data entries. Perhaps those persons should have been listed in other sections of the reports so it was easier to find but the evidence proved clear that one of the grievant's jobs was to make sure that all the relevant information was correctly placed on the Intel data entry sheets. That meant more than simply cutting and pasting narrative sections into the Intel sheet.

The Union did not claim that there was a failure of training for this task or that the grievant was not told to do this. What was somewhat unclear was whether there was adequate time to read through the reports in that level of detail looking for such entries and have all that done by 9:45 in the morning. In most cases though, the investigators and the St. Peter employee performing the same functions were able to perform that duty in the time allotted.

On this record the evidence showed that there would normally have been adequate time to perform all of the essential functions of the data entry job, read through the narrative to see if there were other persons listed there who should be in other parts of the Intel reports and get that finished in the time prescribed. There was certainly no evidence to the contrary.

The third item listed in support of the 5-day suspension was that the grievant left 15 minutes later than her work schedule. It was alleged that this constituted a willful almost insubordinate refusal to comply with the orders of her supervisor. The Union characterized this as ridiculous. There is some considerable merit to that claim. The grievant testified credibly that she was doing personal work and stayed for a few minutes to chat with co-workers before she left. She never asked for overtime nor was there any suggestion that she was being nefarious about what she was doing. Finally, there was no evidence that she stayed inside the secure perimeter of the facility past her hours.[3]

Finally, there was the allegation that the grievant failed to ask questions about the data entries and that this lack of communication was contributing to the errors on those report. There was some merit to the State's argument here. Several State witnesses testified that they would have been available to consult with the grievant if she had asked. They further testified that it was common to consult with other staff if there was a question about an entry in order to make sure it was accurate. Further, the grievant had been specifically advised to do this in the Letter of Expectations.

The question is whether there was just cause for the 5-day suspension. This is a mixed bag. Some of the allegations had merit while others did not. Further, while the arbitrator did not have the jurisdiction to change or disturb the 3-day suspension, the mere fact that the first discipline given the grievant was a 3-day suspension did not mandate that this one be greater or even equal to it; certainly under these circumstances where the Union provided credible testimony that the history of discipline in this facility has been far less Draconian than was apparent here.

[3] Ms. Firkus testified that the rule in the facility is that people do need to leave right away after their shift if they are within the secure perimeter so that management knows who is there in case of an emergency or incident. There was no rule against staying a few minutes later or coming a few minutes early to get ready for work, i.e. take off coats and get a cup of coffee or make small talk with coworkers, as long as you are outside of the perimeter. This was credible testimony.

On this record, given the proven allegations and those that were not, the grievant's history it is determined that the 5-day suspension should be reduced to a 3-day suspension since one of the main allegations giving rise to it was not proven. Her record shall be amended to reflect this determination. Further she is to be reimbursed for 2 days with any accrued contractual benefits as the result of the reduction in the suspension herein.

7-day suspension:

The basis of the 7-day suspension stemmed from incidents that occurred over two days on January 28 and 29, 2008. The State alleged that the grievant disobeyed a directive that she not work more than 4 hours on those two days. The grievant was on a light duty FMLA leave at that time and was under doctor's orders not to work more than 4 hours per day. This was related to the stress the grievant was under at work some of which is noted above. There was no evidence of any physical restrictions placed on the grievant and the only evidence of a work limitation was that the grievant not work more than 4 hours per day. The evidence showed that the State accommodated this restriction.

The evidence further showed that the grievant had been assigned to help set up a training session on drug recognition for the OSI staff at a church near the Moose Lake facility. She was directed to come to work at 7:30 a.m. on the 28th to set up the coffee and snacks for the day and to work until 11:30 a.m.

The grievant did appear at the appointed time and set things up for the day. At some point during the day the grievant left to attend personal meetings. She returned to make up the time and to make sure she had worked the full 4 hours as directed. She gave credible testimony that she did not want to be subjected to discipline for failing to work enough hours, especially in light of the relationship she then had with her supervisors. She returned to work and stayed until approximately 1:30 in order to make up the time.

There was some dispute about whether the grievant had been approved to leave. She gave credible testimony that she in fact had discussed this with her supervisor and had been approved to leave to attend these personal meetings. Her testimony in that regard was not refuted at the hearing.

Mr. Jungers indicated in the memo found at State exhibit 15, that he had not approved the grievant's absence from the training. The evidence did not support this allegation. It was clear that he spoke with her about her leaving to attend personal meetings and that she in fact left. He would have known that yet there is no allegation that she left without permission or was AWOL to the like.

Further, the grievant's other actions that day were entirely consistent with what she had been told. She set things up at the church and returned to her workstation at the facility later; just as she had been directed to do. Her actions support her credibility in this regard. On this record, the evidence in support of the grievant's position that the leave on the 28th was approved by her supervisor. At the very least he certainly knew about it yet gave no countermanding order to leave at 11:30 that day.

The incident on the 29th is a bit less clear. She was again directed to appear at 7:30 to set things up for the day. She did as directed. She also then left shortly thereafter and returned to her workstation. She returned to the church after her 4 hours to "audit" the training. She claimed that her name was on the training list and that since the training was in a public building and not onsite at the Moose Lake facility, she was free to simply sit in on the training.

Further she claimed that there was no direct order given to her not to sit in for the remainder of the day; she made no claim for pay for that time and felt she was doing nothing wrong by attending. She also asserted that she had brought some trays for food etc. to the training and wanted to be there at the end of the training to make sure she picked those up.

The supervisor claimed that she had been given a directive not to appear for work after her 4 hours and to go home. He further claimed that this is evidence of the grievant's recalcitrant and insubordinate behavior by deliberately disobeying a direct order. Since the training was work related, albeit not related to her work, the State claimed that her appearance after 11:30 was in violation of the clear directive in the Letter of Expectations not to work outside of her appointed hours.

The evidence did not support the State's claim on this allegation. First, there was no direct order not to attend the training. The directive was that she not work more than 4 hours. Simply stated: she didn't. Further, there was no other reason that the grievant could not be at the training; certainly there was nothing on this record to indicate that she was to leave work and go home and rest. Nor was there ever any directive to stay away from her co-workers during non-work hours. The Union characterized this discipline as ridiculous as well. Again there was some cogency to this claim. It is curious that an employee would be admonished, much less disciplined for wanting to learn more about her job, or as, here, the job of her coworkers. While the training did not pertain to her work directly it certainly did tangentially. More importantly, without a clear direct order not to return to the training under these circumstances, just cause for discipline is lacking.

Moreover, the evidence showed that the grievant again did as she was directed; she appeared when she was supposed to, set things up and left to return to her workstation. There was no claim whatsoever for additional time for the hours she sat through the training and no prohibition on her being there.

While it as noted that this could be considered "work" time since the training pertained to the investigator's jobs, the grievant was not "at work" when she was there. This training was only indirectly related to her job and it simply cannot be found on this record that the grievant was "at work" when she sat through the last few hours of the training.

There is something of a dichotomy here in the State's argument. On the one hand it asserted that the grievant was at work yet also argued that the training had nothing to do with her work. In addition, the State argued throughout the case that the grievant was unmotivated and even lackadaisical about learning her job. Here however the grievant spent her own time learning about something that could well have helped her and she was disciplined for it. This is curious at best.

Accordingly, on this record there is no just cause found for the 7-day suspension. That suspension is therefore to be expunged from her record and the grievant is to be made whole in back pay and benefits for the 7-day suspension at issue herein.

Discharge:

The final and most difficult issue of all is the discharge meted out on July 1, 2008. The State argued that despite having been coached, trained and assisted for months the grievant simply never caught on to the job duties. As a result she was given only the most mundane of tasks. Mr. Jungers went through in some detail the essential functions of her job found in the actual job description that she was not assigned to perform because she was never able to perform them. Even though many were never assigned to her, this was because she never displayed any aptitude for the simplest tasks and there was therefore no evidence that she would be able to perform more complex functions. He testified that he had so lost faith in the grievant's abilities to perform her job that he could no longer afford to have her there performing at such a low level.

The grievant clamed that she tried her best and that because of equipment problems, lack of training and sometimes circumstances beyond her control, she was never able to get a fair chance to perform. Further, she was more than willing to do anything that was assigned but never got the opportunity to perform many of the functions in her job description because she was deliberately kept from those jobs by her supervisor.

The Union claimed that the State asserted on the one hand that the grievant was unmotivated to learn her job yet the State also acknowledged that she was deliberately told not to do many of those things. Further, the Union pointed out that while the State continually accused the grievant of disobeying the directives of her supervisors it now seeks to punish her for doing what they told her to do – or in this case – not to do.

The "truth," if that it can be called, lies somewhere in between. There was no doubt that by February 2008 the supervisor felt that he could not assign the grievant anything more than relatively easy and menial tasks. This was based on her clear record of errors and on the history of taking so long to perform her tasks. She was both too slow and inaccurate. Given the clearly demonstrated need for speed and accuracy there was credible testimony that she simply was not performing at an acceptable level in this job.

While the Union was able to show that there were some deficiencies in equipment and even long pauses in training, the fact remains that the grievant was a lateral hire and should have been able tofs pick up this job yet even after many months she did not. Ms. Rose again met with the grievant on June 12, 2008 to go over the requirements of the Intel Database. The Union argued that this was not a good faith effort to train the grievant but was rather an effort to build a case against her for being unable to do the job.

Ms Rose raised similar concerns that had been raised before about difficulty understanding computer processes, disorganization and clutter both on her desk and on her desktop, all of which made it even more daunting to teach the grievant how to perform her tasks. See State Exhibit 22.

In addition, there was considerable discussion about phone monitoring of patients' phone calls. Patients are limited to 16-minute phone calls and OSI monitors these calls and transcribes them for content to keep track of who is communicating with whom and to provide a general sense of what they are discussing. The investigators showed the grievant how to perform this by monitoring the taped call and then doing a synopsis of the call.

The grievant acknowledged this but claimed that the summaries provided by the two investigators were of little help in teaching her how to do this job since she did not have access to the actual phone calls themselves to see what in fact was being summarized. The evidence undercut the grievant's claims here though. The investigators testified credibly that they explained how this should work and that it was not necessary to write down every word of the conversation. The grievant was understandably in need of some training here since she had been a medical transcriptionist, where it is essential *to* write down every word. While the evidence on this score was a bit fuzzy, there was sufficient evidence to show that the State provided adequate training on this task.

Having said that however, some of the expectations placed to the grievant pushed the envelope of reasonable. The grievant provided credible testimony that even if the conversation were only 16 minutes long, it would still take longer than that to transcribe it. This stands to reason. Even experienced typists cannot generally type as fast as people talk. Moreover, it may be necessary to listen to a conversation more than once in order to be able to summarize it. Thus, the admonition by the grievant's supervisor to get the phone calls done in less than 16 minutes, or words to that effect, was not supported by the evidence for the reason set forth above. It was unclear how long this had been taking before the grievant was assigned these tasks or how long it took the other OAS-I in St. Peter to perform that task. Further, the grievant had been employed in the past in medical records. There she was required to write down every word verbatim and it was understandable that this was her perspective. There was no evidence that writing down too much on the phone monitoring sheets was necessarily a bad thing; only that it took too long and kept her from completing other tasks. On this record there was insufficient evidence to show that her performance in phone monitoring was so deficient as to warrant discharge.

The basis for the discharge was that the grievant was again taking far too long to perform the data entry functions of her job. That evidence showed that there were sometimes long delays between entries and that there were some errors in these reports. See State Exhibit 19 and 20. There were also some errors noted in the data entries in June 2008.

The Union countered by noting that in most of the cases set forth on State Exhibit 20 the job of data entry was completed by 9:45 a.m. or within a few minutes of that.[4] It was not clear whether the grievant simply got started on the dates she was late at a later time than she was accustomed to, was assigned to other tasks on those days or was delayed for some other reason. What was clear is that she was late in getting those entries done on time.

The evidence showed that the real basis for the discharge as that the grievant's supervisor had simply lost faith in her ability to get her job done. He had no confidence that she would ever be able to master the essential features of her job much less that she could ever perform the higher-level functions.

The Union put forth several reasons for why the grievant was unable to complete tasks accurately and on time. There was the "lost week" in November 2007 when she was locked out following her suspension. She did not get a second monitor until very late in her employment, i.e. sometime in the late spring of 2008. She did not have access to several of the programs until later on and did not have daily access to the trainer, as did the employee in St. Peter. The Union further asserted that the overall atmosphere was so unwelcoming and hostile that the grievant was never able to pick up the pace or perform her job adequately. The grievant asserted that many of the mistakes were due to her unfamiliarity with the drop-down menus on the data entry system and confusion about the categories of where to place certain matters.

[4] The 6/24/08 entry for example shows that the task was completed by 9:52 a.m. Several other dates showed completion well before 9:45, i.e. 6/13/08; 6/1808; 6/19/08; 6/20/08; 6/26/08. Others were considerably later. See e.g. 6/25/08; 6/23/08.

The Union asserted that there was disparate treatment by the employer. This was shown to be true in some of the suspensions as set forth above. There was however no evidence of disparate treatment in the expectations that the grievant be able to perform her job, which as noted herein, is the main reason behind the employer's actions here. The grievant was subject to the same expectations as any other employee, in fact perhaps these were somewhat relaxed since she was assigned only menial tasks for several months while she looked for other work. While this could be interpreted as disparate treatment, the facts showed that this actually inured to the grievant's benefit. It is always dangerous to speculate in matters like this but the evidence in this case points to the reasonable conclusion that if the supervisor had assigned the grievant her full duties earlier in 2008, the same discharge action would likely have occurred, only a few months earlier than it did. On this record, the claim of disparate treatment was not borne out by sufficient evidence.

What the evidence did show though was that the grievant was in fact frequently late on her work and that she made far too many errors. The grievant did not refute that the errors were made, only that there was a reason for them that was not her fault.

The parties were in general agreement about one thing: this is a sad and unfortunate case. The one obvious fact, recognized tacitly by both parties is that the grievant's main mistake was in leaving a job she was apparently doing well for one she had little aptitude for. The grievant knew this too. By early 2008 she had met with Mr. Jungers and told him frankly that things were not working out well and that she was trying to leave. There was no evidence that the State or her supervisors thwarted that effort. She was unable to find suitable alternate employment largely due to the 6-month bid ban that prohibited her from taking a new position right away.

The Union claimed that the grievant's managers conspired to keep the grievant from getting another job in the facility of the other State facility in Moose Lake. Clearly the grievant applied for several open positions that she may have been qualified to perform but was not hired. There was no evidence of any sort of conspiracy against her to keep her from getting another job in order to fire her.

In fact, Mr. Jungers appeared to go out of his way to assign only simple tasks and to "let her slide" as he put it for several months while she looked for another job. Eventually though, he felt that she had to either perform the job or he would be forced to take other alternatives and this was frankly a reasonable expectation.

The question as always in a case like this is whether there is just cause for the termination. As noted above, the suspensions meted out to her were reduced and/or overturned and in a normal progressive disciplinary scheme the next step could well be another suspension. Thus, some of what the State did was not supported by sufficient evidence and in some cases the appropriate remedy would be the reinstatement of the grievant to her former position. This case is a bit more complex than that.

The one salient fact though that stands out here above all others is that for whatever reason the grievant was unable to perform her job. As will be discussed more below, another suspension just does not make sense here nor is it mandated that the "normal" progressive discipline be followed in every case. There arecases, like this one, where what is normal and appropriate will depend on the facts of the case.

While there was no evidence of malingering nor was there any evidence that she was somehow intentionally under performing, the fact remains that she was unable to master the data entry functions as well as many of the other essential features of this position. Her managers have the right to expect that at some point the person hired into a position will be able to perform the job without constant close almost over-the-shoulder supervision and coaching.[5]

[5] There was evidence to suggest that the person hired to replace the grievant has been able to perform the job well and without the same sort of supervision needed by the grievant. While this fact alone does not carry the day, it was a factor to consider in determining the appropriate result and remedy to be made here.

This case is really about the appropriate remedy. The parties gave the arbitrator the power to fashion a remedy based on the unique facts of this case. Under a traditional 7-test analysis, the last of the tests frequently used is a whether the discharge is appropriate. It is fully understandable on this record why the grievant's supervisors and co-workers were frustrated here. On the other hand, some of the disciplinary sanctions were either too harsh or unfounded.

Several options were considered. One option was reinstatement to her former position. That frankly would be folly under these facts. Albert Einstein once quipped that insanity is defined as running the same experiment over and over expecting a different result each time. Arbitrators frequently find guidance from various, sometimes unexpected, places; here that inspiration came from history's smartest fellow. There is no reason to believe that reinstatement to the same job would have a different result.

Another option was to reinstate her to an equivalent position as an OAS-I with the state in a comparable position in pay and contractual benefits. One of the oft-used tests of discipline is whether the penalty fits the proven offense. The State argued that there is simply no other option here but termination. In many cases reinstatement is a yes or no proposition. However, if ever there was a case that cried out for a somewhat creative remedy it would be this one. There is no question that the grievant made several serious mistakes in her job. More importantly, she was unable, despite her best efforts, to master even the basic functions of the OSI position. Certainly in some cases, the most reasonable conclusion and remedy is to discharge the employee who simply cannot do the job.

On the other hand, it would be manifestly unfair to simply cashier an employee after 23 years of otherwise good and dedicated service. Her employment record up to the time she took the job at OSI was overall very good and there is in this case no reason to believe that she would not be successful in a more appropriate job again. What makes the most sense in this particular case is that the grievant be reinstated to an OAS-I position in or around the Moose Lake facility that is comparable in pay and contractual benefits to her former OAS-I position.

The final question is whether any back pay should be awarded. Several options were considered here as well. One was to reinstate her with full back pay and benefits. This option was rejected simply because the State showed that she could not do the OSI job. To award back pay benefits now would be something of a windfall to the grievant under these unique facts given that the record demonstrates her inability to perform this job and that she would likely not have been able to even if she had been there all along.

The other option was to award partial back pay for some indeterminate period of time. This too was rejected for much the same reason as set forth above. Moreover, back pay awards should have at least a rational basis and be explainable to the parties. To simply pick a figure out of the air, as one would have to do here, does not meet that test.

Finally, the option of reinstatement without back pay or any contractual benefits was also considered. Arbitrators must be cautious of what might at first seem an easy fix; i.e. to reinstate without back pay. This has the net result of a very long suspension that would likely otherwise ever have been imposed – suspensions of 15 months are typically not given. Here though, as noted already, the facts compel a solution that is somewhat unorthodox but gives affect to the valid claims of both parties. Reinstatement to the same position does not make sense on these facts. Neither does discharge given the proven offenses and the grievant's record. Back pay does not make sense either given the evidence that the grievant was unable to perform the job and likely would not have gotten appreciably better over time. The most appropriate result then on these very unique facts is to reinstate the grievant to a comparable OAS-I position in the State but without back pay or other accrued contractual benefits.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART as set forth above. The grievant is to be reinstated to a comparable OAS-I position within the Moose Lake facilities that is equivalent to her former position in pay and contractual benefits but without back pay or accrued contractual benefits. Reinstatement is to be made within 10 business days of this Decision and Award.

Dated: October 27, 2009

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Jeffrey W. Jacobs, arbitrator

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