

IN RE ARBITRATION BETWEEN:

MINNESOTA ASSOCIATION OF PROFESSIONAL EMPLOYEES, MAPE

and

STATE OF MINNESOTA – DEPARTMENT OF REVENUE

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

May 24, 2010

IN RE ARBITRATION BETWEEN:

MAPE,

and

DECISION AND AWARD OF ARBITRATOR
Dixie Dodson grievance matter

State of Minnesota, Dep't. of Revenue

APPEARANCES:

FOR THE ASSOCIATION:

Kathy Fodness, Business Representative
Dixie Dodson, grievant
Bertha Doby, Union Steward
Michelle Frevel, grievant's daughter

FOR THE STATE

Carolyn Trevis, DOER Labor Relations Principal
Nichole Cook, Minnesota Mgt. Budget, MMB
Kathy Zieminsky, Personnel Services Mgr.
Ron Schwagel, Asst. Director of Collections Div.
Marcy White, Supervisor Collections Division
David Eckert, Former MDOR Employee
Terri Steenblock, Director of Collections Div.
Matt Schmidt, Supervisor Collection Division

PRELIMINARY STATEMENT

The matter was bifurcated. The first hearing held on March 31, 2010 was on the question of the timeliness and procedural arbitrability of the 3-day suspension. The hearings on the merits of the suspension and termination were held April 6, and April 30, 2010. All hearings were held at the MAPE Offices at 3460 Lexington Ave. N, Shoreview, Minnesota. Post-hearing Briefs were waived.

ISSUES PRESENTED

The Parties agreed on the issues to be determined as follows:

TIMELINESS: Did MAPE process its grievance over the employer's 3-day suspension of the grievant in a proper and timely manner in accordance with Article 9 of the Agreement between the parties?

MERITS: Did the employer have just cause to suspend the grievant for 3 days under Article 8 of the Agreement between the parties? If the employer did not have just cause to suspend the Grievant for 3 days, what is the appropriate remedy?

Did the employer have just cause to discharge the grievant under Article 8 of the Agreement between the parties, if not what is the appropriate remedy?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2009 through June 30, 2011. Article 9 provides for submission of disputes to binding arbitration.

STATE'S POSITION:

The State's position was that there was no contract violation here at all and that the case is simply one involving the exercise of discretion not to extend a medical leave in the face of a medical opinion giving no clear indication that the grievant might ever return to work. In support of this position the State made the following contentions:

1. **Timeliness** – The State asserted that the Association did not process the 3-day grievance in a timely fashion pursuant to the provisions of Article 9. The relevant portions of Article 9 are as follows:

Article 9 Section 2 B 1 – If a grievance is not presented on behalf of the employee within a time limit set forth in this Article, it shall be considered waived. If a grievance is not appealed to the next step within the specified time limit, or agreed upon extension thereof, it shall be considered as settled on the basis of the Appointing Authority or designee's last answer.

2. It is expected that the Appointing Authority shall respond to the grievance in a timely manner. However, if no response is received, then the Association may move the grievance to the next level.

3. The time limits in each step may be extended by mutual written agreement of the Appointing Authority or designee and the Association at each step.

Section 3 Step 1. If the Association wishes to initiate a formal grievance, it shall be reduced to writing setting forth the nature of the grievance, the facts upon which it is based, the section(s) of the Agreement allegedly violated, and the relief requested, and filed with the immediate supervisor. All grievance(s) shall be filed within twenty-one (21) calendar days after the occurrence of the event giving rise to the grievance or within 21 calendar days after the grievant, through the use of reasonable diligence, should have known of the event.

Step 2. Within ten (10) calendar days following the receipt of a grievance appealed in writing from Step 1, the Appointing Authority or designee shall arrange a meeting with the Association's Steward(s) in an attempt to resolve the grievance.

Within ten (10) calendar days following this meeting, Appointing Authority or designee shall respond in writing to the designated Association Steward stating the Appointing Authority or designee's answer concerning the grievance. If, as a result of the written response, the grievance remains unresolved, the Association may appeal the grievance in writing and within thirty (30) calendar days after the Appointing Authority or designee's written answer is given or due to arbitration by written notice to the

Assistant Commissioner of Minnesota Management and Budget (State Labor Negotiator). Any grievance not referred in writing by the Association to arbitration within thirty (30) calendar days after the Appointing Authority or designee's written answer is given or due shall be waived. The Arbitrator shall hear the grievance as a scheduled meeting subject to the availability of the Employer and the Association Steward.

2. The State acknowledged that the original grievance over the suspension in this matter was timely filed on May 22, 2009 but asserted that the Association never clearly established that there was an agreement to extend the time limits set forth in the grievance procedure and that it was therefore waived. The State pointed to an e-mail dated June 1, 2009 as the last clear reference to the suspension matter between that date and March 2010. That e-mail simply Stated in relevant part: "What do we do with the suspension grievance at this point in time?" The State never formally responded to that e-mail and therefore there was no written agreement, as required by the language above, to extend the clear time limits of Article 9 to hold the suspension grievance in abeyance pending settlement negotiations over the matter or setting an arbitration date.

3. The State also pointed to a series of e-mails between Ms. Fodness of the Association and Ms. Zieminsky dated July 9, 2009 in which there was a reference to an "extension" but asserted that this was only a reference to an extension for the termination grievance. There were settlement discussions about that and the parties agreed to wait to send formal responses pending those negotiations. There was no discussion of the suspension grievance at that time.

4. The State further noted that there were several meetings held to discuss the termination grievance and State witnesses introduced testimony and their notes about those meeting. At no point was there a discussion in those step meetings about the suspension – the discussion was always about the termination. There were further e-mails between the parties about possible settlement but those too were always about the termination, See State Exhibit C, e-mails dated November 6, 10 and 25, 2009.

5. Further, the Association made several additional discovery and document requests over time, See State exhibit C, e-mails dated November 25 December 1 and 10, 2009. These too were in reference to the termination and not the suspension.

6. The Association formally appealed only the termination grievance to arbitration by letter dated January 19, 2010. See Union Exhibit 8. There was no reference in that letter to the suspension. It was only in March 2010 that there was any further mention of the suspension grievance here. Once it became clear to the State that the Association was attempting to add the suspension grievance into the termination hearing the State immediately objected and asserted the waiver argument based on the clear language of Article 9 above.

7. The State argued that the Association is well aware of how to send a clear message to the State when it intends to seek an extension and has done so many times in the past. See State exhibit E. Moreover, the fact that there is a good working relationship between the Business Agent and the HR Director at this department does not trump clear contract language – the parties must follow the contract. Here the contract requires clear written documentation of the extension of time limits and no such agreement was formally reached here – the State reasonably assumed by the Association’s inaction that the suspension grievance had been dropped. The State asserted that it is the outward expression by one party to the other, not the internal assumptions made by one party or the other to a labor agreement, that govern the result. Here the outward manifestation and representations by the Association gave the clear message that the suspension grievance had been dropped and had been waived by the Association. There was nothing to the contrary given by the Association to the State on this record.

8. Finally, the State pointed to several arbitration decisions that require strict adherence to the time limits contained in the grievance procedure. The State noted that it has always adhered to these without exception and that it requires clear written document of any extension of time frames.

9. **Merits – 3-day suspension:** The State asserted that the grievant has a long history of poor performance regarding her demeanor and tone of voice on the phone when dealing with taxpayers. She has been given two prior disciplines, in December 2007 and April 2008 for this very same conduct.

10. Further she has been counseled repeatedly in her evaluations as well as at other times about her lack of professionalism on the phone and for her failure to follow proper procedure to give taxpayers accurate and timely information about their accounts. See, State exhibit 8, listing the expectations of the grievant and the efforts to train and rehabilitate her performance. See also, State exhibit 10, setting forth the expectations including “demonstrate professional behavior even with difficult debtors.”

11. The State alleged that her continuing misconduct in this regard was demonstrated in the phone call of March 25, 2009. That call was monitored and recorded and showed several deficiencies, all of which were relayed in the suspension letter here.

12. The State alleged that the grievant’s tone was harsh and actually escalated the taxpayer’s anger and made things worse. Further she gave him some inaccurate information and may well have confused him. Finally the fact that he did not call later to “complain” about the grievant’s actions do not mean that her conduct was acceptable. The State asserted that the grievant’s actions more than warrant the 3-day suspension especially when viewed in light of the prior discipline and coaching she has received.

13. **Merits – Discharge:** The State noted that the grievant was barely back a few days from her disciplinary suspension referenced above when her continuing failure to follow the expectations of her supervisor got her into trouble again. The State noted that the grievant was expected to let her supervisors know when she was not going to be in to work and to call in to report any absences.

14. The State further noted that she was to e-mail her supervisor every morning to let her know she was in fact there. Attendance had been a problem with the grievant in the past and her supervisor advised her relative to the need to e-mail every day. The grievance was well aware of this requirement and of the reason why.

15. The State reiterated the claim, as it did on the 3-day suspension matter, that contended poor performance was a continuing problem with the grievant. The State pointed to the multiple efforts to train and coach the grievant on procedures and phone etiquette all to no avail. The State noted that the union steward was even brought in to train her but that after a few weeks even he “threw up his hands” in frustration at the lack of progress demonstrated by the grievant and indicated that she effectively ignored him and his advice.

16. The State pointed to the ongoing problems with her performance and to the Quality Assurance Performance Indicators, the so-called QAPI’s, and noted that the grievant repeatedly failed to meet those standards. The State noted it that is against this dismal backdrop that the operative events of May 19, and 20, 2009 occurred. The supervisors were increasingly frustrated with the grievant’s attitude, her poor performance and her utter lack of ability and willingness to improve and to conform her behavior to the expectations of the Department.

17. On May 19, 2009 the grievant was scheduled to be at work. She did not show up at the appointed time nor did she call in as required. Her supervisor called her on her cell phone and left a message more than an hour after the grievant was supposed to be at work. The grievant called her supervisor back a few minutes later and abruptly and somewhat discourteously said that she would not be in and hung up. The State noted that this was unacceptable and that the grievant should have called in before her shift to advise her supervisor she would not be there.

18. The following day the grievant failed to e-mail her supervisor as required when she appeared for work. The State asserted that the claim that the grievant did send an e-mail but that it “didn’t go through” was fabricated as there is no evidence to support that there was anything wrong with the computer or the server or that other e-mails did not go through that day. She simply failed to e-mail her supervisor as she knew she was supposed to.

19. While the grievant’s supervisor noted that she had not e-mailed in as required, she again called the grievant’s work number and got voicemail, for the preceding workday and advised her to change the message. Ms. White contacted another supervisor to check on the grievant’s whereabouts who reported that she was at her desk but appeared disheveled and that she had just gotten there. The State asserted that the grievant again failed to follow the clear directives of her department.

20. The supervisor did not receive a call back until very late in the day, which is unacceptable and was in direct contravention to the specific instructions she had been given about calling in if she was ill. Further, the grievant did not e-mail her supervisor when she came to work the following day, May 20, 2009, as she had been instructed to. That left the supervisor not knowing if the grievant was or was not at work that day. It was after 3:00 p.m. when the grievant finally called her supervisor to advise her where she was.

21. The State asserted that this was hardly the first time the grievant had been admonished to follow the directives of her supervisor and there was no excuse for failing to call back until more than 7 hours after the first voicemail.

22. The State noted too that there was considerable discussion about the so-called “new world” in revenue and that the performance standards were going to change. They provided training and coaching to the employees and were there to help anyone who was struggling to adapt to the new systems and standards. Most did – the grievant did not despite many attempts to provide that assistance. The State asserted that her performance was simply not up to par and that her work performance fell well below what was expected of an RCO under this new world.

23. The State further asserted that the claim that the grievant sent an e-mail but that it did not go through was unsupported and appears to be fabricated. There were no reported problems with the servers or other e-mails going through that day and no evidence that an e-mail was ever sent making the grievant's story suspect at best. The State argued that the most reasonable conclusion here is that she simply did not send an e-mail either because she was negligent or forgot or was intentionally disregarding a clear work directive.

24. Finally, the State pointed to the grievant's long record of poor performance and failure to meet standards as supporting the remedy of discharge. As noted in multiple places and times throughout the hearing process, the State asserted that the grievant has been warned time and again about her demeanor over the phone, her failure to meet standards and to follow proper procedure yet she has continually failed and refused to amend her behavior to conform to these expectations. No amount of training or coaching has helped and she continues to be disrespectful and even hostile toward the clear directives of her supervisors. The State characterized the grievant as irredeemable and asserted that given her terrible performance over time more than warrants her dismissal.

Accordingly the State seeks an award of the arbitrator denying both grievances in their entirety and upholding the suspension and the discharge.

ASSOCIATION'S POSITION

The Association's position was that it processed the grievance for the 3-day suspension properly and that there was an agreement to extend the time limits pursuant to Article 9 B 3 of the Agreement. On the merits of both disciplinary actions the Association asserted that the State violated the contract when it terminated the grievant without just cause and issued a 3-day suspension. In support of this position the Association made the following contentions:

1. **Timeliness** – The Association asserted that the 3-day suspension was both timely filed and processed through the appropriate grievance steps. The Association further asserted that the business representative had an agreement with Ms. Zieminski to hold the 3-day suspension grievance in abeyance and to push forward with the termination grievance first.

2. The Association pointed out that the 3-day suspension was given to the grievant on May 8, 2009 and that the grievance was filed over that on May 22, 2009, well within the 21 days required by Article 9. The Association also noted that the business agent and the Director at this department have always had a good working relationship and that there are frequently agreements to extend time frames between them that are informal.

3. The Association pointed to an e-mail dated May 22, 2009 that had the grievances attached for both the suspension and the termination. There was a clear reference there to addressing the termination initially. Later, on June 1, 2009, there was another e-mail that clearly memorialized the understanding between the parties that the suspension was being held in abeyance while discussions and possible negotiations were held on the termination. That message asks simply, "what do we do with the suspension grievance at this time?" There was no response to this so the Association reasonably assumed that the State had agreed to hold the suspension grievance in abeyance and that there was an agreement to waive the strict time limits.

4. The Association noted that the fact that it made requests for discovery related to the termination does not mean that it had waived the suspension grievance. Further, there was never a clear indication by the State that it believed that the suspension grievance had been waived and the Association assumed, based on the outward manifestations by the State, that the grievance was still pending and could be consolidated with the termination matter if that ever went to arbitration.

5. When it became apparent that the State was not going to negotiate a resolution of the termination, the Association moved the matter to arbitration and then asserted in March 2010 that it intended to move both matters to arbitration. It was only then that the Association was informed that the State believed the suspension had been waived – at no point prior did the State make that assertion. On March 9, 2010 the Association business representative met with Ms. Zieminski and she acknowledged that the parties had “agreed to hear the termination grievance first.” There was a continued acknowledgement at that meeting that the parties had agreed to hear both grievances before the arbitrator.

6. **Merits – 3-day suspension:** The Association noted that the grievant is a long time very experienced RCO 3 and that her prior evaluations have been at meets or exceeds expectations. That continued and her performance was considered quite good until the new supervisor appeared on the scene. Ms. White is a “remote supervisor” and actually offices in Ely, Minnesota, some 250 miles from the grievant’s location in St. Paul. As such she is not in the best position to properly evaluate the grievant’s performance. Moreover, the Association noted that Ms. White took over in the middle of one of the latest evaluation periods and so was not even here for most of that year, yet she gave the grievant a poor performance evaluation despite having only a fraction of the year to evaluate her. The grievant’s prior supervisors were not consulted in that evaluation.

7. With regard to the call in question, the Association asserted that the call was not only not “bad” but showed the grievant’s professionalism as the taxpayer, who was understandably upset and angry when he called, escalated matters and started to get angry with the grievant the grievant’s experienced kicked in at that point and she was both assertive yet gentle with the taxpayer and calmed him down so they could have a rational discussion about the problems he was having and could move forward to deal with it and get the correct plan in place.

8. Further, the Association noted that the grievant had the correct information up on her screen that day but, as many times happens, the computers were somewhat slow and there as a few seconds delay going between screens

9. **Merits – Discharge** – The Association focused on the events of May 19 and 20, 2009 and asserted that the grievant was in fact sick on May 19th and that she was at work, did send an e-mail to her supervisor and performed her work as directed on May 20th. The Association also noted that Ms. White could easily have determined whether the grievant was at work or not and had multiple ways of finding that out other than a simple voicemail to the grievant’s cell phone.

10. The Association pointed to the events of may 19th first. Initially the Association noted that the grievant has a long history of medical conditions, such as diabetes, that have resulted in FMLA leaves, all of which have been approved by the supervisors. Indeed, the grievant has an intermittent FMLA leave due to the effects of her diabetes that was approved only days before the events in question. Thus, the supervisor was not only well aware of the grievant’s conditions but also may arguably be in violation of the law in taking this action. See Association exhibits 14, 15, 16.

11. On May 19, 2009 or late on May 18, 2009 the grievant was required to take insulin for the very first time in her life as the result of her diabetes. The Association introduced testimony from the grievant’s daughter and from her medical providers that the grievant had a severe reaction to this and frankly was nearly incoherent that day. To her credit she did not attempt to come to work as the reaction she had to the insulin was quite severe and there was no way she was well enough to work that day. Because of this, she was quite out of sorts; very ill yet had the presence of mind to call her supervisor to advise her that she would not be in that day. This was exactly what she was supposed to do. Further, this was exactly consistent with the intermittent FMLA leave that had already been approved by Ms. White. Thus there was no “failure to follow directives” for the actions of the 19th as alleged by the State; in fact it was to the contrary – the grievant followed the directives almost to the letter by calling in sick due to her serious medical condition.

12. The Association introduced multiple medical records to support the claim that the grievant's diabetes was out of control and that she was indeed sick on May 19th as she claimed. See Association exhibit 23, which is a letter from Healthpartners indicating that the grievant was unable to work on May 19, 2009. See also, Exhibits 18 through 24, showing the history of the grievant's treatment for her diabetic condition. The Association asserted too that her diabetes frequently fluctuated and that by the 20th she was well enough to go to work.

13. The following day the grievant appeared for work as she was supposed to. The Association placed into evidence the actual time record showing when she appeared for work at 6:58 a.m., See Association exhibit 26. She claimed that she did in fact send an e-mail to her supervisor to advise her that she was there. She found out only several hours later that some e-mail messages had been held up for some reason and that hers may not have gone through.

14. The Association further asserted that the grievant was performing her job as directed and that while on the phone with taxpayers on the ACD system, she was not allowed to check voicemails or do any other work. In conformity with that directive, she didn't. She continued working on taxpayer calls that day so was not able to call her supervisor back. This was not because the grievant was ignoring her requests but rather because she was not supposed to.

15. Further, the supervisor had many other ways she could have checked on the grievant's whereabouts. She could have simply checked the ACD system to see if the grievant was on there. She could have interrupted the grievant's call with a pop-up type screen asking where she was. She could have gotten a supervisor to simply stop by the grievant's cubicle to check if she was there. The Association noted that while there was some reference to that in the termination letter there was no direct evidence of that at the hearing. Moreover, at no time did the grievant appear as though she had just gotten to work – in fact as her punch in indicated she was there right on time and was on the system working almost immediately.

16. The Association asserted most strenuously that there was no work rule violation on May 20, 2009. The grievant was at work as directed and performed her duties as directed.

17. With regard to the performance measures, the Association pointed to the QAPI's for the grievant and noted that they should be averaged and have been over time and that this has resulted in evaluations that were at or above standards. See Association exhibit 3 and the performance evaluations contained therein. Her evaluations were exemplary until Ms. White took over as the supervisor. Suddenly, even though the grievant's performance had not changed, her work was below par. The Association asserted that the State may not change the rules of the game mid-stream and pointed to the supervisor as the person to blame for applying a different standard to the grievant than to other employees.

18. The Association pointed to the two poor evaluations, both from Ms. White, and noted that they had all been well above standards before she got there. Moreover, Ms. White was only the supervisor for a small portion of the year covered by the first bad evaluation and noted that the previous supervisor was not even consulted about the grievant's performance.

19. Further, while there was some references in several of the older evaluations about ways to improve, and there are always ways to improve, and references to "a few rough edges that remain" in the grievant's performance, See 2002 evaluation, these few comments were never enough to warrant a "below" standards evaluation. Thus the grievant's performance has not changed over time; the standards by which she and she alone is being measured have. The Association argued that this is neither fair nor an accurate reflection of the grievant's performance over time.

20. The Association went through the performance measure, Association exhibit 4 and noted that these must be averaged to provide both accuracy and fairness yet the State has "cherry picked" a few months of poor performance and wants the arbitrator to convey those over the entire case.

21. The Association noted that the grievant's performance has been at or above standards for virtually all her measures. The Association compared the performance measures to the grievant's performance and noted that in virtually all cases she met or far exceeded them, see Association exhibit 4 and 5. In the most recent QAPI for which data is available, the grievant was literally at 100% of her performance measures. Thus, the argument that she was a "poor performer" was not true.

22. The Association also noted that the grievant had been commended for her actions on several occasions, some quite recent. See Association exhibits 7 and 8. There taxpayers called in to compliment the grievant on her helpfulness and information given to assist them. The Association argued that the State totally ignored that positive commentary and asserted that this is nothing short of a witch-hunt to try to terminate the grievance.

23. The Association argued that the grievant has learned from the coaching she received and pointed to the latest QAPI from April 2009, which showed that the grievant met 100% of the performance standards. This clearly shows that her performance was quite good and that she is more than capable of meeting the performance standards set for her, even those by her current supervisor.

The Association seeks an award of the arbitrator reinstating the grievant to her former position with all back pay and accrued benefits as well as an award sustaining the grievance on the 3-day suspension and reinstating all lost back pay and benefits for that suspension as well.

DISCUSSION

TIMELINESS OF THE 3-DAY SUSPENSION

The question is whether on these facts there was enough evidence to establish that there was an agreement to extend the time limits for an indefinite period on the 3-day suspension while the termination grievance proceeded. There is an unfortunate paucity of hard evidence on this question either way but there are some facts for which reasonable inferences can be drawn.

There is no question that the original grievance was filed on time. The suspension was given to the grievant on May 8, 2009 and the grievance was filed on May 22, 2009, the same date on which the grievance over the termination was also filed. The grievance procedure requires that the grievance be filed within 21 days of the occurrence and there is no question that both were timely filed.

There was evidence to suggest that the Association requested an extension on the suspension while the termination went forward. There was also some evidence to show that the parties were engaged in discussions for a possible settlement of the grievances. Significantly, when the Association asked in its May 22, 2009 e-mail about dealing with the termination separately there was no response. Based on the prior dealing between the parties the Association reasonably assumed that there was no objection to this by the State. On this record there was sufficient evidence to support the Association's assertion that there was an agreement between the parties to deal with the termination grievance initially and the suspension "later." The question on this record is how much later and whether it was reasonable to assume that the suspension grievance had been dropped by the Association.

The next discussion and contact between the parties on the suspension grievance was dated June 1, 2009 when the Association business representative asked simply in her e-mail to Ms. Zieminski. "What do we do with the suspension grievance at this point in time?" There was no apparent response to this either and no indication that the State felt that the Association had dropped the suspension grievance at that point.

There was a Step meeting about the termination held on June 3, 2009. As one might expect, given the fact that the parties had already agreed to deal with the termination matter first, there was little or no discussion of the suspension grievance at that meeting. This however is entirely consistent with the notion that they would deal with the termination and not the suspension. Moreover, the converse is certainly true – there was no evidence to suggest that merely because the parties dealt with the termination at that meeting that this resulted in the waiver of the suspension grievance.

On July 9, 2009 there was a further e-mail discussion about the grievance, although it is not completely clear which one. The Association representative asks, “Did I get Dixie’s [the response for Ms. Dodson] yet?” This was a reference to a formal response to the grievance and/or a settlement proposal; it was not completely clear which. Regardless of what the Association meant, the State response is most important. Ms. Zieminsky responded, also on July 8th, “no I still need an extension. I’m working on it I have been talking to Collections and MMB about a settlement, but I don’t think we are ready to offer that. So, I am writing a denial.” Again, as one might expect, there was very little evidence about the settlement discussions but it was clear that the Association assumed that the extension was about a formal response to both grievances since none had been forthcoming at that point. More significantly, there was no indication by the State that it believed that the suspension grievance had been waived nor any clear time frame Stated as to when it expected the Association to move that grievance forward even though the discussions on resolution of the termination were still pending.

It is incumbent upon the party asserting a waiver by the other party to make it clear what is being waived and when that right either has or will be waived. No such clear indication was made here. While the State assumed that the Association had dropped the suspension grievance there was no evidence on this record upon which to base that other than that nothing much happened with it for approximately 9 months while the parties discussed the termination. Certainly there was no clear indication by the Association that it was dropping the suspension grievance. Elkouri notes that “Especially common in arbitration is that species of waiver known as ‘acquiescence.’ This term denotes a waiver that arises by tacit consent or by failure of a person for an unreasonable length of time to act upon rights of which the person has full knowledge.” *How Arbitration Works*, 5th Ed, at page 576. A waiver of the right to appeal in this unique circumstance would have required more than the simple assumption by the State that the Association had dropped the matter based on the fact that

the Association kept moving the termination action while doing little to move the suspension. That was, after all, the original agreement.

The State asserted that the Association's actions in not pushing the suspension matter forward for some 8 or 9 months amounted to a waiver. There may be circumstances in which such acquiescence coupled with a lack of communication could result in the waiver of a grievance. Here, however, the "delay" if it could be called that, of 8 months in processing one grievance while another grievance wound its way through the process and where there was an agreement to hold the first grievance in abeyance while that other matter was processed does not result in the waiver of it without a clear message to that effect by the party seeking to assert a waiver.¹

The State further asserted that the Association continued to make discovery requests for the termination grievance but never made any for the suspension grievance. This too is not inconsistent with the apparent agreement to hold the suspension grievance in abeyance and move forward with the termination first. The simple fact that the Association wanted information about the termination in order to defend that part of the case did not result in a waiver of its right to move forward on the suspension grievance.

The Association's appeal letter of January 19, 2010 references only the termination and appealed the matter to arbitration. There was no reference to the suspension at all in that letter. The State argued that it could reasonably assume that the suspension was waived based on that letter which appealed only the termination to arbitration. This was a puzzling letter but on balance, before a party is held to have waived a grievance, especially where it was properly and timely filed to begin with, there must be a far clearer expression of a waiver than the simple omission of a reference in an appeal letter.

¹ Arguably, this same assertion might well apply equally to an assertion that the State waived its right to assert a waiver since there was never a clear Statement by the State that it considered the suspension grievance waived either. Certainly, as noted above, a waiver of a clear contractual right requires clearer evidence of waiver than was presented here.

Further, there always was an agreement to proceed first with the termination grievance and deal with the suspension at some indefinite later time. The appeal letter alone does not alter that agreement and appeared to be consistent with it.

The next clear expression of the Association's intent to move both grievances forward and combine the suspension and termination grievance occurred in March 2010 when the Association business agent finally referenced both grievances and expressed a desire to arbitrate them both. It was at that point that the State MMB intervened and asserted that since nothing had essentially happened with the suspension grievance the Association had waived it. That brought the matter to the bifurcated hearing held in the matter on this question.

To be sure, things could have and should have been made much clearer. Further, it was clear that both sides made assumptions without knowing what the other side was thinking – if ever there was a case that provided an example of the need to be clear about one's intentions and the assumptions being made about the matter it would be this one. On balance however there was nothing in the strings of e-mails about the matter that clearly and unequivocally resulted in the waiver of the Association's right to move the suspension grievance forward.

Elkouri notes that waivers of the express time limits can be done orally and without any formalized written agreements. See Elkouri and Elkouri, *How Arbitration Works*, 5th Ed at page 278. Here it was clear that there were both oral conversations about the suspension grievance being held for a while as well as written memorializations of that. Further, as noted, there was no clear waiver of the right to grieve the suspension grievance and no clear assertion of the claim that it had been waived until far too late in the game.

The State cited several prior awards in which the arbitrators declined to hear matters on the merits due to the failure of the unions in those cases to properly process the grievances. In *State of Minnesota, DOLI, and MAPE*, gr. # 99-8-3742, (Jay 1999) the arbitrator found that the Step 3

grievance meeting was held on April 27, 1999. The grievance had been properly filed and processed up to that point.

In that case the HR Director issued a denial of the grievance that same date and the union contacted an attorney to address what the Association felt were factual errors in the HR Director's letter. The Association sent a letter dated May 11, 1999 to the HR Director asking that he reconsider several of the alleged inaccuracies in the April 27, 1999 denial letter. That letter made no reference to appealing the matter to arbitration nor was there any request made either there or at any other time to extend the time limits (which were similar to those found in the current labor agreement) to arbitration. The attorney then left the country on or about May 17 or 18, 1999. When he returned he discovered that there had been no response to the May 11th letter. MAPE then sent a letter dated June 8, 1999 formally appealing the matter to arbitration. DOER received this letter on June 9th, some 42 days after the April 27, 1999 denial letter.

The arbitrator denied the grievance as untimely finding that there had been no request or agreement to extend the time limits and that the appeal to arbitration was simply made too late; i.e. 42 days when 30 was required. Here obviously the facts are quite different. There was a request and an agreement to hold the suspension grievance in abeyance until the termination went forward. The claim here is that the Association acquiesced and that the State could reasonably have simply assumed that the suspension matter had been dropped. There was no hard evidence of that intent made by either party as noted above. In the case before Arbitrator Jay there was nothing to indicate that the Association wanted anything other than a reconsideration of the denial in the letter of May 11th and no letter appealing the case until it was far too late.

The State further cited *MN Dep't of Employee Relations and State Residential Schools Education Association*, BMS 01-PA-539 (Flagler 2001). There the disciplinary memo was given to the grievant on May 23, 2000. There was some factual dispute about whether there Union representative placed a phone call to the HR Director seeking to discuss the grievance. The Union claimed that a call was placed on May 31st but the arbitrator found that no record of such a call existed.

The arbitrator found that the two did finally speak on June 19th and that a Step 2 hearing was held on July 2, 2000. The date the appeal to Step 2 was due would have been June 6, 2000. The arbitrator further found that irrespective of whether the parties had a history of verbal extensions of time, the employer “steadfastly” denied any such verbal agreement on the record there. The arbitrator denied the grievance holding essentially that the Union had dropped the ball and had made no agreement, verbal or otherwise, to extend the time limits and that they had passed.

Here the facts are again quite different. There was credible evidence of an agreement to hold the suspension grievance in abeyance; indeed there was acknowledgement of this through the e-mail from the State that it still “needed an extension.” The outward manifestations of one party are the critical pieces of evidence and here those outward manifestations, or lack thereof, were enough to demonstrate that the Association was reasonably relying on the original agreement to hold the suspension matter while the termination went forward. There was no evidence as there was in the *State Residential Schools Education Association* matter referenced above, that the Union had not in fact ever made the call or that there was no agreement originally. These facts make this case a very different one from that presented here.

Finally the State cited *State of MN, Brainerd RTC and MAPE*, (Miller 1993). There the arbitrator found that the grievant had been terminated on April 10, 1992. The grievance over that action was filed April 14, 1992. The Step 2 meeting was held May 14, 1992 and formally denied by letter dated May 18, 1992. The appeal would have been due on July 20, 1992 pursuant to the time limits in place at that time.

There was a dispute about whether indeed a letter appealing the denial of the grievance was ever sent. The Union in that case believed it had sent the letter but the State had no record of the appeal. The arbitrator found that through inadvertence and simple human error by the union secretary the letter had in fact not been sent. He was compelled to deny the grievance on procedural grounds because of this oversight.

This case is even more obviously distinguishable from the instant matter and even proceeds on a different theory. There the question was whether the arbitrator could find some way to allow the matter to go forward because the Union fully intended to appeal the matter but simply failed to send the letter appealing the case. Here the question is not whether there was an appeal – there was- the question is whether there was some outward manifestation of an intent to waive the suspension grievance by the Association – there was not.

Here as noted above, the facts demonstrate that the Association properly appealed the grievance and that there was a mutual agreement to waive the time limits for the suspension grievance. Further, even though there was little communication about that grievance, although there was some, in the intervening period, the delay here was not so unreasonable or long that it results in the knowing and intentional waiver of the right to appeal the suspension grievance by the Association. Accordingly, the matter can proceed on the merits of both grievances.

MERITS – 3-DAY SUSPENSION

The grievant is a Revenue Collections Officer 3, RCO, and has been with the Department of Revenue for approximately 15 years. The State alleged that her job performance over time had deteriorated and that the grievant had been told multiple times about her demeanor and professionalism over the phone when talking to taxpayers yet she refused to conform her behavior to the expectations of the department despite warnings, prior discipline coaching and training. The event that led to the suspension occurred on March 25, 2009 when the grievant took a call from a taxpayer regarding a garnishment he was experiencing due to unpaid taxes.

The State alleged that she was brusque and short with the caller and failed to follow procedure in dealing with his questions and concerns. The grievant was previously counseled about this and was given multiple opportunities to get the necessary training and either failed to do so or refused to follow procedures.

The Association asserted that her demeanor over the phone was acceptable and that the grievant is a long time very experienced RCO who frequently gets calls from people who are angry with the department. Indeed, that is virtually all she gets; anyone calling the department usually has a problem or has been subject to a garnishment or penalty of some sort and they are understandably upset and even hostile. It is the responsibility to be both firm yet professional with these people and the Association asserted the grievant was both.

The call was recorded and presented at the hearing. There was some evidence to support the claim that the grievant was unduly short with the taxpayer and at one point accused him of being obstreperous over the phone. There was little basis for this and the grievant's demeanor with the taxpayer may have actually escalated his angst rather than diffused it. Had this been a single incident such a call could easily be chalked up to one bad phone call out of the many taken during the course of a day or even a week. Here however there was evidence to suggest that the grievant has been counseled about this very thing many times.

Moreover, the call was "audited" by other staff, see State exhibit 3 and 4 and found to have contained several deficiencies in documentation and advice given the taxpayer. Further, the grievant was given a 2-day suspension in April 2008 for the same conduct. See State exhibit 6. There the grievant was accused of "disrespectful treatment of taxpayers and failure to meet the job expectations of a Revenue Collection Officer 3." This was grieved and resolved. She also received a written reprimand on December 4, 2007 again for almost identical concerns. To be sure there were some things the grievant handled well in this call and those are reflected on several of the State's documents. See State exhibit 6. However, a review of the evidence from those incidents as well as that from the March 25, 2009 call demonstrated virtually the same sorts of concerns.²

² It should be noted that all of the discipline referenced in this paragraph came from the grievant's latest supervisor. One of the Association's allegations is that she was unreasonable in her expectations of the grievant and was not in the best position either time wise or geographically to adequately or accurately judge the grievant's performance. This allegation had considerable cogency in the termination discussion and will be discussed more below. For now however, it was clear that the grievant was placed on notice of the concerns and that for whatever reason was not doing enough to correct them for this supervisor.

The Association asserted that there were no complaints raised by the taxpayers in either case and that they therefore did not feel that they were treated so rudely that they called to complain. This however is a bit of a false argument and does not alter the other established facts on this record.

If indeed someone has been treated badly they may not complain or perhaps even feel that this is the “culture” of the department and that calling to complain would be futile. On this record the evidence of the grievant’s lack of professionalism and failure to follow standard procedure was demonstrated by the audit done of the call and of the taped call itself.

Further, while there was some merit to the claim that the performance standards may have changed with the new supervisor on this record that argument was not as persuasive as it could have been under slightly different facts. The grievant in fact has been told multiple times that her demeanor over the phone needs to change – and that was under a different supervisor who had *not* rated her poorly overall. While this was a factor in the termination piece since overall poor performance was one of the main issues in that matter, it did not change the State’s claim that the grievant needs to change her demeanor over the phone and that she has been told to do so many times – both by her current supervisors as well as prior supervisors.

The main factors here were thus the grievant’s demonstrated demeanor and tone as heard on the recording of the call in question as well as the credible testimony that she failed to follow proper procedure and gave the taxpayer inaccurate information that day. These facts, when viewed in light of the prior warnings and training given show that there was just cause for the 3-day suspension meted out in this matter. Accordingly, that part of the grievance must be denied.

MERITS – TERMINATION

The termination was a much thornier issue with conflicting evidence on the grievant's long term performance and conflicting facts on the allegations of misconduct on both May 19 and 20, 2009. Whereas the evidence supported the State's claim that the grievant was brusque with the taxpayer in the call of March 25, 2009 and that she had been warned about this multiple times, the evidence here on her overall performance was murkier to say the least. The State asserted that the grievant has been told many times to correct her demeanor over the phone and that even though her evaluations were "good" from the time before Ms. White took over as the supervisor, the grievant was clearly told that under this supervisor, her demeanor has to change.

Certainly, a new supervisor can change the rules of the game and set new standards for performance. The mere fact that an employee was seen as demonstrating acceptable performance under one set of management guidelines and one set of supervisors does not mean that that same behavior will be acceptable for all time. This is especially true when the management team puts forth a new set of rules and expectations for the line employees, and, as here, calls it "the new world." It was clear that things were changing in the revenue department and that the grievant was informed that she needed to adapt to it. Change is by nature the underlying principle of the American workplace and everyone, management and line employees alike are subject to it.

Having said that though it was apparent that the Association raised some excellent points about the grievant's performance over time. First, there was evidence to establish that the QAPI's were to be averaged when assessing performance and that while in some of the months introduced into evidence here, the grievant fell below standards, for many of them she met or exceeded her performance measure. Indeed, in the last month of her employment, April 2009, she was at 100%. There was thus some merit to the argument that this employee is not irredeemable as the State put it and that she can learn and can be expected to correct her behavior.

The arbitrator spent considerable time sifting through the performance measures and the grievant's performance. There was also the clear evidence that the State has been trying to get the grievant to correct her performance and offered training and coaching with a union steward. The evidence from Mr. Eckert frankly did some damage to the grievant's case here in that he had a clear sense that she was not paying as close attention to his advice as she should have and even gave him the sense she was ignoring him.

One of the basic tenets of a "job performance" discipline case is whether the employer has offered adequate notice to the employee that their performance is deficient in some fashion. The State did that here. The evidence did not establish that there was some element of discrimination here. The record shows that the grievant was subject to the same performance measure as the other RCO 3's out there and the Association's claim that the grievant was subject to some disparate treatment was unsupported by the evidence.

There was also evidence to show that the grievant had been disciplined for the very same sorts of issues that the State claimed were not corrected now. As noted above, the grievant was given a warning in 2007 and a 2-day suspension in April 2008 for virtually the same problems as are being raised now. There was no discussion of those but the letters were reviewed and showed that the grievant was clearly on notice of the things that she was doing incorrectly and that she knew not only what they were but how to fix them. On this record the State clearly met this requirement.

Second there is the requirement that the grievant be given adequate equipment, tools, materials and training to do the job. There was no claim that her equipment was defective. There was some claim that the computers were sometimes slow and that may well be true but there was no evidence that only hers were slow or that it affected the grievant's performance any more or less than other employees in the department.

Moreover, there was very little evidence by either side as to how the grievant's performance compared to other employees. Thus no conclusions can be drawn from that other than to note that had there been a claim that other employees were given different standards or held to some different performance measure, either formally or informally, that evidence would presumably have been brought forward by someone. Here it was not so the question was whether the grievant was properly measured against the "norms" as established in the Department. It appears she was but, as noted above, she actually met many of them. This was a fact that undercut the State's case on this record.

Further, there is the requirement that the grievant be given an adequate opportunity to conform her behavior to the expectations of the Department. Here that was something of a mixed bag. The State showed that some of the expectations had been given to her over a long period of time. The grievant's employment evaluations are instructive on this point. Many of those showed that she had been counseled to correct her demeanor on the phone for example. Those admonitions however did not change the fact that her prior evaluations were for the most part "meets or exceeds" expectations.

Here too, there was some evidence to establish that the grievant was given an adequate chance to correct her behavior. As noted she was given training and coaching and a reasonable time within which to correct the deficiencies. More importantly, she never raised the claim that she did not have enough time or was not trained well enough during any of this. The grievant's claim was that she was meeting her standards. To some degree that was true but there were clearly deficiencies noted that were not being adequately addressed.

Here, the State showed that the grievant's performance was not in all cases what was expected. The Association showed that in many other categories it was. On balance, the record established that even though the grievant's performance in some cases was acceptable it was deficient in many ways and that her attitude in effectively rejecting the efforts to train and assist her was troublesome. This was taken into account in determining the appropriate remedy in this matter.

Thus, the State showed by a preponderance of the evidence that the grievant's performance warranted some discipline on this record but would not have established sufficient cause in and of itself to warrant dismissal. The question next turns to whether the grievant's conduct on May 19 and 20, 2009 were sufficient to establish just cause for her discharge

The evidence supported the grievant's version of what happened. While the grievant did not call in on the 19th at the exact time she should have, the Association was able to provide a very credible, plausible and acceptable explanation for why. It was abundantly clear that the grievant had applied for and been approved for FMLA leave due to her medical conditions. Association exhibit 14 showed an FMLA approved leave for back pain and diabetes on an "indefinite" basis. There was also an indication of medication for diabetes under "treatment." This record is dated 7-22-08 and indicates the need for intermittent FMLA leave.

Further, Association 15 showed that the grievant has depression as well as fibromyalgia and several other conditions. Significantly, it indicated that the employee could be expected to be out of work "2-3 days/ month." This is dated 8-22-08 and also indicated the need for intermittent leave. It was approved for the 2-3 days per month.

Finally there was the FMLA approval dated 4-27-09 that clearly indicates "poorly controlled diabetes" as well as other conditions. This indicates that her conditions will affect her ability to work "3X" per month. Significantly, all of these were approved by Ms. White. Why there was no investigation as to whether these medical conditions may have affected the grievant's actions on the 19th and 20 of May 2009 was not explored or explained at the hearing but substantially undercut the State's claim that the grievant was somehow "disrespectful to her supervisor" as the discharge letter alludes to. The evidence did not support that allegation.³

³ There was no evidence that these medical conditions caused or aggravate the grievant's poor performance and no decision is made with regard to whether that was the case. On this record, these medical conditions clearly did cause the grievant to act erratically on May 19th however.

It was clear from the records and the credible testimony of the grievant and her daughter that the grievant had in fact started insulin literally the night before the 19th and had a reaction to it that caused the grievant to be quite lethargic, out of sorts and even a bit erratic. Under these circumstances it was quite understandable why that occurred and why the grievant did not call in until shortly after 8:36 a.m. even though she should have called in at 7:00 a.m. The evidence showed that the grievant was reacting severely to the insulin and frankly was not fully aware of what she was doing. Certainly there was no showing that she intentionally failed to call in.

Obviously if the grievant had been in a coma she would not have been able to call in so the “rule” relied upon by the State is certainly not absolute. While the grievant was not unconscious she was clearly having a severe reaction and was not thinking straight at all. Under these circumstances the Association’s claims had merit on this record.⁴

The evidence further established why she was somewhat abrupt when she spoke to Ms. White that day. This too was related to her medical condition that day and the grievant’s and her daughter’s testimony supported the grievant’s odd mood that day. It was further abundantly clear that the grievant was in no condition to go to work that day and that her FMLA leave documents appear to be exactly what this condition was aimed at. On this record there was thus no just case for her discipline for the actions on May 19, 2009.

The next question is whether there was just cause to discipline the grievant for her actions on May 20, 2009. The evidence did establish quite clearly that she appeared for work that day on time and that she got to work as directed and began performing her duties that day.

⁴ It should be noted that this decision in no way undermines the authority of the management at this or any other Department to establish reasonable rules and expectations for employee conduct. The issue here was not the reasonableness of the rule but rather whether the evidence established a reasonable excuse for why it was violated. On this quite unique facts it did.

There were also several other ways the supervisor could have checked on the grievant's whereabouts and her actions that day. She could have simply checked the computer system to see if the grievant had logged in. She could also have interrupted the grievant's ACD session with a "pop up" type window asking where she was. She could, and apparently did, have another onsite supervisor check on the grievant.⁵ On balance the supervisor could easily have verified where the grievant was that day.

Having said that however, the grievant was subject to a clear directive to e-mail her supervisor every day when she got to work to let her know she was at work. Despite a claim by the grievant that she did send an e-mail there was no evidence that this happened.

The two finally connected late in the day by phone, at approximately 3:04 p.m. The supervisor was understandably upset by the delay in the grievant getting back to her. The grievant explained that she was not allowed to make such calls but the evidence showed that there were times when she could have and should have picked up voicemail to see that her supervisor had called. The evidence on this record failed to establish a legitimate reason for the failure to e-mail the supervisor or to return the voicemail as directed even though there were in fact other ways to get in touch with the grievant.

The final question is what to do with all this. As noted, the State failed to establish just cause for the discipline for the actions of May 19th. Further, as noted, the question of the grievant's performance was something of a mixed bag; with some evidence showing that her performance was unacceptable and other evidence showing that her performance was at or even above performance standards as measured by the QAPI's.

⁵ The discharge letter refers to another supervisor located near Unit M checking on the grievant and alleged that he found that the grievant appeared to have just gotten to work. It was not clear when this happened but this allegation was not supported by the evidence on this record. The Association established without question that the grievant appeared for work on time and that she logged into the ACD system when she was supposed to. See Association Exhibit 26 and 27. Further, and significantly, there was no evidence of this alleged visit by the other supervisor on this record. This too was troublesome and was a part of the rationale for discharge which was simply not shown to be supported by the evidence.

Moreover, while there was some evidence to show that the supervisor could have used other ways to check on the grievant's whereabouts and actions on May 20th, the grievant did not e-mail her supervisor nor did she return the call made to her in a timely fashion. The grievant claimed to have sent the e-mail but there was no evidence that it was sent nor any convincing evidence that it had been held up somehow or that there was a technical glitch that prevented it from going through.

Several options were considered. First the option of termination was seriously considered but rejected because the State failed to prove all of the allegations against the grievant and because even though some of her performance measures do not meet expectations she meets many of them. Second a reinstatement with full back pay was rejected since the State did show that there was cause for some discipline based on the actions of May 20th and some of the performance measures and her prior record. A reinstatement with a suspension of some sort was considered but rejected due to the nature of the grievant's ongoing performance issues and her failure to gain sufficient insight from the training by her steward that was offered and the other training and coaching that has been offered. The arbitrator was mindful of the allegation that the grievant was irredeemable by the State but the evidence showed otherwise – the performance measure in April 2009 showed marked improvement establishing that the grievant can perform well if she is motivated to do so. It is hoped that something in this decision will do that but there is always some risk that it will not.

Finally, the most appropriate remedy on this record was a reinstatement without back pay or benefits. This was deemed most acceptable due to the fact that the State proved a majority of the claims against the grievant on this record. Accordingly, the grievant is to be reinstated to her former position as a RCO 3 within five business days of this award but without back pay or accrued contractual benefits.

AWARD

The grievance regarding the 3-day suspension is determined to be timely filed and procedurally proper but is DENIED on the merits.

The grievance regarding the terminations is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated to her former position within 5 business days of this Award but without back pay or accrued contractual benefits.

The parties' grievance procedure at Article 9 calls for the losing party to pay the full fee. Here since this was a somewhat split decision the parties are ordered to split the fee equally.

Dated: May 24, 2008

MAPE and State of Minnesota, Dodson.doc

Jeffrey W. Jacobs, arbitrator