

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

LAW ENFORCEMENT LABOR SERVICES

Re: Employee Termination

-and-

B.M.S. No. 09-PA-1140

**THE COUNTY of RAMSEY
ST. PAUL, MINNESOTA**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Employer: Marcy Cordes, Labor Rel. Mgr.

For the Union: Brooke Bass, Staff Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article 7, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievant on June 12, 2009, and eventually appealed to binding arbitration when the parties were unable to resolve the matter to their mutual satisfaction during discussions at the

intermittent steps. The undersigned was then selected as the Neutral Arbitrator to hear evidence and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. Subsequently, a hearing was convened in St. Paul on March 18, 2010 and continued the following day. At that time the parties were afforded the opportunity to present position statements, testimony and supportive documentation. At the conclusion of the proceedings, each side indicated a preference for submitting written summary statements. They were received on April 10, 2010, and thereafter the hearing was deemed officially closed.

The parties have stipulated that the matter is properly before the arbitrator for resolution based upon its merits and that the following constitutes a fair description of the question to be answered.

The Issue-

Was the Grievant discharged from her employment for just cause?
If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that at the time of her termination, the Grievant, Sochinda Keopenchan, was an employee of Ramsey County (hereafter "County", "Employer" or "Administration") working as a "9-1-1 Telecommunicator" ("TC") in the Department of Emergency Communications. As such, she is a member of the bargaining unit represented by Law Enforcement Labor Services ("Union" or "LELS") who, together with the Administration has negotiated and executed a labor agreement (Joint Ex. 1) covering terms and conditions of employment for those employees assigned to the classifications of Radio Dispatcher 1 & 2, and Telecommunicator.

The Grievant began her employment with the County as a TC in January of 2008, and remained in that capacity until her termination in June of last year. Like other employees assigned to the same classification, Ms. Keopenchan received classroom and hands-on training to receive incoming (911) calls that came into the Communications Center ("Center"). The Center handles both fire and police calls for some fifteen cities in the County, including St. Paul.¹ In addition the Employer is

¹ Prior to 2007, the City of St. Paul operated a separate emergency call center. However,

responsible for receiving medical emergency calls for five cities in the County.

The Grievant's job responsibilities included answering 9-1-1 emergency and non-emergency calls from the public, interdepartmental calls from police, fire and ambulance services, as well as calls from other public safety agencies within the County's jurisdiction. She monitored approximately four computer screens, while gathering, prioritizing, and documenting caller information. Additionally, she provided callers with the appropriate advice or referral, or to initiate police, fire and/or emergency medical services to the caller (County's Ex. 1). A TC was expected to perform these tasks efficiently and accurately in a fast paced, high-stress environment. Accordingly, the Grievant needed to have the ability to listen, speak and write articulately and without confusion when interacting with the public (*id.*, at p. 3). A person occupying the position also needed to demonstrate the ability to resolve common challenges associated with handling such calls for police, fire and emergency medical services that might be needed, and to determine the relative severity of the calls waiting to be dispatched

they merged their facility with the County's that year, and currently the Employer is responsible for all incoming emergency calls.

(default priorities) utilizing the Center's Computer Aided Dispatch ("CAD") equipment system.

According to the Administration, the Grievant began to evidence difficulties with the performance of her assigned job duties, "almost immediately" upon completion of her formal training. More particularly they charged that Ms. Keopenchan was having problems with quickly analyzing the incoming calls and prioritizing them. For the first six months, a newly hired Telecommunicator is on probation. When the Grievant's probationary period expired in July of 2008, the Employer concluded that her job-related difficulties were caused in part by what they understood to be personal problems she was experiencing at the time. Accordingly, they opted to "pass" her with the idea of administering further coaching and counseling in an effort to preserve her employment.

Throughout the balance of 2008, the Grievant continued to receive one-on-one coaching and counseling - primarily from Shift Supervisors Emily DeBroux and Catherine Carbone. This additional training was documented (County Exs. 18 - 21). While some of the comments made were encouraging (Ms. DeBroux wrote "keep up the good work" on a number of occasions) there were nevertheless recurring problems

identified with her performance by the supervisors. These included difficulties with prioritizing calls, entering incorrect addresses, missing pertinent information, failure to initiate dispatcher calls with clear and concise information, grammar issues and convoluted comments (Employer Ex. 19). Supervisor Carbone's observations noted, among other things, that Ms. Keopenchan had difficulties with spelling, the use of incorrect words, being argumentative with callers, priority coding, and her failure to pass along critical information to the responders (County Exs. 21-25).²

The training and counseling continued into 2009. In addition to Ms. Carbone and Ms. DeBroux, Shift Supervisors Annette Norlander and Denise McMullen also sat in with Ms. Keopenchan while she was working, to provide one-to-one guidance (Employer's Exs. 22-25). However, the same (alleged) deficiencies were observed and noted as continuing. In addition they included problems with keeping the caller on the phone until help arrived, incorrect and confusing wording, and type coding at her work station, as well as what they perceived to be a failure in making

² The Grievant maintains that she was receiving inconsistent directives from these supervisors and that her experience while actually performing her job was quite different from the training she was receiving during this time (Union's Ex. 5).

prompt communications to the various responders.

These concerns were passed along to yet another Shift Supervisor, Kim Adamek, who testified that she then conducted her own investigation into the matter. After examining a number of the recorded calls that the Grievant had taken, Adamek concluded that the County was facing potential liability issues were Ms. Keopenchan allowed to continue working as a Telecommunicator. Accordingly, she sent a memo to Operations Manager Denise O'Leary and the Center's Director, Scott Williams, recommending that the Grievant be terminated (Employer's Ex. 10). This supervisor cited recurring deficiencies with the Grievant's ability to classify calls, assign them the appropriate priority and writing inaccurate and confusing comments (*id.*).

Manager O'Leary, following discussions with other members of the Administration, concluded that the Grievant was indeed experiencing severe errors in the performance of her duties, which they believed "seriously compromise(d) officer and citizen safety" (County's Ex. 11). Nevertheless they determined that rather than discharge Ms. Keopenchan, they would give her another opportunity to improve and therefore offered her thirty days of remedial training in an effort to save

her job (*id.*).

Training Officer and fellow Telecommunicator Brittany Karels was assigned to do the training which commenced on or about April 20, 2009 (Employer's Ex. 26). Just prior to that date however, the Grievant received a written reprimand for the manner in which she handled a call in January of that year (County's Ex. 8). According to the County, the discipline was a result of the Grievant's inability to identify the proper address where the incident was taking place; that there was no sense of urgency even when the caller indicated that he was being attacked by sword wielding man outside his car, and; that she directed the caller to return to the very place where the perpetrator resided thereby placing him in greater harm. Calling the errors committed "egregious" Supervisor Carbone concluded by noting that "...a recurrence of this conduct or similar conduct could result in more severe discipline" (*id.*).³

At the end of her participation in the remedial training, Ms. Karels noted that while the Grievant had improved in some areas of her job duties, she nevertheless was not progressing according to schedule. She concluded Ms. Keopenchan was unable to keep up with the work load

³ The incident became known as the "Knoll call" after the name of the street where the "comp" was located when he made the call.

at an acceptable level of accuracy, and that the repeated errors in her performance were unacceptable despite the fact she was a willing participant in the process who “tried hard” (Administration’s Ex. 27).

Once the additional training was completed but without what the Administration believed to be the desired result, Ms. Keopenchan was notified by Director Williams that she was being terminated for poor job performance (Joint Ex. 2). Thereafter the Union filed a formal complaint on her behalf alleging that the discharge lacked just cause, and seeking a make whole remedy.

Relevant Contractual Provisions-

Article 10
Discipline

* * *

10.1 The Employer will discipline employees for just cause only. Discipline will be in the form of:

- a) Oral Reprimand
- b) Written Reprimand
- c) Suspension
- d) Reduction
- e) Discharge

Positions of the Parties-

The **COUNTY** takes the position in this matter that the termination of Ms. Keopenchan was for just and sufficient cause. In support of their claim, the Administration maintains that the position of a 9-1-1 Telecommunicator is a very important one, requiring employees occupying such a classification to master certain skills necessary to perform what is clearly a pressurized and therefore stressful job. In this instance however, the Grievant has demonstrated, in a variety of ways, her inability to communicate a situation accurately and clearly. Moreover, they assert that she repeatedly was unable to properly prioritize calls, assigning them a lower priority in most cases than what was warranted. This creates a very real safety issue for the responder who depends upon the information passed along by the TC to the Dispatcher. It is imperative that those who handle emergency calls for the County be able to consistently and reliably perform the basic tasks of their position. In this instance however, Ms. Keopenchan simply was unable to improve her performance to the acceptable level. This, in spite of the extraordinary effort of offering here thirty days of one-on-one remedial training in lieu of her termination in March of last year. Indeed, the same

person who administered the Grievant's initial training was the one chosen for the additional instruction. At the conclusion of her involvement with the added exercise, Ms. Karels simply concluded that the employee lacked sufficient cognitive skills to become a reliable and competent Telecommunicator. Accordingly, for all these reasons, they ask that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position that Ms. Keopenchan's termination lacks just and sufficient cause, thereby violating the express provisions of Article 10 of the parties' Labor Agreement. In support, L.E.L.S. contends that the Grievant passed her probation in July of 2008, indicating that she was competent in the performance of her duties as a Telecommunicator for the County. The position itself, they argue, is a difficult one that takes a certain amount of time to master. By the Employer's own admission, there are grey areas involved in the performance of the requisite duties. Each call to the Center is different requiring instant judgment and prompt response. Ms. Keopenchan was extremely excited when she was awarded the job, as she had family members in the same profession, and she carried with her a desire to help the community she lives in. After completing her initial training and

working at the Center for a period of time, she developed a "CAD" sheet which was used on the floor by other TCs as an aid. Unfortunately however, according to the Union, as performance problems arose, the Grievant began to receive inconsistent and sometimes conflicting instruction and direction from the Shift Supervisors which only increased the stress she was experiencing. Moreover, they were less than honest in their interactions with her. Additionally, L.E.L.S. charges that Ms. Keopenchan's due process rights were violated in this instance when the County failed to administer progressive discipline prior to her termination. Furthermore, the Employer failed to obtain the Grievant's version of the events in advance of discharging her. For all these reasons then they ask that the grievance be sustained and that the employee be returned to her former position and made whole.

Analysis of the Evidence-

This case is unique to the extent there is a threshold issue that needs to be resolved to determine the most reasonable approach to an analysis of the evidence contained in the record. More particularly, the initial inquiry is concerned with whether this is a disciplinary termination

(Union's position) or one driven by the employee's failure to obtain a performance level deemed necessary to properly perform her job (County's view).

An answer to this question is clouded somewhat by the unrefuted fact that in April of last year, Ms. Keopenchan received a "written reprimand" for the manner in which she handled what has come to be known as the "Knoll Drive" call (Employer's Ex. 8). Neither side disputes the fact that this constituted discipline in the most traditional sense of the word. Yet, what transpired both before the issuance of the letter, and after, cannot in my judgment, support the argument that this matter should be approached as a normal disciplinary case. Rather, when all the evidence is reviewed and evaluated, I find that the Grievant's dismissal ultimately was the result of what the County deemed to be her inability to meet the demands of the job.

While considering an employer's action to dismiss based upon incompetence rather than any misconduct is relatively unique within the arbitral setting, it is nevertheless not without precedent. See: *Saginaw Board of Ed.*, 101 LA 194; *Southwestern Bell Telecom*, 94 LA 199. The dispute in *Saginaw* is particularly germane. There, the parties agreed

initially the employee would be able to perform the duties of the assigned position; that the employee repeatedly attempted to perform the work, but; that ultimately it was determined they were unable to do so at a minimally acceptable level.

L.E.L.S. maintains that a dispute addressing just cause necessarily includes discipline and the concomitant question of whether progressive measures and due process was administered prior to what is normally considered to be the most severe form of punishment within the American system of industrial relations. As previously noted, Article 10 of the parties' Labor Agreement establishes progressive disciplinary steps. The Union further posits that an application of the progressive process is based on the premise that discipline is intended to "rehabilitate" an otherwise satisfactory employee. Their argument begins to lose altitude however when common and industrial dictionary definitions of the critical terms are taken into consideration, along with the fact that Ms. Keopenchan never fully achieved a satisfactory level of performance.

Roberts' Dictionary of Industrial Relations, BNA, 4th Ed., defines the term "discipline" to be: "Action by an employer...against an employee for infraction of company or contract rules. * * * Discipline is *a form of*

punishment to obtain conformance...is widely used in labor-management relations" (at. p. 175; emphasis added). Similarly, *Webster's Dictionary* defines the verb "rehabilitate" to mean "to put back in good condition; to restore that which has been lost." On balance, I find that the facts developed in the record, do not fit the rule infraction/punishment paradigm but rather address the question of job competency and whether the Administration was justified under the circumstances for removing Ms. Keopenchan from her position due to her inability to achieve the expected level of skill and proficiency necessary to perform her job.

Utilizing this approach, and following a careful evaluation of the evidence and accompanying arguments submitted, I conclude the answer must be declared in the affirmative.

The record shows that by the end of her initial probationary training period, Ms. Keopenchan's evaluations indicated a rating of three which was below the level four that the County normally considers acceptable for a new TC (Employer's Ex. 18). As previously indicated, after supervision reviewed and evaluated her work at the end of her probationary period in June of 2008, it was felt that events with her personal life were hindering

her performance. Thus, in lieu of “letting her go” at that time, management determined that with additional counseling and coaching they would be able to bring her work product up to an acceptable level (testimony of Operations Manager, Denise O’Leary). The subsequent training and coaching the Grievant received for the balance of that year has also been identified above. Her difficulties continued into 2009, as evidenced by the record.

Beyond the Knoll Drive incident, no fewer than four supervisors offered testimony and supportive documentation demonstrating a continuing pattern of difficulties with Ms. Keopenchan’s job performance. They included a relatively high error rate in taking and recording calls, numerous spelling and grammatical errors, missing (critical) information, errors in connection with analyzing and prioritizing calls received in the Center, and entering information incorrectly. During this time, these problems were continually identified and the Grievant was coached and counseled on numerous occasions. Their efforts were memorialized in County Exhibits 19 – 25 by Supervisors DeBroux, Carbone,, Kim Adamek and Annette Norlander. Beyond question, someone occupying the position of Telecommunicator must be able to demonstrate good

judgment and analytical skills in order to correctly evaluate the facts of each call received and to promptly take the necessary action required.

In light of the testimony from these four supervisors – each of whom counseled and continually coached Ms. Keopenchan – she cannot now be heard to say that she was unaware of her relatively precarious position. If nothing else, the written reprimand the Grievant received regarding the January 2009 incident on Knoll Drive should have served as a wake-up call that her work product was less than satisfactory. Indeed, the Letter of Expectation that followed in March of that year expressing the Administration’s “severe reservations about (her) ability to appropriately handle emergency calls” and encouraging her to “mount a focused effort to improve,” should have sufficed. The increased training and supervision that followed, according to the Center’s Operations Manager, was unprecedented. Her testimony on this regard was not disputed.

L.E.L.S. asserts that the additional training was flawed as the Grievant received conflicting information from the supervisors who participated in her counseling and coaching. The evidence however, fails to adequately support the claim. Brittany Karels, who was one of

the Grievant's two choices as a person she would prefer to perform the additional remedial training, testified that she truly believed the Employer wanted Ms. Keopenchan to be successful. Significantly, Ms. Karels was a member of the bargaining unit with seven years of experience as a TC. In the end, she concluded that while she felt Ms. Keopenchan "wanted to succeed," and that she "tried hard," the ability needed to perform the job simply "was not there." Moreover, Union witness Elizabeth Hendren, acknowledged that on balance, the Grievant "received good training."

The Union further contends that the Grievant was singled out as other employees were given the opportunity to correct their unacceptable behavior through the application of the progressive disciplinary steps. Additionally, they charge that Ms. Keopenchan's dismissal was not reasonably related to the seriousness of the offenses she was charged with. Indeed, they maintain that the County did not rely on any specific series of instances or events where it was shown that she violated any written policy.

Again, however, I must respectfully disagree.

As previously observed, this case centers not on discipline in the traditional sense, but rather on an employee who, in the final analysis,

lacked the necessary skills and abilities needed to succeed at her job. I am satisfied that the weight of the evidence has adequately demonstrated the Grievant's ultimate lack of competence, despite the Administration's repeated attempts to bring her performance up to a satisfactory level. Under the circumstances, it is not necessary for management to establish a violation of any particular rule or regulation. No one questions the importance of the position Ms. Keopenchan held and the need to master the duties and responsibilities that pertain to it. Furthermore, there is no compelling evidence indicating that the training materials and requirements for the job she was presented with were somehow flawed or different than what other new-hires were given. If the Grievant received desperate treatment it was in the form of additional remedial training administered by the Employer in an attempt to save her job, which nearly all of their witnesses characterized as unprecedented. While Ms. Keopenchan claimed that she received conflicting and therefore confusing direction from the four-plus supervisors who counseled and coached her, there was essentially only one operating procedure cited (the "911 hang-ups) out of some five hundred in use at the Center (Union's Exs. 5 & 6; Employer's Ex. 18).

Finally, the decision reached here has been influenced in part by the County's argument regarding safety issues. Certainly, the Administration has a very legitimate interest in limiting exposure to hazardous conditions for first-responders such as police, fire and other similar personnel. As they have pointed out, failure of a TC to perform their job properly could seriously jeopardize the safety of employees who participate in the emergency response process. An excerpt from the "Class Specification Bulletin" published by the County for the Telecommunicator position is both relevant and illuminating:

"Impact on Services/Operations:

Duties impact on the Communication Center's ability to deal with both emergency and non-emergency situations in a timely and effective manner: *Proper performance of duties results in the dispatch of the appropriate response unit for each situation; increased safety and efficiency of deputies, police officers or other emergency responders due to being provided timely and accurate information; and the accurate maintenance of records and files. Improper performance of duties can result in a negative public image for the Department due to inefficiency in handling calls or poor public relations skills; decreased safety to emergency responders and public due to the provision of inaccurate information, delays in response or inappropriate dispatch of response units. Consequences of errors range from a simple delay in service to loss of life"* (Employer's Ex. 1; emphasis added).

There is no evidence in the record to indicate that Ms.

Keopenchan's efforts to improve and succeed in her job were anything less than genuine. Clearly, she was not dismissed for misconduct. Rather after eighteen months of employment and repeated opportunities to improve her performance, the testimony and supportive documentation tendered demonstrates that the Grievant was unable to achieve a satisfactory level of skill and ability necessary to adequately perform the functions of the position she held.

Award-

Accordingly, for the reasons set forth above, the grievance is denied.

Respectfully submitted this 26th day of May, 2010.

Jay C. Fogelberg, Neutral Arbitrator