

**IN THE MATTER OF ARBITRATION**

**-between-**

**A. F. S. C. M. E. Council No. 5**

**-and-**

**THE MINNESOTA DEPARTMENT  
of VETERANS AFFAIRS  
MINNEAPOLIS, MINNESOTA**

**OPINION & AWARD**

**Grievance Arbitration**

**B. M. S. Case No. 10PA159**

**Re: Employee Discipline**

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

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**Representation-**

For the State: Joy Hargons, Principal Labor Rel. Rep.

For the Union: Cynthia M. Nelson, Business Representative  
Loretta Meinke, Field Representative

**Statement of Jurisdiction-**

The Collective Bargaining Agreement duly executed by the parties, provides in Article 17 for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievant on or about January 27, 2009, and thereafter appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-

signed was then mutually selected as the neutral arbitrator by the parties, and a hearing convened on July 29, 2010 in Minneapolis. Following receipt of position statements, testimony and supportive documentation, each side was given the opportunity to make an summary argument. Thereafter the hearing was deemed officially closed.

At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and that the following represents a fair description of the issue.

**The Issue-**

Was the Grievant, Dennis Olson, terminated for just cause? If not, what shall the appropriate remedy be?

**Preliminary Statement of the Facts-**

The record developed during the course of the proceedings indicates that the American Federation of State, County & Municipal Employees, Council 5 (hereafter "Union," or "Council") represents, among others, all regular full-time food service workers employed at the Minnesota Veterans Home in Minneapolis, a skilled nursing and living care

facility for some three hundred veterans operated by the State of Minnesota's Veterans Home Board ("State," "Employer," or "Home"). Together the parties have negotiated a labor agreement covering terms and conditions of employment for members of the bargaining unit (Employer's Ex. 1; Union's Ex. 2).

Prior to his termination, Dennis Olson, had worked at the facility for approximately twelve years as a Food Service Worker ("FSW") along with approximately sixty-two other employees who hold the same job title. Those occupying this classification are responsible for preparing and serving meals to the residents, and clearing up the kitchen afterwards.

The evidence shows that a large industrial dishwashing machine is utilized at the Home to clean all dishes and other containers used for the preparation of each meal. All FSWs have been trained to operate the dishwasher, including the proper method of cleaning the machine itself. The employees are given a variety of assignments by their supervisors in connection with the preparation, service and clean-up for all meals. For approximately eighteen months prior to his termination, Mr. Olson was primarily assigned to cleaning chores in the "dish room" (State's Ex. 4) as he had encountered difficulties with other aspects of the FSW position which necessitated direct contact with the residents. It was shown that

this was due primarily to the fact that he would engage them in conversation while neglecting his job obligations for an unreasonable amount of time.

On November 24, 2008, the Grievant was assigned to clean the top portion of the dishwashing machine. The machine must be cleaned periodically to alleviate dirt and food build-up. However, in the course of performing the task on that date, Mr. Olson – while utilizing a hose to clean the dishwasher – unintentionally sprayed water on the electrical control panel which shorted it out and started a fire. As a consequence, the machine was out of service for a period of three weeks, and many of the dishes needed to be washed by hand. This in turn, required extra staff to be scheduled, and resulted in additional expense to the Home amounting to approximately \$18,000.

An investigation into the incident followed, and although Mr. Olson had been disciplined a number of times previously, the Administration determined that the most appropriate course of action was to give him “yet another chance,” opting to counsel and re-train him on the cleaning process (Union’s Ex. 5).

On January 15, 2009, the Grievant was again working in the dish room and was preparing the dishwasher to be cleaned. However, in

advance of the task, the side doors to the machine must be opened enough to release the steam that builds up inside. It was shown that if opened too wide, or too quickly, excess steam can flow into the room which, in turn can set off the fire alarm. There is also a large exhaust system attached to the dish machine used to remove the steam through the ventilation system. On this date, the Grievant inadvertently turned off the power to the machine when he pressed the wrong button on the control panel. He followed this by lifting the side doors without first checking to see if the fan in the dish room was on, thus causing too much steam to escape from the dishwasher at one time. In turn, the fire alarm was activated by the heat from the steam escaping and the dining room had to be evacuated. Order was restored after the local fire department responded and gave their approval for the workers to return to the kitchen/dish room area.

Following the Administration's investigation into this incident, a memo was prepared on January 21<sup>st</sup> and forwarded to Mr. Olson. In relevant part it stated:

"This letter shall serve as notice of your separation from employment at the Minnesota Veteran's Home- Minneapolis. This action is being taken as a result of your poor performance on 1/15/09, resulting in violation of Work Rule #1 "Poor performance of duties, including failure to follow

instructions or to maintain established standards of workmanship or productivity, because of an unwillingness to perform or carelessness' " (State's Ex. 11).

Thereafter the Union filed a formal complaint on behalf of Mr. Olson claiming that his termination lacked just cause and seeking a make whole remedy (Council's Ex. 2). Eventually the matter was appealed to binding arbitration pursuant to the grievance mechanism contained in Article 17 of the parties' Labor Agreement.

### **Relevant Contractual Provisions-**

#### Article 16 Discipline & Discharge

Section 1. Purpose. Disciplinary action may be imposed upon an employee only for just cause.

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Section 3. Disciplinary Procedure. Disciplinary action or measures shall include only the following:

1. oral reprimand;
2. written reprimand';
3. suspension;
4. demotion; and
5. discharge

### Positions of the Parties-

The **EMPLOYER** takes the position that their decision to terminate Mr. Olson's employment in January of last year was entirely proper and justified under the circumstances. In support of their claim, the Board maintains that in November of 2008, the Grievant's careless performance of his job led directly to a fire in the dish room caused by a short in the control box of the dish machine. Had Mr. Olson followed the proper cleaning procedures – a process he had performed many times previously – there would have been no water splashed on the electrical control panel which eventually led to the fire. The accident itself caused the Home to be without the dish machine for three weeks at a considerable expense and disruption to the food service department. Further, they contend that the Grievant has compiled a lengthy disciplinary work record, which included counseling, warnings, and suspensions in advance of his dismissal. While there was justification for termination following the fire, Management determined that in light of his length of service at the Home and satisfactory marks on his job evaluations, he should be given another chance. Thus, he was counseled again and re-trained on the cleaning process in lieu of being discharged. That event however was followed in short order by another

when in January of 2009, he again was not giving proper attention to what he was supposed to be doing, and consequently allowed excessive steam to billow from the dish machine resulting in the fire department being called out. This was the final straw as he again demonstrated an inability to follow instructions and maintain established standards of workmanship. Accordingly he was justifiably terminated and the Union's grievance, in the Administration's view, should be denied in its entirety.

Conversely, the **UNION** takes the position in this matter that Mr. Olson's termination was not justified under the circumstances. In support, the Council asserts that the Grievant was a long-term employee who routinely received high marks on his annual performance reviews from his supervisors. Comments such as "capable of doing all jobs," "willing to always help out when needed," "very thorough and precise" are contained in the reviews. Moreover, his overall rating was consistently marked "satisfactory" by Management. Additionally, they charge that the work rule which he was accused of violating is vague and would not reasonably lead any employee to believe that making a mistake such as activating a fire alarm would lead to discharge. Further, the Grievant maintains that in connection with the November 2008 incident, he was performing the cleaning duties in the same manner he has always done

them by cleaning the dishwasher from the "clean" end toward the front of the machine. The assertion is made that the performance of his duties were not unsafe and would not lead others to believe that their safety was in jeopardy as a result. Finally, the Union notes that no fewer than three other employees were guiltily of the same mistake in terms of allowing too much steam to escape from the dishwasher at one time, and yet were not disciplined let alone terminated. For all these reasons then they ask that the grievance be sustained and that Mr. Olson be returned to his former position and made whole.

### **Analysis of the Evidence-**

In a disciplinary matter such as this, the employer is routinely assigned the initial burden of proof to demonstrate, in a clear and convincing fashion, that their decision was justified under the circumstances. It is widely held that management must first establish the accused employee is indeed guilty as charged. Should that be accomplished, they then need to show that the discipline administered was fair and reasonable when all relevant factors are considered (assuming, of course, that there is no language in the labor agreement that limits a neutral's authority to review the penalty imposed). In this

instance however, the initial evidentiary obligations of the State have been diminished by the unrefuted fact the Grievant has acknowledged that on January 15<sup>th</sup> of last year, he failed to follow established procedures in connection with the cleaning of the dishwashing machine which resulted in too much steam being allowed to escape thereby activating the alarm and prompting the local fire department to be called out to the Home.

Both in the course of the investigation and his testimony at the hearing, Mr. Olson readily admitted that he was aware of the proper procedures that were to be followed for cleaning the piece of equipment in question, but that he failed to do so. Approximately two days after the event, the Grievant was interviewed by the Administration with a Union representative present. At that time Mr. Olson acknowledged he knew the proper process for preparing the machine to be cleaned but did not know why he didn't follow those procedures. He surmised that his conduct in the dish room leading to the disruption was the result of what he termed, "a senior moment" (Employer's Ex. 7).

Furthermore, at the hearing, under direct examination, Mr. Olson allowed that he "accidentally pushed the wrong button (shutting off the power) and then opened the door almost all the way," which, as he

noted, was contrary to the in-service training he had received from Management. In the course of his testimony, the Grievant admitted: "I was going too fast, and not paying attention."

The January incident came on the heels of another mishap in November of 2008, when Mr. Olson caused a fire in the dish room. Again, there is no evidence in the record to indicate that the event was not the result of the Grievant's negligent conduct; that it was properly investigated, and; that he took responsibility for the accident allowing that it occurred in the course of performing his cleaning duties (Union's Ex. 5; testimony of Mr. Olson).

Having established wrongdoing on the part of the employee, the question remains concerning the reasonableness of the penalty itself.<sup>1</sup> When considering this aspect of a disciplinary dispute, arbitrators often look at such factors as the grievant's work history, the investigatory procedure undertaken by the employer (due process), whether other employees have been disciplined for similar misconduct, and (assuming their adherence to the concept of progressive discipline) whether the penalty was excessive under the circumstances. When these

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<sup>1</sup> Article 17, "Grievance Procedure," Section 5 places no specific limitation on the reviewing neutral concerning an examination of this aspect of the case.

components are applied to the instant dispute, I find the Employer's decision to be aptly supported by the evidence and therefore both fair and rationale under the circumstances.

Testimony and documentation proffered by the Employer sets forth the Grievant's disciplinary record. It is less than exemplary. For approximately five or six years prior to his dismissal, Mr. Olson has been the recipient of numerous counseling sessions, reprimands and suspensions administered consistent with the progressive disciplinary procedures outlined in Article 16 of the parties' Master Agreement (State's Ex. 1; Union's Ex. 1). Considered collectively they demonstrate a history of performance deficiencies, an inability to remain attentive to his assigned duties, and failure to follow policies and procedures known to him (Employer's Ex. 10). The Director of the Dietary Department where the Grievant worked, Amy Olson testified that on more than one occasion, Management "backed off" suspending Mr. Olson in an attempt to "save his job." Food Service Supervisor, Craig Mammen stated at the hearing that following the November fire incident, the Administration considered terminating the Grievant but opted instead to give him "one more chance" deciding to administer additional counseling and re-training in lieu of dismissal.

Considered collectively, the Employer's disciplinary approach indicates that they were more than reasonable, attempting to give Mr. Olson every opportunity to improve his performance and thereby save his job.

There was no evidence placed into the record to indicate that the investigatory procedures followed by the Administration in connection with the January 2009 incident (or any of the other disciplinary applications) were less than proper or that due process was not extended to the Grievant.<sup>2</sup>

The Union counters that the work rule policies relative to the cleaning process for the dishwashing machine were confusing and ambiguous to the extent that they would not lead any employee to believe that making a mistake causing the fire alarm to be activated would logically lead to termination. Additionally they raise the defense of desperate treatment.

At no time did Mr. Olson ever claim not to understand the nature of his duties nor the process to be followed when cleaning the dishwashing machine. Under direct examination he acknowledged that he had been

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<sup>2</sup> The record is void of any evidence indicating that any of the prior disciplines administered to the Grievant were challenged or otherwise overturned.

trained on how to clean the machine. He added that his supervisors had been "fair" with him and had treated him "pretty well." Director Olson and Chief Cook Peter Nygard both testified that the proper procedures had been reviewed with the Grievant more than once and that such matters as not spraying the control box during the course of cleaning the machine was a "major concern" repeatedly expressed in the course of training the FSWs. Mr. Nygard added that he had worked with Mr. Olson "multiple times" cleaning the equipment in the dish room, and that there was no doubt in his mind that the Grievant "knew how to do it."

The Local offered Exhibits 8B – N as examples of other incidents of fire in the kitchen area, including the dish room, but where no employee was terminated as a consequence. At first glance, this evidence would appear to support their claim of desperate treatment *vis-à-vis* Mr. Olson's experience. Their argument however, begins to lose altitude when the Grievant's work history is taken into consideration. As the Department Director observed in the course of her testimony, none of the examples cited by the Union included a similar work record or an employee whose future at the Home was nearly as tenuous as the Grievant's in light of prior discipline. The numerous instances of an attempt to correct the

Grievant's job performance, reflected in Employer's Exhibit 10, distinguish Mr. Olson from the other examples cited.

Finally, the Local points to the annual job evaluations compiled by the Grievant since he began his employment at the Home in 1998 - all of which give him a "satisfactory" overall rating (Union's Ex. 4). Such ratings do not appear to be entirely consistent with the disciplinary record Mr. Olson developed during the same time period. At the same time however, it is noted that the performance levels available to the reviewing supervisor range from "unsatisfactory" to "outstanding," with "satisfactory" being in the middle or average. Such run-of-the-mill ratings cannot overcome the rather extraordinary record of discipline compiled by the Grievant over the same time period. Certainly they do not serve as a vaccination against the action taken by the Employer in this instance.

**Award-**

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

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Respectfully submitted this 18<sup>th</sup> day of August, 2010.

/s/ \_\_\_\_\_  
Jay C. Fogelberg, Neutral Arbitrator