

IN RE ARBITRATION BETWEEN:

MIDDLE MANAGEMENT ASSOCIATION, MMA

and

STATE OF MINNESOTA, MDH

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

October 4, 2010

IN RE ARBITRATION BETWEEN:

Middle Management Association, MMA,

and

DECISION AND AWARD OF ARBITRATOR

State of Minnesota, Department of Health, MDH.

APPEARANCES:

FOR THE UNION:

Ron Rollins, Attorney for the Union
Zaidee Martin, Attorney for the Union
My Lee, Union Representative
Tony Brown, Union Representative
, grievant
Jessica Marie Racchini, former Cashier
Roxanne Somers, Lead Worker, Registration
Linda Loftus, Management Analyst

FOR THE STATE

James Jorstad, DOER Labor Relations Principal
Barbara Wills, Assistant Division Director
Heidi Grandlund, Deputy State Registrar
Nicole Bouthilet, Customer Service Specialist
Jody O'Malley, HR Director for MDH
Jim Golden, Division Director for Health Policy MDH

PRELIMINARY STATEMENT

The hearing in the above matter was held on September 14, 2010 at the Department of Health Offices, 1645 Energy Park Dr., St. Paul, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties waived post-hearing Briefs.

ISSUES PRESENTED

The Parties stipulated to the issues as follows:

Issue #1: Did the Employer have just cause to discharge the grievant? If not what is the appropriate remedy?

Issue #2: Did the employer violate Article 6, section 4? If so 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 7 provides for submission of disputes to binding arbitration. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

STATE'S POSITION

The State's position was that there was just cause for the termination of the grievant and no violation of Article 6, section 4. In support of this position the State made the following contentions:

1. The State noted that the grievant is a long-term employee of the Office of the State Registrar, OSR. He has a good work record and a clean disciplinary record. Despite that however, he was guilty of serious dereliction of duty as demonstrated by this case, which was so serious as to warrant immediate discharge.

2. The State noted that the Office of the State Registrar, OSR, is responsible for issuing vital records, including birth and death records. These are very important documents that establish identity and the potential for abuse if they are issued inappropriately is huge. They could be used for any number of illicit purposes, including perpetration of fraud, identity theft and even acts of violence and terrorism. There are very strict requirements for the showing of "tangible interest" before a birth certificate can be issued. Minn. Stat. 144.225 and Minn. Rule 4601.2600 require that before such a record is issued there must be a showing of tangible interest by the requestor to prevent fraud and assure that all records are appropriately issued. There are forms generated for this purpose, see Joint Exhibit 8 at page 4. These must be filled out accurately and completely and notarized in front of a notary public. There must also be the proper fee paid. The fee for a birth certificate is currently \$16.00 and this must be paid either by check, money order or by credit card before the record is issued. An expedited fee of \$20.00 additional can be paid to have the record issued faster.

3. The State noted that the grievant is well acquainted with and knows the strict requirements of tangible interest and of the requirement that the fee be paid before a birth record may be issued. He knew that these requirements must be followed and cannot be "fudged" nor can corners be cut. He knew that he could not issue birth records on what he terms the "honor system" nor was he allowed under State law and regulations to direct others to issue birth records without a showing of tangible interest and of proper payment for the records.

4. The State acknowledged that there are circumstances when the fee is paid and the application of tangible interest is made but through some glitch in the mail or other situation, the record is lost and does not reach the applicant. In those circumstances the grievant still must verify both tangible interest and proper payment. The applicant can pay the fee under those circumstances and, if the first record does appear, they may return it to the State for a refund of the first fee paid. However, the grievant knew that he was never to issue the record, even in “emergency situations” or where there is a claim that the record is needed right away, in order to get a child into school or for health care purposes or even to obtain a passport or the like, without verification of tangible interest and prior payment.

5. The basis of the State’s case is that the grievant did in fact issue several birth records over the course of 3 months or more without a showing of tangible interest and/or proper payment. He directed his staff to issue birth records in clear dereliction of his duty and responsibility to verify both tangible interest and payment. His staff even noted their concerns about not following the law but he continued to direct them to “get the records out” in an apparent effort to divert complaints from people who claimed their records were lost or from the Governor’s office and legislators.

6. The State asserted that pressure from above or below is no excuse for failing to follow the law and did not excuse the grievant’s attempt to be customer friendly. The risk that a birth record could fall into the wrong hands is too great and the potential consequences of such an error are too great to ignore the clear dictates of the law and the expectations of the position.

7. The State asserted that when it became aware that the grievant was possibly directing his staff to issue these records in violation of law and his duty, they immediately commenced an investigation to determine if it was true. They interviewed the grievant on several occasions and he acknowledged his understanding of the rules pertaining to tangible interest and proper payment for the records.

8. He further acknowledged that he sent e-mails to his staff on multiple occasions directing them to issue or re-issue birth certificates for people. While he claimed that he always had proof of payment in front of him when he did so, those records were in many cases not found. The grievant claimed that he reviewed the original application both verifying on the application, the State's electronic record system, the Vital Records Version, or VRV, as it was known, and verified that payment had been made.

9. Despite his claims, the investigators could not find the application the grievant claimed he saw and later placed in a stack of documents in his office to be filed later nor could they always find proof of payment for the records. The State introduced evidence from witnesses who indicated that they checked for the applications for the birth records in question on several days, not just the dates of the applications themselves, in case they had been filed earlier and misfiled. They also checked several dates for entries for payment and as noted in Joint Exhibit 13, they could not find the documents. The most logical conclusion is that the documents did not in fact exist and that the grievant simply took people's word for it over the phone and issued the records to keep people quiet.

10. Further, in the investigation the grievant admitted that he occasionally would send out the birth records on what he termed the "honor system" and allow people to get their records without proof of interest or payment. Even his Union representative later acknowledged in a grievance step meeting that the grievant might have "gotten loosey goosey" with the records and with a proper showing of payment. These startling admissions can only lead to the conclusion that the grievant was guilty of sending out or directing others to send out birth records in clear violation of law. See Joint exhibit 10, 6-30-09 interview of grievant at 17:50. "I would just have to trust that they would send the first one back," was the grievant's comment about dealing with people who claimed to be desperate for a birth record over the phone. The State asserted that this was exactly what he should not have done and he did so knowing that it was clear violation of law.

11. When asked if he would go get the applications, the grievant admitted that he “didn’t look at the apps.” The State went through multiple instances where the grievant told his staff to issue birth records and asserted that in at least 13 of these, there were serious deficiencies and that there was either inadequate proof of tangible interest or of proof of payment for the record he sent out. See Joint exhibits 13, 14 and 15. As noted above, the State searched diligently for the applications that would have shown tangible interest and could not find those in several of these instances. In others they looked for payment and could not find any of those either. The State asserted that the grievant’s claim that he saw the applications and the proof of payment is simply not credible since they were unable to locate the vast majority of these. These could not all have been simply “misfiled” as the Union and the grievant alleged.

12. The State acknowledged the grievant’s work record but asserted that he was somewhat vindictive and told people not to get on his bad side and that he was anxious about any delays in getting records out. He frequently told staff to just “get the work out” and that this was even in some of his e-mails. See e.g. Joint exhibit 13 at page 18. He sometimes berated staff and told them not to air the department’s dirty laundry outside of the department. The State asserted that he may well have been motivated to cut corners due to the pressure he was getting and that he was motivated to just keep people happy.

13. The State asserted that while other actions were contemplated, such as demotion or some sort of suspension, none were considered appropriate here. The State alleged that they have so lost trust in the grievant’s ability to follow the very strict rules in place for the issuance of these records that they cannot be satisfied this will not happen again. The grievant could, in the face of similar pressure, be tempted to alter records, changing a cause of death for example, or issue birth records again inappropriately. The State urged termination is the only appropriate remedy here.

14. Finally, the State asserted that there was no violation of Article 6 section 4 as claimed by the Union. They gave adequate notice to the grievant of the charges prior to the investigation and in fact he never indicated that he was unaware of what the charges were. The grievant was given ample opportunity to present any facts to explain what happened on several occasions. Further, the grievant was given a *Loudermill* hearing and was certainly given both the opportunity to present any evidence in the grievance steps and at the arbitration itself.

15. The State presented decisions by other arbitrators who have indicated that even where there has been a technical failure of the process, subsequent opportunities for due process cure any prior defects. Here there was ample opportunity for due process and no prejudice shown to the grievant due to any technical violation of the contract language, even if it determined there was one.

Accordingly the State seeks an award of the arbitrator denying the grievance in its entirety

UNION'S POSITION:

The Union's position was that there was no just cause for the grievant's termination and that the State violated Article 6, section 4. In support of this the Union made the following contentions:

1. The Union had a very different view of the facts and asserted that the grievant did not on any occasion violate any of the State's rules on issuance of birth records as alleged. The Union alleged that the grievant never issued any records without verifying the information on the application was correct and appropriate and that proper payment had been issued.

2. The Union asserted that the cases cited by the State were no "issues" of birth certificates but rather "re-issues" of birth records that had for some reason been delayed or lost. The Union argued that these presented a very different situation from what the State alleged. The Union maintained that the rules allow for the re-issuance of a second record if the first one has been lost. The grievant was well within his authority to deal with the customer who had requested the record, check to see that tangible interest was established and then check for proof of payment. The applications have notes indicating payment on the face of the page in the upper corner.

3. The Union and the grievant maintained in the strongest terms that he always checked those applications and had his staff get the applications when the customers called and bring those applications to him. He would then check the information on the application and check for payment. Then and only then would he direct staff to issue another record.

4. The Union argued that the whole issue of the “honor system” was overblown and was not as the State asserted. The State alleged that the grievant was simply issuing another birth certificate upon nothing more than a phone call. The grievant steadfastly maintained all along that he never did that and knew far better than to ever do that. What he may have done, although he could think of no instances, was to take the call, check the information as described above and trust that the caller would send the first certificate back if it showed up. The Union maintained that the grievant by that time had already checked for tangible interest and for payment and might have issued a second one before getting payment for it but only in the most urgent circumstances.

5. The Union asserted that the State’s witnesses acknowledged that if the grievant checked for the applications and for payment it would have been entirely proper to issue the record just as he claimed he did. In no case did he or would he issue a birth certificate on someone’s call without absolutely verifying tangible interest and payment. Thus, the honor system discussion was a red herring and what he did was proper if tangible interest and payment had been verified.

6. The Union pointed out that the office is extremely busy at times with hundreds of birth certificates issued every week. The Union also noted that filing was problematic in the office and that one employee misfiled things all the time. The Union pointed out that records were frequently found in other files, stuck to other documents or lost. Some applications that appeared on the VRV system when the paper application could not be found or vice versa. Thus, not only *could* some of the applications have been lost, many *were* lost or misfiled. The mere fact that the State could not find some of the documents on which its case is based, certainly does not mean they were never there.

7. Further, the Union noted that the documents in many cases were there, even though the State still insisted that they were not. The Union noted how curious this was that the very cases upon which the State's case was based actually showed verification that the documents were later found and accounted for.

8. Moreover, for those cases in which the documents were not found, the Union maintained that the State's investigation did not search far enough. In virtually all of the cases, the direction to issue the record was done weeks or months after the original application or payment was sent in by the requestor. The State may have looked within a day or so before and after the application was supposedly sent in but the Union introduced evidence that it may have been posted a week or more before or afterward.

9. In addition, the Union put on witnesses consisting of other staff people, many of whom were the people directed to issue the records in this case, who testified that they in fact found the records and gave them to the grievant. While they could not recall the specific documents, since there were so many records they dealt with on a daily basis, they never had any concerns about the grievant's actions and testified that if they had any concerns that records were being issued inappropriately or in violation of State law they would certainly have raised those concerns at the time yet they did not.

10. Those witnesses disputed the State's assertions that the grievant was vindictive or that he rushed to get documents out by cutting corners or violating regulations. They testified that the grievant was quite thorough and showed a very conscientious concern for adherence to those regulations.

11. Finally, the Union argued in response to the allegation that the grievant had some motivation to issue these documents, that a man with a law enforcement background whose entire career was about following rules would place his career and his reputation and integrity in jeopardy by cutting corners for total strangers is absurd.

12. The Union raised as a separate issue the State's failure to follow the requirements of Article 6, section 4. That provision reads in relevant part as follows:

The supervisor shall be advised of the principal allegations being investigated and, if known, the alleged time and place of occurrence prior to questioning.

13. The Union pointed to the investigatory meeting and the tapes made of those and argued that at no point was the grievant advised of the charges against him even though the State knew what those allegations were and the date and time of occurrence. The initial suspension letter dated June 11, 2009 gave him no information at all about what those allegations were. The Union asserted most vehemently that the State's failure to adhere to the clear language of the contract cannot be ignored or minimized and should on its own result in the discipline being overturned. Significantly, the State is relying heavily on the statements made at the meetings, especially the honor system statements, and should not be able to rely on statements made when there was such a flagrant failure of due process.

14. The Union asserted that there was no evidence of wrongdoing here at all and that the grievant followed all appropriate rules in issuing the certificates he did. On this record he should be reinstated with all pay and benefits.

The Union seeks an award reinstating the grievant with full back pay and accrued benefits.

DISCUSSION

FACTUAL BACKGROUND

The Office of the State Registrar, OSR, is responsible for issuing vital records, including birth and death records. These are very important documents that establish identity and that the potential for abuse if they are issued inappropriately is huge. They could be used for any number of illicit purposes, including fraud, identity theft and even acts of violence and terrorism. There are very strict requirements for showing "tangible interest" before a birth certificate is issued. Minn. Stat. 144.225 and Minn. Rule 4601.2600 require that before such a record can be issued there must be a proper showing of such tangible interest by the requestor in order to prevent fraud and assure that all records are appropriately issued to the person requesting it.

Minn. Rule 4601.2600 defines tangible interest and requires certain information from the requestor and provides in relevant part as follows:

Subpart 1. Application; birth or death record.

An application for a certified birth or death record must be made on a form prescribed by a registrar or contain the information required in this part. An application must be made to a registrar and accompanied by the required fee and documentation. If the applicant is alleging to have tangible interest because a certified birth or death record is necessary for the protection or determination of a personal or property right, the applicant must apply for issuance of a certified birth or death record to the State registrar and provide supporting documentation. The State registrar must evaluate the application according to the criteria described in subpart 12.

Subp. 2. Registrant information.

A. To request a certified birth record, the applicant must provide the following information about the registrant:

- (1) first name, middle name, and last name;
- (2) sex;
- (3) date of birth;
- (4) county of birth;
- (5) mother's first name, middle name, and maiden surname; and
- (6) father's first name, middle name, and last name.

B. To request a certified death record, the applicant must provide the following information about the registrant:

- (1) first name, middle name, and last name;
- (2) county of death; and
- (3) date of death.

C. A registrar may accept estimates of or waive a requirement listed in items A and B if:

- (1) the applicant does not have exact knowledge of the information; and
- (2) the applicant has provided sufficient information for the registrar to locate the record.

Subp. 3. Applicant information.

A. To request a certified birth or death record, the applicant must provide the following information about the applicant:

- (1) first name, middle name, and last name;
- (2) home or business address;
- (3) telephone number;
- (4) date of birth;
- (5) signature of the applicant;

- (6) date the application is signed; and
- (7) a statement of the relationship of the applicant to the registrant demonstrating tangible interest according to Minnesota Statutes, section [144.225](#), subdivision 7.

Subp. 5. Identification required.

An applicant must provide a completed application as described in subparts 1 to 3 and, except as noted in subpart 6, provide documentation of identity as follows:

A. For an application made in person, the applicant must provide a document of identity that readily identifies the applicant. To be accepted by a registrar, the document of identity must include the applicant's signature and photograph or physical description and the registrar must be able to authenticate the document with the issuing entity. If a normally acceptable document of identity was issued so long ago that the registrar determines that it no longer readily identifies the applicant, an applicant must provide a document of identity that was issued more recently. A document of identity that has been altered or changed in any way is not acceptable.

B. For an application not made in person, the application must be notarized according to Minnesota Statutes, sections [358.41](#) to [358.50](#).

Subp. 6. Acceptable identification not available.

If an applicant does not have an acceptable document of identity or if an applicant provides a signed statement that no document of identity is available, to obtain the certified birth or death record, the applicant must have a witness attest to the applicant's identity. The witness must:

- A. have known the applicant for at least two years;
- B. complete a statement to identify as described in subp. 7; and
- C. accompany the applicant, sign the statement to identify in the presence of a registrar, and present an acceptable document of identity according to subpart 5, item A and either subpart 8 or 9. If a witness cannot accompany an applicant to a registrar's office, the witness' signature must be notarized on a statement to identify according to subp. 7.

Minn. Stat. 144.225, subd 7, is equally clear and provides in relevant part as follows:

Subd. 7. Certified birth or death record.

(a) The State or local registrar shall issue a certified birth or death record or a statement of no vital record found to an individual upon the individual's proper completion of an attestation provided by the commissioner:

(1) to a person who has a tangible interest in the requested vital record. A person who has a tangible interest is:

- (i) the subject of the vital record;
- (ii) a child of the subject;
- (iii) the spouse of the subject;
- (iv) a parent of the subject;
- (v) the grandparent or grandchild of the subject;

- (viii) the legal custodian, guardian or conservator, or health care agent of the subject;
- (ix) a personal representative, by sworn affidavit of the fact that the certified copy is required for administration of the estate;

(xii) a person or entity who demonstrates that a certified vital record is necessary for the determination or protection of a personal or property right, pursuant to rules adopted by the commissioner; or

(xiii) adoption agencies in order to complete confidential postadoption searches as required by section [259.83](#);

(2) to any local, state, or federal governmental agency upon request if the certified vital record is necessary for the governmental agency to perform its authorized duties. An authorized governmental agency includes the Department of Human Services, the Department of Revenue, and the United States Citizenship and Immigration Services;

(3) to an attorney upon evidence of the attorney's license;

(4) pursuant to a court order issued by a court of competent jurisdiction. For purposes of this section, a subpoena does not constitute a court order; or

(5) to a representative authorized by a person under clauses (1) to (4).

The point here is not to belabor the record or to provide a tutorial for issuing vital records but rather to illustrate the point that the requirements are quite strict and that there are forms generated for the specific purpose of assuring that the information required is provided before a birth record is issued. Very little if any deviation is allowed in order to assure security and accuracy.

The State also made the point that proof of payment must be made as well. The cost of a birth certificate is \$16.00 and an expedited process costs an additional \$20.00 to make sure, as the witnesses put it, that the request goes to the top of the stack and that the request is reviewed within 5 business days of its receipt by OSR.

The evidence showed that the office is quite busy and issues literally hundreds of birth records, as well as a multitude of other records each week. Estimates ranged from 70 or 80 records per day up to perhaps several hundred. The evidence also showed that, sadly, the office is not as well organized as it could be and that records are frequently lost, misplaced or misfiled. The evidence showed that there are occasions when records are requested and the proper application for them showing tangible interest is received by the office along with payment but that for various reasons the record does not get to its intended recipient.

This can be due to a variety of reasons from simple human error when dealing with such a large volume of records and the sometimes labor intensive process of verifying the information, making sure payment has been received and then issuing the record and making sure it is posted to the correct address of the requestor. Sometimes things get lost in the mail and the recipient does not get their requested record and they then call the department to complain about that.

The grievant as a supervisor took many of those calls. The record showed that at times, again, as several witnesses from both sides put it, the phone “rings off the wall” and it is quite distracting and can delay the work to get current records out when having to deal with the problems of the past.

There was a clear showing that the grievant was required to follow all of the applicable rules for determining tangible interest and proof of payment and that he as a supervisor did not have the discretion to “bend the rules” or to issue a birth certificate without proof of those two vital items. While there are situations where the evidence showed they can be re-issued in the situation described above, i.e. where there is some evidence that they were sent out and have become lost, the grievant was responsible for making sure that all applicable rules and regulations and requirements for issuing birth certificates were followed, not only by him but also by his staff.

The grievant understood his role and his responsibilities in this regard. His statements in the interview and at the hearing clearly demonstrated that he had knowledge of these requirements and what he needed to do to perform not only his duties but also to direct his staff to do theirs. See, Joint Exhibit 10 at page 16. The grievant was quite clear that he was well aware of the prohibition against issuing a substitute birth record without an initial application. It was also clear from the very outset that the grievant claimed that he never issued a record without seeing that there had been proof of tangible interest and payment made originally. See 24:39 to 26:47 of that interview record.

The grievant knew he was not, for example, allowed to issue a birth record to someone who called over the phone claiming to have applied for a birth record and not have gotten it without first verifying that the person sent an application showing tangible interest and that this had been received by the department along with proof of payment. His staff testified to that as well. There was thus not any apparent confusion over what the rules were and what people needed to do to comply with them.¹

The question here though is not whether the grievant knew the rules but whether he violated them. On this record there was no such evidence. First, it must be noted that there was no direct evidence whatsoever that the grievant violated the above referenced requirements. There was no evidence from anyone that the grievant told them to issue a record and where he also acknowledged that there was no proof of tangible interest or payment for those records. As noted herein, the witnesses who testified on behalf of the grievant testified to the exact opposite and indicated that they were directed to get the applications and/or proof of payment so the grievant *could* verify tangible interest and payment. They indicated that they only issued records *after* the grievant had been given the applications, with proof of payment noted on them.

Neither was there any evidence whatsoever of an intentional or nefarious reason for the State's allegations against him. The State asserted, and this is certainly true, that a birth record is a valuable commodity on the black market. In the wrong hands they can be used to steal identity or for the purposes of perpetrating fraud or even worse.

This of course is why the rules are so strict and that people cannot play fast and loose with the requirements before issuing those records. There was no evidence whatsoever that the grievant was issuing these records for any such dastardly purpose and frankly since the grievant is a former police officer, such an allegation would have seemed preposterous.

¹ There was some claim by the Union that the grievant had not received adequate training for the job. He did not apparently receive "formal" training but it was apparent that he knew his job quite well and that he was able to ask questions of those in a position to know the answers to his questions. On this record there was no showing of an inadequacy of training.

At best the case revolves around mostly circumstantial evidence that there were some 13 instances upon which the State relied, see Joint exhibit 13, where a record was apparently issued and when investigators went back to verify an application showing tangible interest or proof of payment, they could not find either or both of those things.

The grievant steadfastly maintained throughout this entire proceeding that when he would get a call from a disgruntled or frustrated customer claiming that they had in fact applied for a birth record but had not received it, he would advise them of the requirements for re-applying or he would get the verification he needed that showed both proof of payment and tangible interest.²

THE HONOR SYSTEM DISCUSSION

The State's case was based on several points. First there were the 13 instances wherein it was alleged that the grievant issued a birth certificate without proof of payment or tangible interest. These are all listed on exhibits 13, 14 and 15 and will be discussed in detail below. Second there is the allegation that he issued birth records on what the grievant called the "honor system" and that he would issue a birth record on someone's unsubstantiated claim over the phone that they had sent in an application for the record some time before but had not received their record.

In his recorded statement, the grievant was quite clear that these instances were exceedingly rare and, more importantly, that he did not and would not have issued a new birth record without verification of payment and tangible interest. Joint exhibit 10 at page 14 is instructive. There the grievant was asked about the problem of callers wanting a record that had somehow not gotten there.

Q: Did you ever instruct staff to reissue birth certificates to satisfy callers' concerns?

A: Probably did. It all depends on the situation. I wouldn't doubt I have Yeah.

Q. In those types of circumstances, what would be the normal process?

² The record showed that there is a form generated by the department for the purpose of showing tangible interest that must be properly signed and notarized so there is adequate proof of tangible interest. There is virtually always a notation in the upper right hand corner of these forms indicating how payment was made, either by check, money order or by credit card. Thus, having the form would show whether tangible interest was verified and whether payment was made.

A: I had the form on my computer that I would fill out date of birth or death and e-mail it to Jessica [Jessica Racchini, former Cashier]. On the bottom I would just say previously paid for. Often time, the ones I am thinking of are desperate people. We've sent it, they don't have it. I just have to trust them that they will send the first one back. They need it because their medical insurance is expiring or their kid has to get into school. Or something. But only in desperate situation. Otherwise, they just have to buy another one and return the first one to us. Yeah I have done that. Not just because they are yelling.

Q: In those desperate circumstances, what would you have them send in? What would you do?

A: I would ask for another application. Again if it was not an exigent circumstance where they have to have it today or tomorrow, they have to get another app [application] and another check. But now and then it's like I say getting a child into school, they have to have it tomorrow. I have to trust them, OK, we'll help you out. Get them a certificate. Please send me another one. Just an honor system. That is so rare. I can't even think of a particular circumstance.

Q: Would you have them fax in right away before you would issue them another certificate?

A: No, honestly I have just sent them out on the honor system. But it is not a common occurrence at all.

Q: In those circumstances, would they be in the computer as having had one issued in the first place?

A: Yes. So we know there was one but it just didn't get to them. And again if they just say I need it when I get it, then they send me another application with a check or a credit card. We'll send you another one. If you ever get the first one that was lost, send it back and we will refund the money. We satisfy them, but we don't give them away for free.

Q: Is Julie the one who would look it [the applications] or would you?

A: It all depends on whether I got a phone call or an e-mail. Her and I would share in OSR1 e-mail, but a lot of the phone calls are routed to me. I would look to see if it had been issued or not.

Q: Would you go get the app?

A: I would have Julie do that. I do not look at the apps.

The State used the grievant's statements that sometimes people were desperate for the record and needed them right away for various purposes, like getting a child into school or for health insurance or for some other purpose. The State's allegation is that the grievant would simply take people's word for it and direct staff to issue a record without verifying the application or payment.

The record simply did not support this. There was no direct evidence, as noted above, that this in fact happened. In his statement, the grievant indicated that he would never and has never issued a birth record under those circumstances. He claimed, and his statements on the recorded interview bear this out, that what he was talking about was a very different situation.

The so-called honor system was a scenario where he had verified tangible interest and payment and would re-issue a second birth record without another proof of payment. Under those circumstances however, tangible interest and proof of payment had already been received. Normal procedure would be to require the person send in another payment for a second record and then to advise them that if the first one ever showed up they could return it for a refund. In these desperate situations there was frequently no time to do that and he indicated that he may have directed staff to re-issue a second one based on the person's promise that they would send the first one back if they ever received it. The grievant indicated that he recalled one or two instances where that might have happened and the people involved in fact sent the first record back when, for whatever reason, it showed up late, either because it was lost or damaged in the mail.

It was also apparent from the context of the conversation quoted above that the topic was the re-issuance of birth certificates where a caller alleged that they had sent in the proper information and payment but had not received the birth certificate. That is of course a very different scenario from the initial issuance of a birth certificate on some sort of honor system. That latter scenario never occurred.

The State also pointed to the last statement quoted above as evidence that the grievant did not even look at the applications and must therefore have been so careless and cavalier in his duty that he in fact was giving the certificate away for free and perhaps to the wrong people. As the Union asserted, jumping to conclusions is acceptable as long as one does not jump to the wrong conclusions.

Here it was quite obvious that the grievant was in fact looking at the applications before sending out a second birth certificate and that his normal procedure was to follow the requirement to have the caller send in another application with another payment. It was only in these rare exigent circumstances that he would send out a second certificate *but only after verifying that a proper application and payment had been sent for the first one*. The interview showed that the grievant knew not to issue a birth certificate without an original application and payment on file. See Exhibit 10 at page 16; 24:30 to 26:47 of the interview.

Moreover, the context of these statements is critical to the analysis. The grievant's statement that he does "not look at the apps" was clearly not what he meant. A more common sense reading of this when viewed in context and as a whole is that he does not look *for* the apps – he has Julie do that.

Significantly, that was exactly what Ms. Racchini testified. She was both persuasive and credible in her testimony on that score. Moreover, the other Union witnesses testified to this process as well and were quite clear and credible on their testimony that they followed that same procedure and never had any concerns that the grievant was directing them to do anything outside of the law or department policy.

While Ms. Bouthilet was concerned about it she was unable to provide any direct evidence of wrongdoing by the grievant. Her concern was perhaps understandable given the difficulty in finding some of these records from time and time but the explanations given for the grievant's "honor system" statements and his quite credible testimony regarding verification of the applications and proof of payment before sending out a second certificate.

This obviously is a very different picture than was painted by the State's witnesses. They alleged that the grievant was a man run amok here and was intentionally derelict in his duties in order to get people off his back and "get these things out the door," and that he was cutting corners to relieve the pressure of these frequent complaints. The record did not bear that out.

Moreover, the State's witnesses acknowledged on cross-examination by the Union's counsel that if he in fact had verified tangible interest and payment, what he did would not have violated any of the rules in place for the issuance of birth records. This was a very significant acknowledgement in this matter. The case against him rested entirely upon the premise that he did not in fact look at the records to verify tangible interest or payment records and that he simply sent the records out on someone's say-so over the phone. If one believes that the case for discharge is made. However, if the record showed, as it did, that he in fact did look at the records and that he did verify both tangible interest and payment than it fails for lack of proof.

Here it was quite apparent from not only the grievant's testimony as well as the independent testimony of other staff people and from the documentation itself that there was a lack of proof that he failed to look at the records. The evidence showed that he did both.

Moreover, the honor system comment was apparently taken out of context and misinterpreted by the State's investigators on this record. State witnesses also acknowledged that the State does send a second certificate out if the first one has not arrived and that the requester can then send the first one back if it does get there for a full refund, just as the grievant claimed in his interview and his testimony.

In addition, there is apparently a procedure in place covering the scenario involved in this matter. See Joint Exhibit 10, attachment 9, setting forth a process for reissuing certificates. This, coupled with the testimony from the State's witnesses outlined above, made it clear that if indeed the grievant had reviewed the applications and found proof of payment, he was guilty of no violations of rules or policy.

Having said that it is certainly understandable why such a statement would have raised their concern. Birth records cannot be initially issued on an "honor system" where someone calls in and claims to have tangible interest and to have paid for the record but no such information is ever located. That is precisely the scenario all the rules and statutory sections cited above are designed to prevent. If the grievant had been found guilty of such action the result here would have been very different but on this record there was no evidence to support the State's allegations of wrongdoing on this count.

The Union asserted that instead of disciplining the grievant the State should be praising him for being able to solve problems rather than exacerbating them by being overly bureaucratic and wooden headed about the way he dealt with these customer complaints. The Union acknowledged that the rules in place are reasonable and well founded but that the grievant did not violate them and in fact was being customer friendly by solving these problems as he did. There was some merit to that argument.

THE 13 INSTANCES OF ALLEGED ISSUANCE OF BIRTH CERTIFICATES WITHOUT PROOF OF PAYMENT OR VERIFICATION OF TANGIBLE INTEREST

The inquiry now turns to the 13 instances where it was alleged that the grievant issued records without proof of payment or tangible interest. This is a somewhat closer call but the evidence showed again that the grievant, while somewhat lax in his system committed no wrongdoing here and that he did in fact verify tangible interest and payment before sending out a certificate.³

First, the State investigated 17 instances wherein it was suspected that the grievant directed his staff to issue records inappropriately. Four of those were found to have been entirely correctly. The State acknowledged that if the grievant had in fact verified both tangible interest and payment, what he did would have been correct and presumably this case would never have arisen.

It was solely due to the inability to find the applications or payments he claimed were there when he directed his staff to issue these records that this case arises at all. The other 13 instances of alleged misconduct and dereliction were reviewed in some detail.

Initially it should be noted that there was serious flaws in the investigation of the claim. The VRV, the electronic system used to track birth and death record and applications, has no apparent drop down screen to determine proof of payment. It was thus difficult to determine when the payments were made. Moreover, once the application was found the payment method would have shown on the top of it.

Further, it was apparent that most, if not all, of these instances were situations involving the re-issuance scenario, or something akin to it, as noted above. The applications may well have been sent in weeks or even months before the request for the second certificate was made and it was also apparent that the tracking system did not always show exactly when the first application was filed.

The investigators did the best they could but on this record the fact that they were unable to find these records did not mean they were not there. In the face of the compelling evidence that the grievant did in fact see the applications and verify payment showed was strong evidence in the Union's

³ To be sure, the evidence showed an office in some disarray. The notion that these important records were tossed on a pile on the floor of the grievant's office for filing later by a person who by all accounts was less than competent at that simple task was troubling since the grievant was supposed to be in charge and presumably prevent errors like this. He was not

favor. In addition, as alluded to by the parties at the hearing, filing was problematic in this office and there was compelling and persuasive evidence that documents were not always filed correctly and that some were lost as a result.

however disciplined for this and the case must rise or fall entirely upon the charges that were leveled against him – i.e. the inappropriate issuance of birth certificates as alleged in the August 27, 2009 discharge letter.

Further, as noted above, some of the records the grievant claimed were “in the pile” were found later. That others were not found, especially on this record, was not surprising. The typical parade of “could have happened” that is used in defense of discipline is not always persuasive unless there is some evidence that would or could have happened did in fact happen.

On this record there was considerable support for the Union’s claim that the records were there when the certificates were issued and that the grievant did see them and verify the information thereon and the payment for the first record but that the records for whatever reason were not found later. Finally, as discussed below, it was apparent that some record necessary to show tangible interest and payment *were* actually found and that reasonable explanations were available for the remaining 13 instances yet the decision to terminate the grievant was still made.

Exhibit 13 E shows that the grievant sent an e-mail to Jessica directing her to send a birth certificate out. There is a notation on that e-mail that the record was “previously paid for.” Apparently no application was found. Ms. Racchini was not able to recall this situation specifically but indicated credibly that she would not have issued the record if she had thought there was no application and that she would have gotten the application and brought it to the grievant for his review. The State asserted that the grievant certainly had some incentive to fabricate his testimony but there was frankly no evidence that he did or that he had any reason to.

The testimony of the other Union witnesses was that the grievant always had the applications in hand before directing anyone to issue a second certificate. On this record there was insufficient proof of anything inappropriate simply because the investigators did not find the application later.

Letter F is an instance where the check was in fact apparently found. There is the same “previously paid for” note on the e-mail to Jessica as well. The State’s case on this record appears to be based on the assumption that a person would send in a check for a record without an application and that the grievant would issue a substituted birth certificate based on proof of payment alone.

The most reasonable, and perhaps only, inference to be made here is that the grievant certainly saw the application, or he would not have known payment had been made. The sole basis that there was no application was the note that it was not found on “5-28-09.” That of course is the date *after* the e-mail was sent. The application would have been filed long before that.

Letter G shows an even stronger set of facts in favor of the grievant’s version of the facts. The e-mail was sent on 5-04-09 to Jessica again with the same notation regarding payment as above. The handwritten notes by the investigators show that a certificate was apparently issued on 2-17-09 and a second one issued on 5-4-09. The concern is that there was no check logged and nothing in the returned mail indicating that the first one had been sent back.

The obvious question is why the first one would have been issued unless there had been a proper application and proof of payment – unless there was one and the first certificate simply got lost, mangled or stuck to another one in the mail.⁴ As in the next case, there was testimony that some \$70,000.00 worth of checks were placed in a drawer and not logged in this office and that this check along with several others may well have been in that pile.

This fact was startling but the grievant is not being charged with any wrongdoing for that scenario. It is relevant here only to show the very real possibility that the missing checks were in that lot and that they were not properly logged thus explaining why they were not found later.

Letter H is again a situation where there was no check found. The same analysis applies here as that above. It strains reason to assume that the first certificate was sent out without verification of interest or payment. The fact that the check was not found later does not provide as much support for the State’s case as they hoped.

⁴ There was considerable testimony that some times these records get stuck to each other or that they are truly lost in the mail and that they do not always come back from the post office. They are thus lost and the requestor is telling the truth when they say they “did not get it.”

Letter I is an e-mail dated April 10, 2009 sent to Ms. Bouthilet directing her to issue a certificate. The concern here is that there were apparently two certificates issued; one by Ms. Bouthilet and another one by Jessica. There was no explanation for why this glitch occurred and there were two certificates issued. What was clear is that the grievant did not direct that to happen. He directed that only one be issued and lack of communication between the other employees can hardly be laid in his lap. Moreover, the check was apparently found, as shown on the notation in the handwritten notes as was the application. Ms. Racchini testified that she would have had that for both issuances and would have given them to the grievant for his review before he directed the issuance of a second certificate. See also, Joint Exhibit 15 shows both verification of the check and the application dated 3-20-09.

Letter J is a situation where the grievant indicated that “we dropped the ball” and directed that a substitute record be issued by e-mail date 4-16-09 to Jessica. The notes indicated that the check was found – and that it was for \$20.00 not the required \$16.00 – and that no application was found filed on April 16, 2009. The record showed that the original application was filed far earlier than that and that the state’s investigators may not have searched far enough before and after its original filing date to have found it. Again though, and significantly, the fact that a check was found strongly supports the grievant’s claim that an application was found too and that he reviewed it and determined tangible interest existed.

Letter K had a bit more history to it. There is reference to it in Exhibit 13 that contains only the notation that it was previously paid for with a request to Jessica dated 5-28-09 to send “one each” to 4 separate requesters. There were no other handwritten investigative notes on that exhibit. Exhibit 14 however contains a series of e-mails regarding this request that indicates that the certificates were issued on 4-28-09 “but presumably the original application and check were mailed in much earlier.” The e-mails were between Ms. Wills who did testify and Ms. Julie Figgins, who did not.

Ms. Figgins' e-mail dated July 29, 2009 at 9:49 a.m. is instructive. There she writes that "I do recall speaking to Tou Lee and his wife at different occasions about his birth certificate application. I had to go to [the grievant] for his assistance and whatever I had, I would have given the information to [the grievant.] *** I checked the logs for Feb 2009, March 2009 and April 2009 but I could not find a copy of his check. I researched Tou Lee and just Lee. I could look at the copies of the checks that the cashiers copy and we keep them in the lean room." The response she got back was a few minutes later from Ms. Wills as follows: "There is no need to review the copies of the checks. If they aren't on the log I don't think you will find it on the copy sheets."

There was no adequate explanation for why the investigation stopped there and no further effort was made to find a record of the checks. There was insufficient evidence to demonstrate by a preponderance of the evidence that the grievant directed the issuance of the certificates without proof of payment or tangible interest. The arbitrator was mindful of the difficulty in proving a negative here by the State. The case was largely based on the lack of proof that he actually found these applications rather than some positive proof that he issued the certificates without verifying the information. This is always difficult and in many cases rests on other corroborative evidence. Here though that corroborative evidence was far more supportive of the Union's case than the State's.

Letter L is yet another instance of an e-mail to Jessica to issue a birth record that had apparently been previously paid for but the application could not be found. The Union made the point that the e-mail was found but that the search for the original application did not go far enough to locate it. The State noted that the search was both difficult and time consuming and that they did not have time to scour every possible record to find the application. The Union also noted that there was some fatigue involved with all of these and that going through box after box of similar looking records is both drudgerous and can lead to one being overlooked.

That is quite plausible and if there had been more evidence of dereliction by the grievant the mere fact of a somewhat imperfect investigation would not have carried the day. Here though the corroborative evidence pointed in the direction of the grievants' innocence rather than the opposite.

Letter M is a similar case to letter L above and carries essentially the same analysis. Letter N is again curious in that the note indicated that it was both previously paid for and that the grievant "found it in Frostbite," which is a vital record index. There was a notation that the original check was logged on 3-2-09 but that neither the application nor the check showed up in the appropriate spot on the VRV system. There was no application found on 5-7-09.

The State asserted that there should have been another application filed before issuing the certificate but there was frankly inconsistent testimony on this question. There is also the lingering problem of the apparent rampant misfilings that were going on at the time that could quite easily explain all this.

Finally, the State acknowledged that they only looked a day or so before and after the date of the e-mail and that this could well have been to limited a search for these records. Given the delays in getting matters like this on the system that were shown on this record, there was insufficient proof that the grievant committed a violation of the rules or State law.⁵

Letter O was apparently paid for with a money order. Again there would have been no way for the grievant to know that unless he had seen the application with the proof of payment written on it. There was no evidence that the grievant would have intentionally lied about seeing the application and the proof of payment nor that he was making this up. More to the point, as Joint Exhibit 1r5 showed the application appeared on the VRV.

⁵ To be sure, it was somewhat troubling that some of these applications were not found. Here though many of the originals were found along with proof of payment. The grievant acknowledged that the process was to ask for another application if the first certificate did not appear and he testified to that both in the interview and at the hearing so it was apparent that he knew the procedure. While it is not OK to skirt the rules and send out certificates without verification of tangible interest and proof of payment the state's witnesses did acknowledged that if he did verify that before sending the new certificates out that was not a violation of the rules.

Letter P involved a person who sent his application in but forgot to send the check. He sent e-mail explaining this to the department asking if he could send the check and have them match the check with the application to save him from having to send in another application. It was not completely clear why this was included in the list of cases the grievant allegedly did incorrectly. The e-mail at Exhibit 15 at page 7 from Ms. Figgins indicated that she found the check and that she had seen the application as well. The e-mail message when read in context showed that the grievant was merely directing Ms. Figgins to get the application and that she was communicating that she had seen the application and the check. How the investigators concluded that there was no application under these facts was not entirely clear. The grievant testified that he reviewed the application as well and verified the application was accurate. Under these circumstances the evidence showed that what the grievant did was entirely proper.

Letter Q was again a situation where the VRV showed the application and that there was tangible interest. See Exhibit 13 and Exhibit 15 at page 13. The grievant discussed this at his interview, Exhibit 10, page 17. He provided an explanation for how the certificate was issued. The application was faxed, which under the rule was apparently acceptable, and there was evidence that the credit card was charged so there was proper payment. See Exhibit 16. There was no record of the application being rejected and the e-mail indicates that they were able to locate the faxed application, which had proof of payment noted near the top. There was no record of the certificate being issued so the grievant directed staff to issue it. There was some argument on the recorded interview CD about why this certificate was issued but the grievant provided plausible evidence that the application was on the fax log and that it was proper to issue the certificate with the information available at the time

This last case presented a slightly more difficult situation in that there was some evidence that the grievant merely checked the VRV and the fax log to make sure the information was correct. However, by a slim margin, there was insufficient evidence to show that what he did was contrary to established policy that he should be disciplined, much less terminated. Some additional training or a clearer policy might have been of some benefit but that is not the issue here.

On this record there was adequate evidence that the grievant checked for the proper records to make sure there was an application and payment. While this case was not a re-issue, as many were, it was similar in that payment and proof of tangible interest was received but for some reason the record was not issued.

Overall, the record does demonstrate a somewhat lax set of procedures for filing and processing of documents but that is not part of why the grievant was disciplined and in some ways was not of his making. There were obvious staff issues as well that could and likely did lead to why many of these documents were not found later. When taking the evidence as a whole there was no proof of any intentional violation of the rules, no direct evidence showing that the grievant ignored procedural safeguards and insufficient evidence to establish any wrongdoing, whether intentional or negligent or otherwise on this record.

ARTICLE 6, SECTION 4 – DUE PROCESS ISSUE

The Union raised this as a procedural issue but also one that it asserted goes to the very heart of the due process afforded any employee and therefore to the merits of the case itself. The allegation was that the State failed to comply with the clear provisions of Article 6 section 4 which provides in relevant part as follows: “The supervisor shall be advised of the principle allegations being investigated and, if known, the time and place of occurrence prior to questioning.” This clause seems simple enough and clearly requires that before an investigatory hearing or interview is conducted the subject of the investigation must be advised of the matters listed.

The State asserted that he had representation and that subsequent opportunities to give statements cured any procedural defects. This argument misses the point. The clear implication of the Article is to assure that the subject of a disciplinary investigation is made aware of what is being investigated *prior to the questioning*. This was especially true where, as here, a large part of the employer's case was based on statements made during the interview. To coin the old phrase, one cannot unring the bell.

Here it was clear that no such warning or notice was given. The letter of suspension mentioned nothing about the allegations or the time and place of occurrence. Moreover, all that was stated on the tape was that "we were looking into the activities of [the grievant's] unit." There was nothing more specific than that nor any notice or warning to him that he was under investigation for the specific allegations of issuing birth certificates inappropriately. By the time of the interview in late June 2009 the State clearly knew what the charges were. While they may not have known the specifics it was clear from the record that the State was aware of the "principle allegations being investigated" and at least some of the 'alleged time and place of occurrence.' Under these circumstances there was no excuse for not complying with the provisions of Article 6 section 4.

The State cited two cases where procedural defects were found to have been cured by subsequent opportunities to be heard. While those arbitrators ruled that there was adequate due process in their cases. See, *State of MN Dept. of Revenue and MMA* (Cooper 2009) and *Honeywell International v IBT 1145*, (Befort 2007), it was apparent that those cases were vastly different.

In Arbitrator Cooper's case the specific provisions of Article 6 section 4 were not at issue. While she ruled that the procedural due process was adequate in that case, the issue was different as well. There the Union claimed that it was confused as to the reasons for the discipline but the arbitrator ruled that they had been placed on sufficient notice of the charges and more importantly, that those charges could have been explained at a *Loudermill* hearing. The Union waived the *Loudermill* hearing in that case however thus effectively waiving the procedural argument,.

In Arbitrator Befort's case, which was with a different employer and Union, he found that there had been collusion between management and the Union on the handling of some cases. The claim was that an outside law firm hired to conduct the investigation did not do so fairly and that it failed to interview some relevant witnesses. The arbitrator rejected that claim and found that the investigation had been proper and that any prejudice suffered by the grievant was cured by the arbitration hearing itself. That case hardly provides a basis to ignore clear contract language in this case.

On this record there was no such notice provided. At the very least when there is a failure of due process any incriminating statements made in the course of that interview should be disregarded. The failure to follow due process may not compel the reversal of discharge if there is other compelling evidence of wrongdoing and the employee received substantial due process and an opportunity to present his or her side of the story prior to the discipline being imposed. Here however, the evidence showed a rather flagrant disregard for the due process guarantees contained in the parties' contract. Such language cannot be disregarded.

The State's "no harm no foul" position was troubling. While there was no evidence that the investigators intentionally misled the grievant about why he was being interviewed nor any evidence to suggest some subterfuge to get him to admit to something unwittingly, the contractual requirements in Article 6 section 4 are unambiguous and require that the subject of the investigation be given certain information prior to the interview. That was simply not done.

The Union urged the complete vacation of the discipline based on this procedural defect alone, claiming that once the fundamental rights of a grievant have been ignored in this way any subsequent opportunity to be heard is irreparably tainted by the initial procedural failing – it is an argument akin to the "fruit of the illegal tree." There is no need to decide here whether the violation of Article 6, section 4 must, on its own, result in the reversal of the discipline, given the findings above. Certainly, in a slightly different case it could, especially where much of the Employer's case rested on statements made in an investigatory meeting held without the proper contractual notice.

Since the overall record showed no evidence of any wrongdoing on the part of the grievant, the question of a proper remedy is moot. It would be inappropriate to mete out discipline in a situation such as this given the grievant's persuasive and credible version of the facts. It should be noted that the State's witnesses were credible as well but that the evidence here did not support the main allegation of dereliction of duty or negligence in issuing birth certificates as alleged.

Accordingly, the grievant is to be reinstated to his former position within 10 business days of this award with full back pay and other accrued contractual benefits. Back pay is subject to mitigation of damages and that any government unemployment, disability or wage replacement benefits as well as any earnings from salary or wages earned between the time of the grievant's discharge and his reinstatement hereunder are to be deducted from the back pay award.

AWARD

The grievance is SUSTAINED. The grievant is to be reinstated with 10 business days of this Award to his former position with full back pay and accrued contractual benefits, subject to mitigation as set forth above. The grievant's file shall be expunged of the termination herein. Pursuant to the BMS rules and the dictates of the Minnesota Data Practices Act, the grievant's name has been redacted from this award and only his initials are referenced herein.

Dated: October 4, 2010

MMA and State of Minnesota, Peterson award

Jeffrey W. Jacobs, arbitrator