

IN THE MATTER OF ARBITRATION) GRIEVANCE ARBITRATION
)
 between)
)
 Rice County, Faribault,) Rosemary Kaderlik -
 Minnesota) Termination Grievance
)
 -and-)
) BMS Case No. 10-PA-1250
)
 Minnesota Teamsters Public)
 & Law Enforcement Employees')
 Union, Local No. 320) October 5, 2010
))

For Rice County

Terrance J. Foy, Attorney, Ratwik, Roszak & Maloney, Minneapolis,
Minnesota
Meredith Erickson, City Attorney
Paul Knutson, Assessor
Gary Weiers, Administrator

For Teamsters Local No. 320

Paula R. Johnston, General Counsel
Leland Johnson, Business Agent
Rosemary Kaderlik, Grievant

JURISDICTION OF ARBITRATOR

Article VII, Employee Rights - Grievance Procedure, Step 4
of the 2010 Collective Bargaining Agreement (Joint Exhibit #1)
between Rice County (hereinafter "County" or "Employer") and
Teamsters Local No. 320 (hereinafter "Union") provides for an
appeal to arbitration of disputes that are properly processed
through the grievance procedure.

The Arbitrator, Richard J. Miller, was selected by the
Employer and the Union (hereinafter "Parties") from a panel

submitted by the Minnesota Bureau of Mediation Services. A hearing in the matter convened on July 12 and August 9, 2010, at 9:00 a.m. at the County Government Services Building, 320 Third Street Northwest, Faribault, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions.

The Parties elected to file posting hearing briefs electronically with an agreed-upon submission date of September 10, 2010. The post hearing briefs were submitted in accordance with those timelines, and the Arbitrator exchanged the post hearing briefs electronically, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

ISSUES AS AGREED TO BY THE PARTIES

1. Whether the County had just cause to terminate the Grievant?
2. If not, what is the appropriate remedy?

STATEMENT OF THE FACTS

The County is located in central Minnesota, thirty miles south of the Twin Cities metropolitan area. The County

encompasses an area of four hundred ninety-six square miles and contains seven cities and fourteen townships. The two largest cities are Faribault and Northfield. The County is comprised of 30,000 parcels of land. The County Assessor's Office is responsible for discovering, listing, and valuing all taxable property in the County, both real and personal, for tax purposes.

The Grievant, Rosemary Kaderlik, was hired as a secretary in the Rice County Extension Office in March 1973. The Grievant's job title was subsequently changed to that of Clerk II. Due to funding cutbacks, the Rice County Board of Commissioners eliminated the position of Clerk II in the Extension Office and the Grievant was placed on layoff in February 2004. In June 2004, the Grievant was recalled from layoff, pursuant to a collective bargaining agreement ("CBA" or "Contract") between the Parties, to a position as a Clerk II in the County Assessor's Office.

The Grievant duties and responsibilities as a Clerk II in the Assessor's Office was to research and verify property sale, ownership and valuation information, including property addresses and inputting day-to-day changes in property information into the Assessor's two major computer programs -- CAMAVISION and MANATRON. CAMAVISION is the County's assessment program and is used to keep track of property. MANATRON is the County's tax

program and links the Assessor's and Auditor's offices. Day-to-day property changes must be input first into CAMAVISION and then input into MANATRON. In order for the system to work properly, day-to-day changes have to be accurately made in both systems. Information contained in the computer system is then placed on the Internet where it is available to the public, including realtors, appraisers, and property owners. The Assessor Office also maintains addresses for property in the County, which are used by the Rice/Steele Joint Dispatch Center to direct first responders to emergency crisis situations. The data in the system is also used by the Department of Revenue to determine the State's sales ratio, the sale price of property compared to its assessed value. In order for the system to work properly, day-to-day changes have to be accurately made in both systems.

The Clerk II position increased in complexity and responsibility. The Grievant processed Certificate of Real Estate Value ("CRV") data into the County's system. (Employer Exhibit #1, Tab 2). The data reflected the property sale price paid by a new owner of property in an "arms length" transaction. The data in the County's computer system is used by the State to establish the sales ratio of property. The assessed value of real estate should reflect at least 90% of the sale value. The Grievant was also responsible for inputting building permit and

miscellaneous deed data into the system. Miscellaneous deeds, resulting from a divorce or other court order, are not considered to be "arms length" transactions. The Clerk 1I was required to assess and evaluate property transfers in order to determine whether or not the transfer was a "arms length" transaction for purposes of establishing CRV. Id.

In mid 2006, the County conducted a job evaluation study of its various positions. Reflecting the responsibility of the Clerk II position to analyze and engage in a thought process, which correctly categorized property transfer information, the Grievant's position was reclassified and placed at a higher salary range.

In 2007, the County negotiated the implementation of job evaluation study with the Union. The new wage rate for the Clerk II position was included in the Parties' 2008 Contract.

Prior to the implementation of the new compensation schedule, many employees, including the Grievant, were at the top of their salary range. Since performance evaluations would not result in a change of pay, evaluations were often cursory, in nature. The Grievant received adequate evaluations in 2005 and 2006. In 2007, no evaluations were conducted except for those employees who, unlike the Grievant, were eligible for step increases based on a performance review.

The implementation of the new salary schedule in 2008, resulted in many employees, including the Grievant, being placed in new salary ranges and becoming eligible for steps. Along with implementing the new salary schedule, the County placed a new emphasis on training supervisors and stressed the need to conduct meaningful employee performance-based job evaluations.

County Assessor Paul Knutson met with the Grievant and conducted her job performance evaluation on October 15, 2008. This evaluation addressed the Grievant's inputting errors and other job concerns. As part of the evaluation, the Grievant was placed on a 2008 Work Improvement Plan, which listed ten specific areas of improvement. (Employer Exhibit #1, Tab 27).

Among the ten "Goals and objectives for succeeding evaluation period", the 2008 Work Improvement Plan required the Grievant to meet the following conditions:

6. Incumbent must attend and successfully complete Minnesota Assessor Course "Assessor Laws and Procedures," to be held in January 26-30, 2009. It is a five day course with an examination at the conclusion. A course completion certificate and a passing exam grade must be presented to the supervisor and the department head.
7. Successfully complete the Special Ag Reapplication Project as assigned by supervisor, with protocols. The protocol will require the incumbent to receive data sensitive documents and immediately seal them in an envelope and staple them to the application.

10. Input accurate data in the system. Apply job knowledge to efficiently evaluate submitted information and perform required follow-up or research as needed to ensure that data is complete and accurate prior to inputting. The expectation is that there will be no more than 2% errors on building permits, measured on an incident basis. The expectation is that there will be no more than 2% errors on entering Certificates of Real Estate Values, measured on an incident basis.

(Employer Exhibit #1, Tab 27).

The Parties agreed that the Grievant's progress and performance would be reviewed again in six months. The Grievant would receive a step increase in the event her performance improved satisfactorily. (Employer Exhibit #5).

The Employer continued to monitor the Grievant's work performance and noted the following inaccurate inputting data in the system:

- The Grievant stated she removed Multi Property (MP) status from parcels where the Special Ag Homestead forms were not returned but failed to do so. (Employer Exhibit #1, Tab 4).
- The Grievant improperly removed the Green Acres ("GA") designation because she did not realize the parties applying for GA were the personal representatives of the decedent's estate. (Employer Exhibit #1, Tab 5).
- The Grievant failed to create a tab "Homestead" for a homestead statement. (Employer Exhibit #1, Tab 6).
- The Grievant erroneously input data indicating that a landowner had installed a \$4,000 swimming pool on his property when his permit was actually for cement steps and a railing. (Employer Exhibit #1, Tab 7).

- After owners returned a homestead application, the Grievant entered the homestead change in the notes but failed to input the homestead change in the tax system, resulting in the need for an abatement. (Employer Exhibit #1, Tab 8).
- The Grievant improperly removed the homestead exemption where a property owner moved into an assisted living facility. (Employer Exhibit #1, Tab 9).
- The Grievant failed to change the code on a property from 201 to 909 by transposing the numbers. In addition, the Grievant processed a CRV and then changed the parcel's tax classification from taxable to exempt without the consent of the County Assessor. (Employer Exhibit #1, Tab 10).
- The Grievant failed to remove the homestead exemption from property no longer entitled to it. The Grievant also improperly input the seller's and buyer's names. (Employer Exhibit #1, Tab 11 at p. 3).
- The Grievant indicated that she entered the homestead exemption for a parcel of property into the system. However, the homestead exemption was not reflected in the tax system. (Employer Exhibit #1, Tab 12).
- The Grievant input the wrong address for parcels of property. (Employer Exhibit #1, Tab 3).
- The Grievant created an error in the MP number for parcels of linked property. The error had an impact on the calculation of tax by limiting the agricultural homestead credit. (Employer Exhibit #1, Tab 16).
- The Grievant erroneously calculated a family to family sale as an arm's length transaction. (Employer Exhibit #1, Tab 17). The Grievant's error has serious consequences. Only arm's length sales are used to calculate appraisals. If not an arms' length transaction, the tax sales ratio is skewed. Such an error could result in reductions in Local Government Aid or trigger proceedings in tax court.

- The Grievant placed a permit on the wrong parcel of land. (Employer Exhibit #1, Tab 18). She repeated the same mistake. (Employer Exhibit #1, Tab 20, p. 3).
- The Grievant erroneously pulled the homestead exemption from a parcel of land. (Employer Exhibit #1, Tab 21).
- The Grievant failed to properly input an address change. (Employer Exhibit #1, Tab 22).
- The Grievant erroneously removed the homestead exemption from a parcel of land. The Grievant's error resulted in three years of incorrect assessments where the property should have been classified as homestead. (Employer Exhibit #1, Tab 23).
- The Grievant input the incorrect value into the County's database. The error, if not corrected, would impact the sales ratio. (Employer Exhibit #1, Tab 26).
- The Grievant failed to remove the This Old House exemption. (Employer Exhibit #1, Tab 29).
- The Grievant failed to enter a final determination regarding a parcel of land and also failed to include a certified note, resulting in the loss of an exemption. (Employer Exhibit #1, Tab 40).
- The Grievant did not accurately input address and zip code changes into the County's computer system even when repeatedly instructed to do so by her supervisor, and after she received feedback on how to input data correctly. (Employer Exhibit #1, Tabs 45-47). On January 12, 2010, the Grievant e-mailed her supervisor stating she was told not to put addresses on vacant property. Her supervisor advised that ever since the address database meeting on September 15 and October 14, 2008, addresses reminded her to be put on vacant properties. (Employer Exhibit #1, Tab 47, p. 36).

The Grievant's Work Improvement Plan required the Grievant to successfully complete the Special Ag Reapplication Project. The Grievant received extensive training in how to complete the

Special Ag Reapplication Project. (Employer Exhibit #1, Tab 36).

The Grievant was also required to complete the Assessor Law and Procedures ("ALP") class, presented by the Minnesota Association of Assessing Officers, which other staff had previously taken and passed the final examination. (Employer Exhibits #2, 3). The Grievant registered for the ALP class and intended to attend the class, which was being held from January 26-30, 2009.

The ALP class is generally presented twice a year, once in January and the other time in July, depending on the number of registered participants. If the registration does not meet the desired number, the ALP class is canceled to the next date (January or July). In fact, the Grievant intended to attend the July 2009 ALP class, but it was canceled due to low enrollment.

On January 23, 2009, prior to completing the Special Ag Reapplication Project or completing the ALP class, the Grievant fell on the icy steps outside the Assessor's Office, on her lunch break, severely injuring her back. The Grievant did not return to work. While she was out of work, the Grievant was advised that she was still required to complete the ALP class. (Employer Exhibit #1, Tab 54).

On March 26, 2009, the Grievant received from the Employer a written reprimand, when the County learned for the first time, that on or about August 27, 2008, she changed a parcel's tax

classification from taxable to exempt without consent of the County Assessor, which is required by State law. This was the first disciplinary action received by the Grievant since her employment date in March 1973. The Grievant was advised that further failure to comply with office procedures and State law could result in further disciplinary action, including the possibility of termination. (Employer Exhibit #1, Tab 38).

The Grievant returned to work on a part-time basis in June 2009, moving to full-time in August 2009. Following her return, the Grievant received extensive retraining on the MANATRON computer system and her other Clerk II duties. (Employer Exhibit #1, Tab 42, pp. 7-8). The Grievant also received additional training on how to complete the Special Ag Reapplication Project assigned in the 2008 Work Improvement Plan. (Employer Exhibit #1, Tab 41, pp. 15-19). To further assist her, the Grievant's duties regarding building permits were removed.

Despite the additional training and reduced duties, the Grievant was unable to successfully complete the Special Ag Reapplication Project. (Employer Exhibit #1, Tab 41, pp. 1-14; Tab 47, pp. 42-44, 46, 50, 52-66). Out of thirteen new parcels given the Grievant to review, errors were made regarding eight of the parcels, with thirteen errors made in all, a 62% error rate. (Employer Exhibit #1, Tab 39).

The Employer also avers that the Grievant violated County policy by claiming vacation without preapproval on December 7 and 8, 2009. The Grievant was advised of her need to comply with County policies and procedures. The Grievant's response was to claim that she did not know she had to actually receive preapproval, despite being advised of the requirement by e-mail on December 3, 2008, after she committed a similar violation. (Employer Exhibit #1, Tabs 33, 44).

In November 2009, the Grievant suffered a non-work related injury to her elbow. The Grievant fractured the radial head in her right elbow. The Grievant is right handed. The Grievant was able to keep working.

The next ALP class was scheduled for Monday, January 25, 2010, beginning at 8:00 a.m. and ending on Thursday, January 28, 2010, at 5:00 p.m., with the final examination on Thursday afternoon. (Union Exhibit #2). The ALP class was being held in St. Cloud, Minnesota.

After the Grievant's cast was removed and a splint applied, part of the Grievant's prescribed medical treatment for the injury was physical therapy, which she was required to attend several times per week. The Grievant's physical therapy was to be scheduled at a clinic in Northfield, Minnesota, about two hours of car travel time from St. Cloud.

On January 8, 2010, the Grievant sent an e-mail to the ALP class coordinator (Stephen Behrenbrinker), with copy to County Assessor Knutson, asking him whether the ALP class would be offered in July 2010, in addition to January 2010. The Grievant noted that she wanted to attend the January class, but was having much discomfort with her elbow injury, and would instead prefer to attend the July class, if so offered. (Union Exhibit #3).

On January 13, 2010, County Assessor Knutson advised the Grievant that she was required to attend the January 2010 ALP class and must pass the final examination. The Assessor also claims that on that date he directed the Grievant to attend the class unless a doctor's note said she was unable to come to work at all because of her injury. (Employer Exhibit #1, Tab 64). The Grievant, on the other hand, claims that County Assessor Knutson said that she had to get a doctor's note before she could be excused from attending the ALP class. In any event, the Grievant advised County Assessor Knutson that she had a doctor's appointment on January 15, 2010.

On January 22, 2010, the Friday before the class, the Grievant advised her supervisor, Becky Kotek, that she was not attending the ALP class because she had to go to physical therapy at a clinic in Northfield, Minnesota for her elbow injury. The Grievant provided a schedule of physical therapy appointments for

January and February 2010, including the dates during the ALP class on Tuesday, January 26 (appointment at 2:15 p.m. leaving work at 1:30 p.m.) and Thursday, January 28 (appointment at 2:00 p.m. leaving work at 1:45 p.m.). (Employer Exhibit #1, Tab 63).

The Grievant also presented a doctor's note, dated January 19, 2010, which stated:

Pt. will need to attend PT/OT sessions through the end of the month and should not miss them for work activities.

(Union Exhibit #1).

The Employer rejected the doctor's note because it did not state or specify that the Grievant was unable to work during the dates of the ALP class during the week of January 25 through 29, 2010.

On or about February 10, 2010, the Grievant was advised in writing by County Administrator Gary Weiers that the County was considering termination of her employment because of incompetence and misconduct in the performance of her duties. The Grievant was advised that she failed to meet the goals and objectives established in the 2008 Work Improvement Plan, including completing the ALP class to increase her job knowledge, successfully completing the Special Ag Application Project, and achieving a minimally acceptable error rate of 2% for her data entry duties. (Employer Exhibit #1, Tab 65).

Following a pre-termination hearing (Loudermill) attended by the Grievant and Union Business Agent Leland Johnson, County Administrator Weiers made a recommendation to the County Board that the Grievant be terminated. The County Board on February 23, 2010, approved the recommendation to terminate the employment of the Grievant, effective on that date. (Employer Exhibit #1, Tab 66). At the request of the Union, the County Administrator advised the Union of the termination by e-mail on February 23, 2010. (Employer Exhibit #1, Tab 67).

On February 23, 2010, Union Business Agent Johnson, on behalf of the Grievant, filed a written grievance protesting the Grievant's termination. (Joint Exhibit #2). The grievance seeks as a remedy that the Grievant be reinstated with full back pay and benefits and expungement from her personnel file of all reference to this disciplinary action and make her whole. Id.

The grievance was denied by County Administrator Weiers on March 11, 2010. (Joint Exhibit #3). The grievance was ultimately processed by the Union to final and binding arbitration, the last step in the contractual grievance procedure.

COUNTY POSITION

At a time when it is continually being asked to do more with less, the County has the right to expect competent and efficient

performance from its employees. Employers have a right to terminate employees who are unfit or unable to perform their jobs. The CBA negotiated by the Parties recognizes this right. While the CBA provides for various kinds of discipline, both the Employer and the Union have agreed that the list of types of discipline is not meant to imply a sequence of events.

The record overwhelmingly demonstrates that the Grievant was not performing at the level expected of her and that she is incapable of doing so. The pay equity study reflected that the Grievant's job increased in complexity and responsibilities and, therefore, the County's expectations were higher. The Grievant could not competently perform the Clerk II duties to the County's expectations.

The Grievant was guilty of making substantial and repeated data entry errors that were inconsistent with the expectations of a Clerk II in the Assessor's Office. The Grievant's decision making, such as changing tax exempt property to non-tax exempt property, making erroneous homestead classification changes, failing to assign addresses to vacant property, and failure to change zip codes when changing addresses went beyond mere data entry issues. After almost five years experience, the Grievant still could not even change addresses correctly, creating a serious risk to the public, and a serious liability to the

County, if an emergency vehicle was dispatched to the wrong address.

The Grievant is also guilty of a lack of progress on the 2008 Work Improvement Plan. The County found it particularly distressing that the Grievant would continue to make errors and violate policies where issues were addressed in staff meetings, by her supervisors, and in the 2008 Performance Improvement Plan.

The responsibilities in the Assessor's Office are intertwined and that, while everyone has a different part, all the parts have to fit together. If the Grievant is not doing her job, it affects the performance of others who have to correct and perform her work in addition to performing their own duties. Ultimately, in the interest of the Assessor's Office and the County, the Grievant's termination was the appropriate course of action.

The County's decision to terminate the Grievant's employment was reasonable and for cause.

UNION POSITION

The Grievant was not insubordinate when, through no fault of her own, she was unable to attend the ALP class. She was unable to attend the ALP class because she fractured her elbow and was required by her doctor to attend physical therapy sessions that conflicted with the class dates.

The Grievant does not deny that she occasionally made errors when performing data entry duties. However, both the quantity of errors and their magnitude were greatly inflated by the Employer and did not rise to the level of incompetence.

Finally, the Grievant did not violate the Employer's policies regarding the reporting of work related injuries or absences. Nor did she violate any policy concerning the reporting of on the job injuries.

The Employer did not have just cause to terminate the Grievant. As a result, the grievance should be sustained and the Grievant be reinstated and made whole.

ANALYSIS OF THE EVIDENCE

Article 10, Discipline, Section 10.1 of the Contract provides that "[t]he Employer will discipline employees for just cause only...in one (1) or more of the following forms: A. Oral reprimand; B. Written reprimand; C. Suspension; Demotion; D. Discharge. The Parties agreed in Section 10.1 that the aforementioned "list of types of discipline is not meant to imply a sequence of events."

The "just cause" requirement in Section 10.1 implies a standard of reasonableness under the unique circumstances of each case. An employee will not be discharged by action which is deemed by the Arbitrator to be arbitrary, capricious,

discriminatory, unduly harsh, or disproportionate to the proven offense committed by the affected employee. The Employer's discharge of the Grievant must therefore meet the standard of reasonableness.

There are generally two areas of proof in an arbitration of an employee's discipline case. The first involves proof of actual wrongdoing, the burden of which is always placed upon the Employer when the Contract requires just cause for discipline. The second area of proof, once actual wrongdoing is established, is the propriety of the penalty assessed by the Employer.

The Notice of Pre-Termination Letter stated that the Employer was considering terminating the Grievant for "incompetence and misconduct in the performance of [her] duties." (Employer Exhibit #1, Tab 65). The letter identified three specific allegations to justify the Employer's termination decision: the Grievant's failure to attend the ALP class, her data entry error rate, and her alleged noncompliance with County absence policies. Id. The Notice of Pre-Termination Letter became the grounds used by the Employer for the Grievant's termination effective February 23, 2010.

The Employer alleges that the Grievant was insubordinate when she did not attend the ALP class held in St. Cloud, Minnesota beginning on Monday, January 25, 2010, at 8:00 a.m.

and ending on Thursday, January 28, 2010, at 5:00 p.m., with the final examination on Thursday afternoon.

In the Grievant's 2008 Work Improvement Plan, one of the listed requirements of the Plan was that "6. Incumbent must attend and successfully complete the Minnesota Assessor Course 'Assessor Laws and Procedures', to be held in January 26-30, 2009. It is a five day course with an examination at the conclusion. A course completion certificate and a passing exam grade must be presented to the supervisor and the department head." (Employer Exhibit #1, Tab 27). The Grievant was provided with additional written notice of this requirement by letter dated February 6, 2009, from County Assessor Knutson. (Employer Exhibit #1, Tab 54).

The offense of insubordination consists of the intentional failure of an employee to carry out a reasonable work order or direction given by supervisory personnel. Such a work order may be an affirmative direction to do something or a negative direction to refrain from doing something. It is the actual refusal to carry out the work order, not the mere verbalization of the refusal, that constitutes the insubordinate conduct. The evidence is sufficient to establish insubordination if a reasonable work order is clearly communicated so that a reasonable employee would understand it and if that employee

thereafter willfully fails to carry out the reasonable work order.

There are some exceptions or qualifiers to the insubordination rule. First, "an employee's refusal to work or obey must be knowing, willful and deliberate." Discipline and Discharge in Arbitration, Norman Brand, Editor in Chief, 1st Ed., p. 156. This requirement may be negated by evidence of circumstances such as personal problems or hospitalization. Discipline and Discharge in Arbitration, 2001 Supplement, Ann L. Draznin, Editor in Chief, p. 35. "Lack of personal control over the subject of the order has also been recognized as a valid excuse for lack of compliance with an order." Id. Second, "the order must be both reasonable and work related." Discipline and Discharge in Arbitration, Norman Brand, Editor in Chief, 1st Ed., p. 157.

In this case, the Grievant's inability to attend the January 2010 ALP class did not constitute a knowing, willful, and deliberate refusal to obey a supervisor's order. The Grievant had a valid reason to miss the ALP class due to her medical condition. She was required by her physician to attend physical therapy sessions during two of the four days of the ALP class. Clearly, the supervisor's expectation that she attend the ALP class regardless of her medical condition and treatment plan

prescribed by the Grievant's doctor was unreasonable and excuses the Grievant was attending the ALP class.

There was no evidence that the Grievant purposely attempted to avoid attending the ALP class. After the Work Improvement Plan was established in November 2008, the Grievant registered for the January 26-30, 2009 ALP class and fully intended to attend. The Grievant unfortunately on January 23, 2009, slipped on icy steps leaving the Assessor's Office during lunch break and fell, severely injuring her back. A co-worker was walking out at the same time and witnessed the injury. The on-the-job injury was so severe that the Grievant was unable to work for approximately five months. She returned to work part-time in June, and was finally able to resume full-time duties in August. It was the Grievant's back injury that prevented her from attending the January 2009 ALP class and not her refusal to attend the class.

Because the ALP class is offered only twice yearly, in January and July, the next opportunity for the Grievant to attend the class was in July 2009. However, the July course was canceled due to low enrollment. The course was next offered on January 25-28, 2010, in St. Cloud, Minnesota.

On November 19, 2009, the Grievant suffered another fall, this time off duty. She broke the radial head in her right

elbow, which controls movement in the arm. Despite the severity of her injury, the Grievant returned to work after a short absence. As part of the recovery process, the Grievant's doctor prescribed physical therapy for January and February 2010. The therapy was essential to her recovery and thus was mandated by her doctor. (Union Exhibit #1). The therapy sessions unfortunately happened to coincide with the dates of the January 2010 ALP class.

County Assessor Knutson's expectation that the Grievant attend the ALP class rather than attend physical therapy was unreasonable. The Grievant's medical treatment, which was prescribed by her doctor and over which she had no control, prevented her from attending the ALP class. The Grievant was not insubordinate by refusing to partake in the ALP class. She was merely following reasonable medical orders to receive physical therapy on her injured elbow.

The County argues that the Grievant should have attended the ALP class during times that she was not in physical therapy. This would include a portion of the day on January 26 and 28, 2010, when she had physical therapy sessions and all day on January 25 and 27, 2010, when she had no physical therapy sessions. This argument is contrary to County Assessor Knutson's edict in the 2008 Work Improvement Plan and his

February 9, 2009 letter that the Grievant not only had to attend the ALP class, she had to successfully complete it, with proof of completion and with proof of a passing grade. (Employer Exhibit 31, Tabs 27, 54). These requirements were never altered even when the Grievant's doctor ordered physical therapy during two days of the ALP class. The Grievant was never told by the County that she should attend part of the course or that she had the option of taking the final exam at a different time or on a different date or she did not have to take the exam. In fact, there is no evidence that suggests that these considerations were even a possibility, since the ALP class was sponsored by the Minnesota Association of Assessing Officers, not the Employer. It must be remembered that the two hour travel time from Northfield to St. Cloud and the exam itself occurred during part or all of the time that the Grievant was in physical therapy on Thursday, January 28, 2010. This made it impossible for the Grievant to take the exam and pass it, which was required of her by County Assessor Knutson.

There was considerable debate between the Grievant and County Assessor Knutson as to what should have been contained in the doctor's note to excuse the Grievant from attending the ALP class. The doctor's note dated January 19, 2010, stated that the Grievant "will need to attend PT/OT sessions through the end of

the month and should not miss them for work activities." (Union Exhibit #1).

County Assessor Knutson's testimony was that he told the Grievant she needed to get a doctor's note stating that she could not work at all in order to be excused from attending the ALP class. The Grievant, on the other hand, testified that Mr. Knutson simply told her that she needed a doctor's note to verify that she was required to attend physical therapy sessions during the ALP class.

The Grievant's version makes more sense. Mr. Knutson knew that the Grievant was already working when he told her that she needed to get a doctor's note. Thus, it would not be necessary for the Grievant to secure a doctor's note indicating that she could not work at all in order to be excused from attending the ALP class. In addition, the Grievant's testimony was also consistent with statements she made throughout the grievance steps. At the March 2, 2010 step three hearing, the Grievant told County Administrator Weiers that it was her understanding that all she needed was a regular doctor's note, which she obtained on January 19, 2010. The doctor's note indicated that the Grievant needed to attend the therapy sessions and that she "should not miss them for work activities", which reasonably would excuse the Grievant was attending the ALP class.

The Grievant was clearly not insubordinate when she was unable to attend the ALP class due to her injury and subsequent required medical treatment (physical therapy).

The County alleges in The Notice of Pre-Termination Letter that the Grievant failed to comply with County and Assessor Department policies. Specifically, the County alleges that "[s]ince your last performance review you failed to follow required procedures for reporting work related injuries. You have failed to comply with County policy concerning reporting work absences. Despite individual discussions and office-wide staff meeting, you failed to follow proper procedures on December 7 and 8, 2009." (Employer Exhibit #1, Tab 65).

It is undisputed that the Grievant suffered a severe work related injury to her back on January 23, 2009. The Grievant slipped on icy steps leaving the Assessor's Office during lunch break and fell, severely injuring her back. This fall was witnessed by a co-worker who was walking out with the Grievant. The unrefuted testimony is that this co-worker immediately returned to the Assessor's Office to notify the Grievant's supervisor of what had occurred.

Because she felt increased back pain and shortness of breath after getting into her automobile, the Grievant drove herself to the emergency room for emergency treatment. As she was being

treated in the hospital, she requested that a nurse call the Assessor's Office and inform the supervisor of her medical condition. The nurse complied with the Grievant's reasonable request.

The County's policy regarding the reporting of work related injury states that "[i]t is the responsibility of each employee subjected to a work related injury/illness to notify their supervisor immediately of the event. Secondly, the employee or supervisor should immediately notify Administration of the injury/illness, at which time a First Report of Injury form and an Accident Investigation form should be completed." (Employer Exhibit #6). The policy goes on to state that "[i]t is the responsibility of the supervisor to advise Administration of all periods of absence resulting from the injury/illness..." Id.

The record establishes that the Grievant clearly complied with this policy. The Grievant's co-worker notified the Grievant's supervisor immediately after the Grievant's fall. At the hospital, the Grievant had a nurse call the Assessor's Office to advise the supervisor of her medical condition. Clearly, the Grievant did everything she possibly could to report the injury. The fact that the Grievant did not directly communicate with her supervisor about the fall is understandable, as she was receiving emergency treatment for a serious work related injury.

It is also undisputed that the County knew that the Grievant would be absent for a significant period of time due to this work related injury. The Grievant testified that the Employer mailed her the appropriate work related injury forms to complete. She completed the forms and returned them to the Employer in a reasonable period of time. Had she not completed the forms in an expeditious manner, she would not have received worker's compensation benefits.

It is also noteworthy that the Employer did not accuse the Grievant of failing to follow the required policy procedures for reporting work related injuries and reporting work absences at the time the injury occurred. The County did not discipline the Grievant for failing to follow the policy until over a year had passed, when the County terminated her. To now bring this issue to the attention of the Arbitrator when one year has passed since the event arose is unreasonable and unfair to the Grievant.

The Employer also alleges that the Grievant violated its policy concerning vacation leave on December 7 and 8, 2009. On those dates the Grievant had car trouble and brought her vehicle to the mechanic to fix the problem. She called in the morning, prior to the opening of the Assessor's Office, on both days. She left messages indicating that she had car trouble and would like to take vacation so that she would be paid for being

absent on those two days. In both messages, she indicated that if she could not take vacation her supervisor (Ms. Kotek) or the Department Head (Mr. Knutson) should call her. Mr. Knutson admitted in his testimony that the Grievant had requested that she be notified if the vacation was not approved. However, even though he did not approve the Grievant's vacation request, he did not notify the Grievant of that decision. Mr. Knutson testified that he did not believe that it was his responsibility to call her and notify her that he would not approve the vacation request.

The vacation leave policy does not indicate a specific method in which to request vacation. (Employer Exhibit #4). It does not state that an employee may not request vacation leave by telephone. It does not state that an employee may not request vacation leave on the same day that she or he wishes to take the leave. The policy only states that "Department Heads are responsible for approving the scheduling of vacation leaves for employees under their supervision, and approval is not automatic." Id. Most certainly, Department Heads, such as County Assessor Knutson, have the ultimate managerial authority to approve or not approve a vacation request once the employee request by any communication method is received by the Department Head.

What is noteworthy is the fact that the Employer did not discipline the Grievant for allegedly failing to follow the vacation leave policy. Instead, Department Head Knutson sent an e-mail to the Grievant on the day that she returned to work telling her that vacation had to be pre-approved and that she was told of this requirement in past vacation requests.

(Employer Exhibit #1, Tab 44). However, if the Grievant's actions regarding the vacation requests for December 7 and 8, 2009, and in the past vacation requests, did not justify discipline at the time the vacation requests were made by the Grievant, they certainly did not justify termination several months later.

The third and final allegation lodged against the Grievant in The Notice of Pre-Termination Letter is that she did not complete the Special Ag Reapplication Project and had a high input data error rate, which were both unacceptable to the Employer.

The 2008 Work Improvement Plan stated that a minimally acceptable error rate of 2% was established for the Grievant's entry duties. The County argues that the Grievant is incompetent as she cannot perform the required Clerk II duties and responsibilities in a satisfactory manner. The Grievant continued to make the same mistakes even though she had been

taught how to input the data correctly. According to the Employer, the Grievant may be trying as hard as she can, but she is incapable of changing her work habits to reach a satisfactory input data rate. The Union, on the other hand, claims that the Grievant's error rate in data entry does not constitute incompetence. Even if it did, the Employer failed to follow principles of progressive discipline.

The concept of "incompetence" carries the dual connotation of unsatisfactory job performance and inability to acquire the skills necessary to perform adequately. Michigan Department of Mental Health, 82 LA 1311, 1316 (1984) (quoting Knight Newspapers, Inc., 58 LA 446 (1972)).

Consistent failure to meet reasonable standards constitutes evidence of a basic inability to do the job rather than a failure of an otherwise capable employee to exercise due care. The distinction is significant because it often determines the appropriateness of an employer's decision to terminate an employee rather than impose progressive discipline. Arbitrators realize that progressive discipline, intended to deter future infractions or other misconduct, would serve no purpose for an employee whose work has been substantially deficient and there is no hope for improvement. Southwestern Bell Telecom, 94 LA 199 (1990).

The Union admits that the Grievant made input data errors, such as changing tax exempt property to non-tax exempt property, making erroneous homestead classification changes, failing to assign addresses to vacant property, failure to change zip codes when changing addresses, and failure to complete the Special Ag Reapplication Project, all of which are important and essential functions of the Clerk II position. In total, the Employer offered proof of the Grievant making approximately 75 data input errors from the time of the 2008 Work Improvement Plan to her termination. (Employer Exhibit #1, Tabs 4-26, 28-30, 37-41, 45-48). The Union alleges that the error rate was approximately .002% based on the testimony of the Grievant that she made more than 32,000 data entries during this same time period. In any event, the Employer admits that in spite of the number of errors made by the Grievant she had a minimally acceptable error rate of 2% for her data entry duties, which is the minimal rate targeted in the 2008 Work Performance Plan.

The evidence establishes that the Grievant make the same data entry mistakes even though she had been taught, trained, and retrained on how to input the data correctly. The Grievant's Performance Appraisal clearly advised the Grievant there were problems with her work performance. The Grievant was also warned in her March 26, 2009 written reprimand of the consequences if

there is no improvement in her job performance (discipline up to and including discharge).

While these factors are important, they do not conclusively prove that the Grievant is incompetent and unable to perform her job if given another chance. The Grievant should be given another chance to prove that indeed she is competent to perform her assigned job duties, especially given the fact that she is a long-term employee (37 years), with only a written reprimand in her personnel record, which are important considerations in any arbitration.

Most certainly, the Arbitrator finds the number of input data errors to be troubling. What is also troubling is that the Grievant was trained, but could not complete the Special Ag Reapplication Project, which was required of her under the 2008 Work Improvement Plan. As a result, while the Grievant deserves to be reinstated, the Employer still has the right to monitor her work progress through a new Work Improvement Plan. For example, the Employer has the right to include in the new Work Improvement Plan a requirement that the Grievant complete the next offered ALP class, and if she does not pass the class, will be subject to termination. This is reasonable given the fact that other County Assessor employees were required to pass the ALP class. In addition, it would be reasonable for the County to include other

performance goals, as outlined in the 2008 Work Performance Plan, in the new Work Performance Plan.

The Arbitrator has found in the past in some other arbitration cases, where there is a long-term employee with a good work record, that the employee resists technological changes or simply any changes at all in procedures or practices knowing that they are at or near retirement. Hopefully, the Grievant will heed the warning that her job performance is not satisfactory and will make a valiant attempt to improve on it in the future unless the Grievant would prefer to retire and not be subject to close scrutiny of her work habits by the Employer in the future.

Clearly, the Grievant's high input data error rate and her failure to complete the Special Ag Reapplication Project cannot be condoned by the Arbitrator. As a result, the Grievant should not be financially rewarded for her poor work performance. However, the County's punishment of discharge is unwarranted, and not for just cause under Section 10.1 of the Contract. To discharge the Grievant in light of the unique facts and circumstances surrounding this case would be excessive. It would represent an overkill on the part of the County. The appropriate remedy is reinstatement with no back pay. The degree of penalty assessed by the Arbitrator in the instant grievance is

commensurate with the seriousness of the Grievant's work performance and her overall work record.

AWARD

Based upon the foregoing and the entire record, the grievance is sustained in part. Within thirty (30) business days of the receipt of this Award the County shall reinstate the Grievant, Rosemary Kaderlik, to her former position without any back pay or any fringe benefits from the period of her discharge to the date of reinstatement.



Richard J. Miller

Dated October 5, 2010, at Maple Grove, Minnesota.