

BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

_____)	
IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	BMS# 11-RA-0120
Human Development Center)	
)	
and)	
)	John Remington,
)	Arbitrator
AFSCME Council #5, Local 3558)	
)	
_____)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a grievance over the termination of Grievant C_____, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Minnesota Bureau of Mediation Services, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on January 21, 2011 in Duluth, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs which they did subsequently file on February 11, 2011.

The following appearances were entered:

For the Employer:

Joseph J. Roby, Jr.

Johnson, Killen & Seiler, P.A.

Merle Peterson

Director of Human Resources

For the Union:

Ken Loeffler-Kemp

Field Representative

THE ISSUE

It is significant that the termination of Grievant is not subject to the just cause provision of the collective agreement but rather is controlled by whether the Employer complied with the procedural and substantive requirements of Article 48 of the parties' agreement. The Employer shoulders the burden of proving its compliance with Article 48. Accordingly, the issue is:

DID THE EMPLOYER TERMINATE GRIEVANT IN COMPLIANCE WITH THE REQUIREMENTS OF ARTICLE 48 OF THE COLLECTIVE AGREEMENT AND, IF NOT, WHAT SHALL THE REMEDY BE?

PERTINENT CONTRACT PROVISION

Employee Performance

Article 44-- Employee Evaluations. Each year within sixty (60) days after the employee's anniversary date of employment, the employee's performance shall be evaluated in writing by his or her supervisor. Employees who disagree with the evaluation shall be permitted to submit a written response and have the response attached to the supervisor's evaluation.

Article 48—Discipline and Discharge—Substandard Performance. In cases of substandard performance, the Employer shall not discipline or discharge an employee without following these steps:

- (1) The employer may set the performance standards for the job in question, provided that the standards shall be made known to the affected employees and shall be applied without discrimination.
- (2) The Employer shall be prepared to demonstrate that the employee failed to meet the performance standards and shall conduct a fair and impartial investigation in that regard.
- (3) The employee shall be given a reasonable corrective plan, under which the employee is made aware of the performance issues, is counseled on how to correct them, and is given an opportunity to correct them.
- (4) The Employer shall be prepared to demonstrate that the employee failed to meet the corrective plan.

BACKGROUND

The Human Development Center hereinafter referred to as HDC or the “EMPLOYER”, is a Minnesota non-profit corporation located in Duluth, MN with offices in several nearby communities. HDC provides psychiatric, psychological, therapy, counseling and other mental health services, primarily to the area’s economically disadvantaged population. HDC employs approximately 300 employees and serves in excess of 8,000 clients in Northeastern Minnesota and Northwestern Wisconsin. Most of HDC’s non-managerial employees, including Grievant, are represented by Council #5 of the American Federation of State, County and Municipal Employees and its Local Union #3558, hereinafter referred to as the “UNION.”

Grievant was initially employed in August of 2005 as a half-time secretarial/ clerical Support Staff person. In January of 2009 her employment was increased to $\frac{3}{4}$ time, but was reduced back to $\frac{1}{2}$ time in September of 2009 to accommodate certain

unspecified medical problems experienced by Grievant. While it is undisputed that Grievant experienced such problems, there is no contention by the Union that Grievant's health affected her job performance. Early in 2009 Grievant's worksite was changed to the Spirit Valley office, a location in Duluth some distance away from the HDC central office. Grievant also received a new supervisor, Community Support Office Manager, Pamela Hinnencamp. Hinnencamp's office was not at Grievant's worksite. However, she did travel to Grievant's worksite and had the opportunity to observe Grievant's performance. In October of 2009 Hinnencamp revised Grievant's job description and Grievant acknowledged receipt of this "updated" description by signing it on October 9, 2009. The Employer did not offer a copy of Grievant's prior job description nor did it provide testimony about her prior duties or about any changes in her job duties pursuant to the October 2009 Job Description.

Hinnencamp testified that the above updated Job Description applied only to Grievant. She further testified that she first became aware of data entry errors made by Grievant when she began to visit the Spirit Valley office to train a new, part-time employee hired to work the hours that Grievant had worked prior to the above noted reduction in hours in September of 2009. Hinnencamp communicated with Grievant, both in person and by telephone, concerning Grievant's allegedly substandard job performance, and coached and counseled Grievant for a period of approximately five (5) months. In March of 2010 Hinnencamp determined that Grievant's performance had not improved significantly and met privately with Grievant and issued her a "Corrective Plan" on March 10. Grievant requested Union representation at this meeting but her

request was rejected by Hinnencamp. The corrective plan cited six “Areas of Concern.”

They included:

1. Opening ARMHS clients charts and in the IRIS system.
2. Correct information in Recurring Event screen.
3. Billing ARMHS clients. Maintaining Funding List.
4. Inform supervisor when tools
5. Updating information in IRIS. Current provider.
6. When diagnosis changes provider information needs to be updated to match clinician.

Under “Expectations” Hinnencamp entered the following:

C_____ is expected to develop a system to address areas of concern. If she is unsure of procedure she is to contact her supervisor for appropriate guidance.

Finally, the Corrective Plan called for “Progress Meetings” to be held between Grievant and Hinnencamp on March 17, March 24, March 31 and April 7, and included the statement:

Failure to meet the above stated expectations may result in discipline up to and including termination.

Hinnencamp subsequently met with Grievant on March 18, March 25 and April 5. Based on Hinnencamp’s testimony and notes (Employer Exhibit #10), it appears that the March 25 meeting was abbreviated because Hinnencamp had failed to bring Grievant’s “information with me.” The March 31 meeting was not held because Hinnencamp was out of work due to illness from March 29 through April 5. Thereafter Hinnencamp met with Grievant on April 13 and April 19. Hinnencamp’s notes reflect that she unilaterally extended the Corrective Plan for two weeks and had discussions with Grievant over data entry errors and verification of client information. Apparently Hinnencamp was still not satisfied that Grievant had made necessary corrections or improved her performance

because she called Grievant on April 23 and directed her to meet with Hinnencamp, Human Resources Director Merle Peterson and Leslie DeCorsey on April 26, 2010. Hinnencamp's notes reveal that the Employer had already determined to terminate Grievant before this meeting, a decision that was communicated verbally to Grievant by Peterson.

Hinnencamp issued the following letter to Grievant on April 27, 2010:

This letter shall serve as documentation of the termination of your employment effective April 26, 2010.

You will be paid all regular earnings and all earned unused vacation on the next normal pay date of April 30, 2010. Enclosed you will find COBRA information to continue your insurance benefits beyond April 30, 2010.

If you should have any questions, please contact me at my office or Human Resources at 218-730-2344.

The Union responded to this termination letter by filing an "Official Grievance Form" on May 6, 2010. The grievance simply notes Grievant's termination on April 26; alleges violation of Articles 3, 10 and 48 of the collective bargaining agreement; and asks that Grievant be reinstated to her former position "with full pay and benefits back to 4/26/10." This grievance was denied on May 14, 2010 in a letter from Hinnencamp to Union representatives Justin Terch and Ryan Welles. This letter states, in relevant part:

I have reviewed the facts of the termination of C_____:

- She was placed on a Corrective Plan on March 9, 2010
- Four follow-up coaching meetings were held to discuss the expectations defined in the Corrective Plan
- The Corrective Plan was extended for 2 weeks to allow for sick and vacation time
- C_____ 's level of errors did not improve; and C_____ herself stated that she doesn't know why she makes mistakes.

- C _____ was terminated on April 26, 2010 after following all of the steps outlined in Article 48 of the collective bargaining agreement.

The Union responded on May 17 with a Step 2 appeal alleging the same contractual violations as those cited in the initial grievance and requesting that Grievant be made whole in remedy. This appeal was rejected in a letter from HDC Executive Director Jim Gruba to Welles on June 3 which simply states that “the termination is upheld.”

However, appended to this letter was an outlined recitation of Grievant’s work history.

The Union appealed the Step 2 denial on June 7. This appeal was rejected by Peterson in a letter to Welles dated June 14, 2010.

Thereafter the grievance was advanced to arbitration in accordance with the provisions of the parties’ collective agreement. There being no dispute over arbitrability, the matter is properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Employer correctly takes the position that the instant grievance is not subject to the just cause standard set forth in Article 47 but is rather to be determined exclusively in accordance with the provisions of Article 48, supra. In this connection Counsel for the Employer also properly contends that the traditional principles of due process and corrective discipline do not apply here, and that the Arbitrator’s remedial authority is constrained if he finds that the Employer complied with the requirements of Article 48. The Employer further takes the position that it carefully followed the four performance steps set forth in Article 48; that it established non-discriminatory performance standards for Grievant’s job; that Grievant failed to meet those standards; that the Employer

conducted a fair and impartial investigation; that Grievant's *Weingarten* rights were not violated; that Grievant failed to meet the corrective plan; and that the Employer ultimately had no alternative but to terminate Grievant. Accordingly it requests that the grievance be denied.

The Union takes the position that the Employer failed to comply with any of the criteria set forth in Article 48 in reaching its decision to terminate Grievant. It asserts that the Employer was unable to provide evidence that it set any clear performance standards or that those standards were communicated to the employee. Indeed, the Union contends that the evidence submitted at the hearing concerning Grievant's poor performance/ data entry mistakes actually reveals that Grievant had a remarkably low rate of errors given the volume of data entries that she made over the five month period between November 4, 2009 and March 30, 2010. Accordingly, the Union argues that the Employer also failed to comply with the second requirement of Article 48 since Grievant could hardly have complied with performance standards that didn't exist. In this connection the Union also argues that the Employer failed to conduct a fair and impartial investigation of Grievant's work performance. The Union further takes the position that the Employer failed to provide a reasonable corrective plan; that the Employer was unable to demonstrate that the Grievant had failed to meet the corrective plan; and that the plan was unreasonable in that it allowed Grievant only four weeks to make unspecified improvements and put an unrealistic burden on Grievant to develop her own improvement plan. The Union therefore urges that the grievance be sustained.

DISCUSSION, OPINION AND AWARD

The Employer's case in chief relies heavily on the testimony of Pamela Hinnencamp. It was Hinnencamp who voluntarily assumed supervision of Grievant in 2009; revised Grievant's job description; allegedly counseled and coached Grievant over a five month period in order to improve Grievant's performance; constructed Grievant's "Corrective Plan"; and made the initial decision to terminate Grievant's employment. Hinnencamp failed to provide any testimony concerning her own educational background, qualifications or experience as a supervisor, an omission that is relevant in light of her later inability to articulate clear performance standards for Grievant's job or objectively explain her evaluation of Grievant's performance. This is particularly troubling given Grievant's unblemished five year work history together with quantitative, although subjective, performance evaluations from 2007 and 2008 that revealed Grievant to be a competent, indeed an above average to excellent employee in some aspects of her job. While the Employer argues that these job evaluations are stale and should be given little weight, it cannot be denied that Hinnencamp had the opportunity and the contractual obligation within the meaning of Article 44, to evaluate Grievant's annual performance within sixty days, before or after, her August 8 seniority date. While it is unclear in the record exactly when Hinnencamp assumed supervision over Grievant,¹ there can be no doubt that she had the opportunity to evaluate Grievant and thereby put her on notice that her performance, particularly her data entry performance, was unsatisfactory. Incredibly, Hinnencamp testified that she wasn't even familiar with Grievant's prior evaluations and that she "used a different form," as if this somehow excused her failure to review

¹ Hinnencamp testified that she became Grievant's supervisor in October of 2009 but admitted on cross examination that "it may have been earlier."

Grievant's record. Further, no alternative form of evaluation was provided by Hinnencamp. Apparently Hinnencamp was either unaware that she or another supervisor was required to conduct an annual evaluation of Grievant's work performance, or declined to perform such an evaluation.

Instead of providing the requisite performance evaluation, Hinnencamp elected to coach and counsel Grievant between November of 2009 and March of 2010. Hinnencamp provided only vague and general testimony about the coaching and counseling and offered no records or notes to substantiate the nature or frequency of this counseling. This was in the face of Grievant's unrebutted testimony that Hinnencamp only visited the Spirit Valley worksite occasionally during the five month period and called Grievant on the phone when the supervisor became aware of a job performance problem. In light of the foregoing discussion the Arbitrator must find that there is considerable doubt concerning either the substance or efficacy of the coaching and counseling allegedly provided by Hinnencamp, and serious doubt that Grievant was made aware, either through a formal performance evaluation or through coaching and counseling, that her job performance was deemed inadequate by Hinnencamp until she was issued the "Corrective Plan" in March of 2010.

Hinnencamp's credibility as a witness was further diluted by her lack of responsiveness on cross examination. Specifically, she was not responsive when asked to identify the performance standards set forth in the "Corrective Plan" which she admittedly wrote. When prompted she simply "guessed" that the standards are the duties set forth in the job description. A review of the "Job Description" (Joint Exhibit #3) reveals only a list of duties, grouped into three major categories, that Grievant was

expected to perform. Those categories include: Reception; Referral, Intake and Update; Data Entry/Billing and Funding; and a fourth category, "Other." It is undisputed that Grievant's performance problems were primarily with data entry and updating. Since the Job Description does not specify the percentage of time Grievant was to allocate to each of these categories, it is fair to conclude that she was deemed deficient by Hinnencamp in less than 1/3 of her total job duties and responsibilities. Contrary to Hinnencamp's above assertion, the Job Description contains no objective performance standards, priority duties, or even expectations as to the amount of time Grievant was expected to devote to each of the listed duties. Reduced to its essence, Hinnencamp's testimony revealed only that Grievant's data entry and record keeping performance was inadequate in terms of some vague and undefined standard and can only be deemed arbitrary. As Hinnencamp finally testified, the standard is "completing work and reducing errors." However, there is no evidence to show that Grievant failed to complete her work as set forth in the Job Description and no objective measure to determine what constituted a satisfactory or even reduced error rate. Was Hinnencamp's baseline some industry standard, a comparison of the error rates of other similarly situated employees, a reduction in the error rate/ per entry, a comparative improvement based on the work of other employees that Hinnencamp had previously supervised, or simply an absolute reduction in the number of errors made over some uniform period of time? Her testimony provided no answers in this regard.

The Union asserts that, based on Hinnencamp's own testimony and the number of errors documented by the Employer, Grievant was actually over 98% accurate in the entry of data. An error rate as low as 2% would appear to be remarkable, particularly

given the fact that Grievant was required to enter data while she was also solely responsible for answering and directing telephone calls, receiving and checking in clients, collecting payments, scheduling appointments, handling the reception area and performing general clerical duties. It is also apparent that most of the data entry errors documented by the Employer were correctable, and that Grievant had, in fact corrected them before they were uncovered by Hinnencamp. While Grievant was criticized for not communicating work assignments and coordinating with her relief workers, it is undisputed that the Employer never scheduled the three different part time employees hired because of Grievant's reduction in hours to overlap Grievant's work hours. Given this circumstance it is difficult to understand how Grievant was to accomplish this coordination and communication. In summary, Hinnencamp's testimony provided no support for the Employer's contention that Grievant was provided with performance standards as required by Article 48 (1). It follows that the Employer was also unable to demonstrate that the employee failed to meet those standards as required by Article 48 (2). On the contrary, the only credible evidence indicates that her data entry performance was more than satisfactory, even by Hinnencamp's vague and subjective standards.

Requirement (3) of Article 48 provides that the employee be given a reasonable corrective plan, under which the employee is made aware of the performance issues, is counseled on how to correct them, and is given an opportunity to correct them. Like the Job Description, the Corrective Plan given to Grievant on March 9, 2010, contains no discernable objective performance standards. The "Areas of Concern" simply list the job duties which Grievant was not performing satisfactorily in Hinnencamp's judgment. Again, there is no indication of what specific errors Grievant is to correct, what course of

action she should take in reducing errors, or how much improvement is necessary to reach satisfactory performance. Despite this vague and imprecise list of concerns, Grievant is somehow “expected to develop a system to address areas of concern.” To place such responsibility on the employee when the Employer cannot even clearly articulate its specific concerns and expectations can only be deemed unreasonable, and so the Arbitrator finds. Neither is it reasonable to expect an employee to correct a laundry list of non-specific performance issues in a period of four weeks. While Hinnencamp’s documentation (Joint Exhibit#5) indicates that she told Grievant of her expectations, these expectations were not clearly addressed in either the testimony or documentation. The Arbitrator is therefore compelled to find that the Employer has failed to comply with the provisions of Article 48 (3). Neither, based on the testimony or documentation, is there sufficient evidence to find that the Employer complied with the requirements of Article 48 (4).

Counsel for the Employer argues that the Arbitrator should draw an adverse inference from the failure of the Union to call the Grievant to testify. While the Arbitrator typically honors such a request when a Grievant does not testify in his/her defense, he has declined to do so here for two reasons. First, it is the Employer that shoulders the burden of proof and, as demonstrated above, it has clearly failed to carry that burden. There is insufficient evidence in the record to support a finding that the Employer has satisfied any of the four requirements of Article 48. Second, the Employer was permitted to call Grievant as an adverse witness and was thereby given the opportunity to elicit relevant testimony.

Brief comment is warranted concerning the Union's allegation that the Employer violated Grievant's *Weingarten* rights by denying her Union representation at the Corrective Plan meeting of March 10, 2010, throughout the meetings of March and April 2010 between Grievant and Hinnencamp, and again at the April 26, 2010 meeting when Grievant was notified of her termination. As Counsel for the Employer correctly argues, the *Weingarten* decision is not applicable to counseling or coaching sessions which are pre-disciplinary and merely intended to put the employee on notice concerning performance, conduct or safety concerns. The difficulty here is that Hinnencamp included the warning that "failure to meet the above expectations may result in discipline up to and including termination" in the Corrective Plan of March 9, 2010.² In doing so she effectively converted the Corrective Plan into a disciplinary warning. Since this language was already included on the Corrective Plan document before Hinnencamp even met with Grievant, Hinnencamp knew that discipline could result from the March 9 meeting. She nonetheless denied Grievant's request for Union representation. While the above may be a gray area in terms of the Employer's compliance with the requirements of the *Weingarten* decision, there can be no doubt in the record that the Employer knew in advance of the April 26, 2010 meeting that it planned to terminate Grievant. To assert that Grievant was not entitled to Union representation at this latter meeting ignores the basic intent of the *Weingarten* decision. Indeed, it is difficult to understand why the Employer would have rejected Grievant's request for Union representation if the intent of the meeting was, as reflected in Hinnencamp's notes, was "to finalize her corrective

² Hinnencamp testified that this language was "standard" on the form and that she had not written it into the document.

plan.” Such a meeting cannot be even be considered to be a fair and objective investigation since the Employer had already decided to terminate Grievant.

Based on the testimony and documentary evidence submitted at the hearing, the Arbitrator is compelled to find that the Employer failed to communicate clear performance standards to Grievant or apply them to Grievant in a non-discriminatory manner (Article 48(1); that the Employer was unable to demonstrate that Grievant failed to meet any standards or to show that it provided a fair and impartial investigation (Article 48(2); that no reasonable corrective plan was provided (Article 48(3); and that the Employer failed to demonstrate how Grievant did not meet the corrective plan (Article 48(4).

The Arbitrator has made a detailed review and analysis of the entire record in this matter and has given full consideration to the arguments raised by the parties in their post hearing briefs. Further, he has determined that certain issues and assertions raised in these proceedings must be deemed immaterial, irrelevant or side issues, at the very most, and therefore has not afforded them any significant treatment, if at all. For example: whether or not the Employer had just cause within the meaning of Article 47; whether or not the Employer failed to effectively manage Grievant’s workload; the award of the Hon. Harvey Nathan in *Hillshire Farms & Kahn’s*, and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties’ collective bargaining agreement, the evidence is overwhelming that the Employer did not terminate Grievant for substandard performance as required by the

provisions of Article 48. The grievance must therefore, and is hereby, be sustained.

Accordingly, an award will issue, as follows:

AWARD

THE EMPLOYER DID NOT TERMINATE GRIEVANT IN COMPLIANCE WITH THE REQUIREMENTS OF ARTICLE 48 OF THE COLLECTIVE BARGAINING AGREEMENT.

REMEDY

GRIEVANT SHALL BE REINSTATED TO HER ½ TIME POSITION FORTHWITH AND BE MADE WHOLE WITH BACK PAY, BENEFITS AND SENIORITY TO MARCH 26, 2010. THE EMPLOYER SHALL ADDITIONALLY REIMBURSE GRIEVANT FOR ANY COBRA PAYMENTS WHICH SHE MADE DURING THE PERIOD OF HER TERMINATION, OR FOR HER DOCUMENTED MEDICAL EXPENSES DURING THE PERIOD OF TERMINATION, WHICHEVER IS GREATER.

THE ARBITRATOR RETAINS JURISDICTION SOLELY WITH RESPECT TO IMPLEMENTATION OF THE REMEDY FOR NINETY (90) DAYS FROM THE DATE OF THIS AWARD.

John Remington, Arbitrator

February 18, 2011

St. Paul, MN