

IN RE ARBITRATION BETWEEN:

MIDDLE MANAGEMENT ASSOCIATION, MMA

and

STATE OF MINNESOTA, DHS, MSOCS

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

August 1, 2011

IN RE ARBITRATION BETWEEN:

Middle Management Association, MMA,

and

DECISION AND AWARD OF ARBITRATOR
Tricia Oian grievance matter

State of Minnesota, DHS, MSOCS

APPEARANCES:

FOR THE ASSOCIATION:

Zaidee Martin, Attorney for the Association
My Lee, Association Representative
Gina Lecy, grievant's former Manager
Tony Brown, MMA Business Representative
Tricia Oian, grievant
Gina Viarello, Former Manager

FOR THE STATE

Carolyn Trevis, DOER Labor Relations Principal
Diane Hirsch, former lead worker Scandia Group Home
Rhachel Alcock, BMA Scandia Group Home
Roger Deneen, Executive Director, MSOCS
Ruth Dahl, Investigator,
Jim Campbell, Program Director for MSOCS
Sean Tolefree, MSOCS HR Director

PRELIMINARY STATEMENT

The hearing in the matter was held June 17 & 21, 2011 at the MSOCS Offices at 3200 Labore Road, Vadnais Heights, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted post-hearing Briefs dated July 8, 2011.

ISSUES PRESENTED

Did the Employer have just cause to discharge Ms. Oian? If not what is the appropriate remedy? Did the employer violate the grievant's Loudermill due process rights afforded her Article 6, section 5 of the CBA? 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. In support of this position the State made the following contentions:

1. The State asserted that the grievant was hired in January 2009 as a supervisor for three group homes in the Scandia Minnesota area. One home in particular was problematic but the grievant was given access to all the assistance from her supervisors and from the HR department she needed or would have needed to improve the overall morale and performance of that home.

2. The grievant has worked with vulnerable adults, VA's, and is familiar with her role as a mandatory reporter under the Vulnerable Adult Act, the Act, and what constitutes abuse of VA's under the statute. She was also familiar with State's policies regarding protection of VA's and of the need to report abuse of VA's and of the procedure for doing that. She has filed such reports in the past and thus knows what constitutes a reportable violation.

3. In addition, as a supervisor she was responsible for following through appropriately on any complaints regarding disputes among the staff, disputes between staff and the VA's and for making sure there was not a hostile or threatening working atmosphere. She was aware of her responsibility to prevent that and to train and/or discipline employees who created such an atmosphere and not retaliate against employees who reported abuse or the creation of a hostile work environment.

4. The residents at the Scandia home are profoundly mentally disabled and are all considered VA's under the Act. Staff are all mandatory reporters of any suspected violations of the Act and abuse or neglect of a VA and are all trained on how and under what circumstances that must occur. Internal reporting is encouraged but not required. See State Exhibit 12, at page 7 of 10, Procedure, B 3.

5. In addition as a supervisor the grievant is both a mandatory reporter under both the Act and State policy and is required to report to a Common Entry Point any suspected abuse of a VA – it is not her job to decide whether there was or was not actual abuse or neglect and the State made a point of asserting that it trains its staff to err on the side of caution and report if there is any suspicion at all of abuse or neglect. The grievant acknowledged this responsibility yet failed to follow through on it and made her own cavalier decision about whether what was reported to her was a violation of the Act.

6. Under State policy, the grievant, as a supervisor, was obliged to follow Procedure C 3 which provides “the supervisor/manager/secondary person [which included the grievant] shall call the Common Entry Point to ensure the report of alleged maltreatment has been made. ...” The State asserted this clearly required the grievant to follow up and make sure that any such actions, whether it appeared to her to be maltreatment or not, were reported and to report them herself if they were not.

7. The residents are non-verbal, have severe mental and some physical disabilities and one even has a propensity to run away. They all require considerable assistance during the day and night and require constant supervision. This is the residents’ home and staff is trained to treat it as such. Two of the VA’s are brother and sister. One has PICA and will eat cigarette butts if he finds them so there is a need to strictly enforce the State’s no smoking policy.

8. The State acknowledged that the Scandia home had problems and a poor reputation but that the grievant’s job was to fix those problems and exercise her supervisory authority to assure the residents were safe and well cared for and that staff was dealing with them and with each other appropriately and consistent with State policy. The grievant was also responsible for making sure that staff complied with all State rules regarding smoking, appropriate behavior around the VA’s, reporting of any suspected violations of the Act, since all were mandatory reporters. In addition, the grievant was subject to State policy regarding reporting and ensuring others had reported violations of the Act.

9. In June 2009 the State hired a lead worker, Ms. Hadjiyanis, (Hirsch), hereinafter Ms. Hadjiyanis, who was assigned to the Scandia home as a lead worker. She immediately began having trouble with the staff who “hazed,” intimidated and even threatened her when she attempted to enforce the rules. Literally within a day of her employment Ms. Hadjiyanis reported a possible violation of one of the residents to the grievant. See State Exhibit 4, 6-30-09 e-mail. This involved forcing a resident to lie on the floor naked after the resident threw a washrag in the toilet and should have been a clear wake up call to the grievant that something was amiss at the home. The grievant failed to follow through on this report and failed to follow through on a number of clear or suspected reports of maltreatment of VA’s.

10. The grievant was also advised almost immediately that there was a hostile and even unsafe working environment at the Scandia home and that Ms. Hadjiyanis felt threatened by co-workers there yet the grievant did little or nothing to investigate or stop this. She should have contacted HR about this yet she did not and made Ms. Hadjiyanis feel as though she was alone and without any support at all from her immediate supervisor, the grievant. This created an even more hostile work environment since it appeared that staff was retaliating against Ms. Hadjiyanis for making the complaints in the first place.

11. Ms. Hadjiyanis made the grievant fully aware of this, even using the words “hostile and threatening,” which should have again been a clear message to the grievant that something needed to be done, yet nothing was. Instead the grievant sent cheery almost saccharin messages to the staff talking about how wonderful everything was when it was clear that there were grave problems that could not be fixed by a Hallmark card style e-mail sent to the staff. Something tangible and real needed to be done and the grievant simply failed to do so. See State Exhibit 4, e-mail of 9-08-09.

12. The State's case was based on a two-prong argument: first that the grievant failed to follow up and take action on the multiple complaints of a hostile working environment. Second, and more significantly, she failed to report or to make sure that others had reported instances of suspected maltreatment and even abuse of VA's, some of which involved possible injuries. These will be discussed separately commencing with the allegations of hostile work environment and retaliation

13. With regard to the first set of allegations, the State argued that Ms. Hadjiyanis sent several e-mails, 6-30-09, (noting possible maltreatment), 7-4-09, (using the words fear of retaliation and asking for help) 7-12-09, (in which Ms. Hadjiyanis advises that "I fear retaliation here" and clearly asks for help in dealing with the situation present at Scandia), 8-20-09 (specifically using the words "toxic and hostile" and again pleading for help), 8-21-09 (advising the grievant of possible abuse of the VA's – flosser incident, discussed below – again no response), 8-23-09 voicemail to the grievant from Ms. Hadjiyanis advising the grievant that a VA had been "dumped" out of a chair by staff and that the VA had fallen as a result), 9-14-09 (in which Ms. Hadjiyanis says she is "sick" after working with certain staff people and "I feel harassed"), 9-20-09 (asking for help, which again never came), 11-14-09 (another message advising of a possible abuse of VA – forcing a resident to go someplace she did not want to – power struggle between the VA and staff resulting is the VA falling), 12-19-09 (Ms. Hadjiyanis expresses frustration about lack of communication, feeling without guidance and again asking for help and guidance and support).

14. The State asserted that there were other verbal conversations in which Ms. Hadjiyanis expressed fear of retaliation by coworkers and of clear evidence of harassment by them. All the grievant did was to tell Ms. Hadjiyanis to file a written report. The grievant also is simply incorrect when she asserted to Ms. Hadjiyanis and again at the hearing that "something had to be in writing."

15. The State asserted that the multitude of messages and there communications she was getting from Ms. Hadjiyanis and others at the Scandia home were more than enough to go to HR and ask them to intervene. The grievant did nothing to fully investigate or stop the harassment that was clearly going on and left some staff feeling vulnerable themselves.

16. The State also asserted that the grievant retaliated against Ms. Hadjiyanis for filing these complaints and for threatening to file a complaint about all of the above with the State. On or about September 18, 2009 Ms. Hadjiyanis showed the grievant a complaint form she was considering filing with Ms. Hadjiyanis, See State exhibit 4. This was never filed but the grievant admitted seeing it, See Tab 10, page 19.

17. Only a few weeks after this the grievant gave Ms. Hadjiyanis a very unfavorable review after telling her only days before she was shown the complaint form that she was “doing a good job” or words to that effect. The grievant completed only one such review during her tenure – for Ms. Hadjiyanis and the totality of this according to the State shows that the grievant was being vindictive and retaliatory against Ms. Hadjiyanis for threatening to file the complaint. The State asserted that this was a clear violation of the anti-harassment and retaliation policy by the grievant.¹

18. The State noted that Ms. Hadjiyanis was not the only staff person to complain of the harassment and other staff issues. Rhachel Schmidt also sent messages to the grievant corroborating what Ms. Hadjiyanis had been saying for months yet the only response was another meaningless, superficial message from the grievant about the need to be more positive. See State Exhibit 4, 12-02-09 and 1-19-10 e-mails to the grievant. These messages outlined multiple violations and of abusive behavior by staff towards each other and towards residents. Still the grievant did little if anything to solve the problem or enforce the rules to make sure both staff and VA’s were safe.

¹ The State raised a credibility issue here since the grievant claimed at the hearing that she had not seen this complaint form prior to issuing the evaluation in mid-September to Ms. Hadjiyanis whereby Ms. Hadjiyanis was not certified.

19. The State noted, in one very detailed e-mail, Ms. Alcock outlined a number of issues that should have galvanized the grievant's attention. She purposely did not include the names of the staff people involved in these allegations so that the grievant would contact her to discuss it further. Amazingly, the grievant never contacted Ms. Alcock to ascertain the facts, the names of the staff involved or to investigate any of Ms. Alcock's allegations further. The State asserted that this was a clear dereliction of duty and that the grievant should have immediately contacted Ms. Alcock and investigated these allegations further. She did neither and sent back a "fluff" e-mail thanking Ms. Alcock for her message and exhorting the staff to "be positive." Staff felt this was nothing more than a whitewash and served deteriorated morale even further.

20. The State asserted that the grievant failed to exercise her supervisory authority to prevent this type of interact between staff and also failed to protect Ms. Hadjiyanis from harassment or to support her in her efforts to get the staff at Scandia to comply with policy. There were instances of staff smoking, staff placing VA's on carnival rides without watching them, allowing VA's to play in the pool without supervision (against his care plan), HIPAA violations by leaving medical information out where others can see it, privacy violations by leaving a staff person's drivers license out in the open and a clear toxic work environment causing staff to cry at work or feel threatened and intimidated. People felt that they could not report it since they feared retaliation by other staff and they knew that the grievant would not do anything to stop it.

21. Lastly, the grievant for whatever reason decided that she should be the "gatekeeper" of whether any of these complaints should go beyond her. She should have immediately contacted the HR department and sought out their help – that is after all what their role is. Instead she incorrectly told her staff that they needed to file a form even though she clearly had more than enough information to report the problem to HR and seek their help in dealing with it. This had a chilling effect on the staff because they felt that any complaint would either stop with the grievant or that they might be subject to retaliation, as Ms. Hadjiyanis was.

22. In any event, the State asserted that the grievant failed utterly in her role as a supervisor and cannot function in that capacity. The State also noted that since she left Scandia another supervisor has taken on the role, acted appropriately and enforced necessary policies and that things are going exponentially better.

23. The second prong of the State's case had to do with the failure to report maltreatment under the Act. There were five such instances on which the State's case rests. In each of those incidents the State asserted that the grievant should have reported the possible abuse to the Common Entry Point or should have made certain that those who observed the potential abuse did so and that in each she effectively did what she did with respect to the allegations set forth above – she decided that they did not deserve to be reported, but it was not her call.

24. The first such instance involved a resident found masturbating while a staff person watched. This was reported to the grievant in an e-mail dated 6-30-09. The grievant failed to properly investigate this for any possible internal disciplinary actions and did not report it as possible abuse or maltreatment.

25. The second such incident involved a resident who was made to lie on the floor wet and naked in the bathroom. Mr. Campbell described this as “corporal punishment” of a resident by a staff member. Even though this too was reported in the June 30, 2009 e-mail, the grievant did not file any report and did not report this to the investigator. The grievant did not deny that these two allegations of neglect and abuse should have been reported under State policy.

26. The third involved a makeshift flosser device that was fashioned out of a pen and masking tape. The State describe this as filthy and a clear example of maltreatment since this was actually placed in residents mouths to floss their teeth. This clearly should have been reported immediately yet the grievant and her supervisor decided on their own that this did not need to be reported. The State asked the rhetorical question that if this did not rise to the level of reporting one wonders what it would take to get the grievant to report such abuse.

27. The fourth involved an incident in which a resident was “dumped” out of a chair and fell. While there was no visible injury as the result of this, no such injury is required. The grievant should have been well aware that physical injury is not required as a precondition of reporting of maltreatment of a VA. The State characterized some of these incidents as “no brainers” that should clearly have been reported under the statute and the State’s policy.

28. The last incident the State asserted should clearly have been reported was the “power struggle” between a resident and a staff member in which the staff member wanted the VA to use the bathroom but the VA had just used it and did not want to go there. The staff person blocked the VA’s way and forced her to go in a direction she did not wish to go. As a result the resident, who has known gait and balance problems, fell. There was some dispute about whether she hit her head but there was not even an examination of her head. Ms. Hadjiyanis reported this to the grievant in an e-mail dated November 14, 2009. The State noted that the grievant admitted that she was aware of this situation and knew that the resident had fallen. Instead of reporting this to the common entry point, she contacted her own supervisor and between the two of them decided that this did not rise to the level of a reportable event under the Act. Again, the State noted, this was not their call – they should clearly have reported this and let the process run its course.

29. The State asserted that there were other events that appeared suspicious, such as an incident where one staff person grabbed the back of the residents’ shirt to keep him from running, allowing VA’s to swim unsupervised in the pool (clearly contrary to the care plan which required that the VA be watched even if he had a life jacket on) and staff leaving cigarette butts all over the house despite a VA with PICA who eats them.

30. The State also asserted that the grievant was lax in making sure that sensitive records were kept secure. Investigators found medical records pertaining to a staff member and a photocopy of another’s driver’s license lying in the open on the desk in the house. Under HIPAA and other State policies, these records should have been kept safe and secure and the grievant failed to do that as well.

31. Finally, the State assailed the grievant's credibility arguing she was untruthful at the hearing. She said she did not see Ms. Hadjiyanis' complaint in mid-September yet in the investigation admitted she had. The grievant was also evasive during the investigation, telling investigators that she would "get back to them" or would "look it up" in response to many of the allegations.

32. The State asserted that the grievant cannot be trusted to report abuse of VA's and her protestations to the contrary now simply cannot and should not be believed due to her clear propensity to decide for herself whether to report a violation of the Act. That simply cannot be tolerated – she should have reported all of these as possible abuse of a VA and cannot be allowed to make these kinds of decision in the field – the residents deserve better than that.

33. The State also countered the claim that there was a Loudermill violation or a violation of the CBA provisions. While some of the information was not available at the Loudermill hearing, the grievant and the Association were well aware of the allegations, since there had been multiple interviews in which the allegations were discussed. Further, there was ample opportunity to present information at this hearing and any minor procedural deficiencies can be remedied through arbitration. Loudermill requires "a hearing" and does not require a detailed listing of every possible piece of evidence that might be used and is merely a safeguard against clear mistakes by the employer. Here there was no such mistake and the grievant offered nothing that would have changed the outcome.

34. Finally, there was no Loudermill violation or of the requirements of the CBA and that even if there were minor missteps they were harmless error and would not have changed the outcome of this investigation. The investigation was thorough and fair and its conclusions should be adopted.

35. The essence of the State's case is that the grievant failed completely to protect the residents by failing to file what should have obvious to her were clear instances of maltreatment or to ensure that those with actual knowledge had reported them. She further failed to protect the staff from a hostile and threatening work environment despite clear warnings of both.

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

ASSOCIATION'S POSITION:

The Association's position was that there was no just cause for the grievant's termination. In support of this the Association made the following contentions:

1. The Association noted that the grievant is experienced working with vulnerable adults and was well regarded by her immediate supervisor. She easily passed probation and was certified by Ms. Viarello for permanent appointment. This, despite all of the turmoil in the Scandia home and the ongoing harping by some of her subordinates,

2. The Association further noted that the Scandia house was in almost total disarray when the grievant was assigned to it. The home was in disrepair and had holes in the walls, peeling paint, sewer problems, the yard was a mess and there were mechanical issues throughout the home. In addition, there were issues with the staff who were unable to work together effectively; the previous lead worker had been recently fired and there was general poor morale. The grievant took over Scandia from a manager who did not know the house well. The previous manager was temporary and had only been assigned for a few weeks. The last permanent supervisor assigned to Scandia had taken a voluntary demotion several months before and the lead worker who had been at the home was discharged only days after Ms. Oian was hired but before she had officially taken over the home.

3. The Association asserted that this situation placed the grievant at a serious disadvantage and that her job was made immeasurably harder due to the situation in which the State placed her. Further, as noted below, assigning Ms. Hadjiyanis to the home made her job even harder due to the sheer magnitude of continual whining and complaining and other sometimes petty issues she brought up that took the grievant's time and energy from other more important matters.

4. As if that were not enough, one of the residents did not fit well with the others who lived there. He smoked and, as noted above, one of the other residents had a condition that caused him to eat the butts that were frequently left lying around the home, both inside and outside. All in all it was already a very bad environment for all concerned.

5. Within a short period the grievant was able to find a better fit for the 4th resident, made extensive repairs to the home inside and out and began working diligently on improving the working relationships between staff. The Association argued that it was unreasonable to expect that all these problems would be solved easily or overnight. The grievant spent extra time at this house trying to get things organized and improve morale. In addition to her other duties she was given additional responsibilities at Scandia to bring that home up to the standards expected of such homes administered by the State. The Association asserted that she performed these duties and spent the time necessary to improve overall operations at Scandia.

6. The Association asserted that when Ms. Hadjiyanis was hired she almost immediately began sending a deluge of messages regarding her inability to get along with staff at Scandia. At first the grievant took these messages seriously but upon investigation she found that Ms. Hadjiyanis was frequently either greatly exaggerating these stories or that the reason staff was shunning her was because of Ms. Hadjiyanis' own actions. It was clear that many times Ms. Hadjiyanis was simply "crying wolf." Despite that the grievant continued to discuss these problems with Ms. Hadjiyanis and advised her to provide details about her problems so they could be appropriately dealt with.

7. The Association noted that Ms. Hadjiyanis had several complaints made against her, at least two filed in May 2010, by other staff and that it was not until those allegations were made that Ms. Hadjiyanis began making her complaints in what the Association intimated was nothing more than retaliation. The Association asserted that Ms. Hadjiyanis was not concerned about improving morale or the working relationships but rather with protecting herself and in harassing other employees. See Association Brief at page 7. Ms. Hadjiyanis kept a log on virtually everything, including times when some staff were as little as 3 minutes late (the Association implied that it was little wonder why people had a hard time getting along with Ms. Hadjiyanis knowing that she was keeping a secret log on them). As a result, only she had a running diary of these events whereas others would understandably have a hard time remembering events from months or even a year before.

8. The Association made a point of noting that the harassment allegations against Ms. Hadjiyanis were substantiated after a thorough investigation. Despite that, and surprisingly, the investigators who were charged with investigating the grievant were unaware of that crucial fact. If they had, the entire focus of the investigation may well have been different if they had known what a difficult employee Ms. Hadjiyanis really was and how much time the grievant had to waste dealing with her often petty and frivolous and unsubstantiated complaints.

9. The Association further asserted that the grievant's advice to Ms. Hadjiyanis regarding the multitude of issues was appropriate. She followed procedure and advised her to file an appropriate complaint in writing, something she never did despite keeping a running, almost daily, log on everything else. The implication was that Ms. Hadjiyanis was aware that an investigation would reveal that most of her complaints were not meritorious and did not file them as a result.

10. The Association asserted too that there was no retaliation against Ms. Hadjiyanis and that despite the numerous complaints the grievant dealt with each one appropriately. In response to the claim that the grievant retaliated for the complaint the Association argued that the grievant was unaware that Ms. Hadjiyanis even had the complaint prior to the evaluation. The Association further noted that the evaluation form may have been the incorrect one, due to some confusion with the State's website, but that the information was correct and that the grievant was correct in not certifying Ms. Hadjiyanis at the time. There was no retaliation against her.

11. The Association also asserted that the grievant reasonably believed that she had not authority to commence a formal investigation without a formal complaint by Ms. Hadjiyanis. Neither HR nor Ms. Viarello explained this process to the grievant and she should not be disciplined for operating within her understanding without more formal training.

12. The Association first asserted that the State failed to give the grievant an adequate Loudermill hearing and failed to comply with Article 6 section 5 of the labor agreement. The Association noted that Loudermill and requires both notice and an adequate opportunity for the employee to be heard. Further, a public employer is required to tell the employee what they are being disciplined for and provide them with a summary of the evidence against them. The employer is required to give the employee an opportunity to tell their side of the story both as to the underlying factual basis for the discipline and appropriateness of the discipline.

13. The Association further asserted that the provisions of Article 6, section 5 of the party's CBA closely mirror the requirements of the Loudermill requires that the grievant be notified in writing the reasons for the discharge. This provision reads in relevant part as follows: "If the Appointing Authority believes there is just cause for discharge, the supervisor and the Association will be notified, in writing, that a supervisor is to be discharged and shall be furnished with the reason(s) therefore and the effective date of the discharge. The supervisor may request an opportunity to hear an explanation of the evidence against him/her, and to present his/her side of the story ..." See, Association Exhibit 1.

14. The Association asserted that this required that the grievant and the Association had a right to see the details of why the State was discharging her. Instead when they arrived at the meeting called for this very purpose, the State's representative had few if any facts and was unable to provide a detailed explanation for any of this. In addition, during the investigation the State used a shotgun approach, asking about multiple situations, but never clearly indicating which were to be used as the basis for discipline. The Association noted that several of the instances on which the grievant was questioned had to do with times and incidents that predated her even going to Scandia and noted that this was indicative of the disorganized way in which the investigation was conducted.

15. The Association and Mr. Brown asserted that at this meeting Mr. Campbell was largely unaware of details, clearly had little if any idea why the discharge was proceeding and provided nothing more than the discharge letter itself. That letter was filled with vague and non-specific charges that gave little guidance to the Association as to the real basis for the discharge and provided no opportunity for any meaningful discussion about whether these allegations were true or whether there was any explanation for them that might lead to a different conclusion. The Association asserted that it is not sufficient under the CBA language or Loudermill to simply say that there is a post-termination procedure at which the allegations would be more specifically discussed and further asserted that such an allegation defeats the very purpose of a Loudermill hearing.

16. The Association further asserted that a Loudermill hearing is a check against mistakes and requires a meaningful discussion of the underlying facts and basis for a discharge *before* the employer's position has hardened. See Elkouri and Elkouri, *How Arbitration Works*, BNA 6th Ed at page 1255, 1257. Once that happens the decision is effectively final and positions have hardened to the point where any further evidence cannot be used to try to convince an employer to change its mind anyway. Here both Loudermill and Article 6 required some specificity as to the specific facts used to justify the termination under the policies cited in the discharge letter. None were provided by the State and the Association argued that these procedural errors were serious and substantive and were not mere "harmless error" as the State asserted.

17. The Association then turned to the alleged violations of the Act and asserted in general that only those matters that are truly maltreatment or other instances of abuse of the Act need to be reported. Certainly there are clear violations, such as striking or swearing at a VA, but none of the allegations here even came close to that line. Accordingly, the grievant asserted that the grievant's actions in investigating these reports and in going to her direct supervisor to determine whether to file these as Act violations was entirely appropriate.

18. The Association noted too that even the grievant's direct supervisor supported her, which is highly unusual in general – typically one would expect that a person's direct supervisor would support discipline if such discipline was supported by the facts. Here the exact opposite was the case and Ms. Viarello clearly indicated that the grievant's actions were well founded and appropriate.

19. The Association also noted that all of the staff at Scandia were mandatory reporters and that anyone who is aware of maltreatment of a VA must report, yet the State only focused their inquiry to the grievant even though she never was a direct witness to any of the 5 alleged instances here. The Association noted that not all incidents need to be reported and that some professional discretion can and must be used.

20. The Association next focused on the specific allegation of the “dumping” incident and asserted that the grievant was unaware of this incident. Ms. Hadjiyanis reported that she “heard” this from someone else – she was not even a witness to it yet the State expected the grievant to do more than she did. In fact the grievant did investigate it and determined that “tipping” the chair to get the VA out of it was a frequent technique used to help the VA out of the chair. There was no direct evidence that the VA was unceremoniously “dumped” out of the chair or that anything constituted abuse or maltreatment.

21. With regard to the flosser incident the grievant knew of the flosser and when she found out about it she immediately consulted with her supervisor about it. She also immediately bought new flossers and directed staff not to use the makeshift ones any longer. The State cannot expect the grievant to stop something she did not know about.

22. Further, the Association asserted that the flosser incident did not constitute maltreatment under any circumstances and need not have been reported – and that was verified by Ms. Viarello. The Association asserted that merely because something is inappropriate does not make it maltreatment under the Act. The grievant knew this based on her experience and even consulted her direct supervisor about it and was told that no report need be filed.

23. The Association argued that it is manifestly unfair to discipline the grievant for an event that was not only not maltreatment under the Act but also where she specifically asked her direct supervisor about it and was told nothing needed to be filed. Further, there was no evidence whatsoever that the grievant was part of some sort of covert cover up to hide or obfuscate maltreatment to protect herself or others.

24. With respect to the power struggle incident the grievant read the report and investigated the incident by talking to the affected staff people. She determined again that no report need be filed since the VA had gait issues and frequently fell. There was no evidence that the resident was pushed or fell as the result of maltreatment by a staff member. Further, there was no evidence in any of these incidents that the grievant directed staff not to file a VA report. They certainly could have – and Ms. Hadjiyanis could have filed one as well if she had felt one was appropriate. None were filed by her either despite her many complaints about how VA's were treated.

25. The Association argued that there was similarly no just cause for discipline with respect to the incident in which a VA was observed masturbating and where another was allegedly made to lie on the floor in the bathroom since the grievant did follow up on those. Further, they had been reported and the grievant was not required to go further and report it herself. The grievant's responsibility was to forward the reports to her supervisor – and the language of the policy in question, which reads “supervisor/manager/designee” could well be interpreted to mean Ms. Viarello. Both the grievant and Ms. Viarello indicated that their interpretation of the rule was that it required only the forwarding of the reports and no further action was necessary.

26. The Association pointed to the testimony from the State's own witnesses that without the VA Act allegations, the grievant would not have been terminated. The Association reiterated throughout the hearing that the grievant either was not aware of the VA allegations, responded to the ones she did know about appropriately or knew that others had reported it and that no further action on her part was necessary.

27. The Association contended that the grievant was as forthright as she could be in the investigation even that she was prevented from going back to the house and was unable to retrieve any of her records. The State seeks to taint her credibility by noting that she was not always aware of the answers when asked but asserted that she was not given the specifics in advance nor was she allowed to refer to the relevant records.

28. The Association countered the claim that the grievant was guilty of leaving private medical and other data out in areas where they could be seen by unauthorized personnel by noting that it was months between the time when she was re-assigned to the MSOCS main building and that literally anyone could have rummaged through those record between that time.

29. Finally, the Association argued most strenuously that the grievant cannot be held responsible under penalty of termination for every failing present at Scandia. She was responsible for two other homes and the State knew of the problems at Scandia both before and during the grievant's tenure there. The State should have given her additional help and cannot hold her solely responsible for those. She followed the advice of her supervisor and believed she was doing a good enough job that she herself was certified as permanent and was never told she was failing until the investigation. She should have been given the opportunity to change her behavior.

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

DISCUSSION

FACTUAL BACKGROUND

The grievant was hired in February 2009 as a Community Residential Supervisor, ("CRS") by Minnesota State Operated Community Services ("MSOCS") and was assigned to supervise three group homes, one of which was in Scandia, Minnesota. The home is a residence serving three people with developmental disabilities. The evidence showed that the home is in fact the residents' home; they live there and are assisted in daily cares and other medical needs by the staff who live with them 24/7.

The residents have a variety of mental illnesses, traumatic brain injuries and other medical needs that require the services of the staff. They are mostly non-verbal but some can use sign language to communicate. Others have balance and gait issues while others have PICA conditions and at least one of the residents has a condition whereby he eats cigarette butts. The residents are all adults but have, as noted, severe disabilities and that it was agreed that they are all vulnerable adults within the meaning of the Vulnerable Adult Act in Minnesota and within the meaning of State policy. It was also clear that all the staff, including the grievant, were considered mandatory reporters of any abuse or maltreatment of the VA's.

There was no question that many things about the Scandia home were in disarray when the grievant got there. The previous manager was a short term person and had not apparently gotten things straightened out either; the last lead worker had been fired and the morale among the staff was quite low. In addition, there were physical problems with the house due to same damage that had apparently been done, i.e. holes in the walls, etc, while other issues were related to deferred or ignored maintenance. It was further clear that Scandia took up far more of the grievant's time than her other buildings and that she in fact did spend more time there doing hands on things and assisting the staff with the residents and other daily chores around the home.

The evidence showed though that the grievant was working to fix the multitude of issues in the Scandia house – as well as its poor reputation with other social services agencies who had noticed the state of disrepair and other staff problems. The grievant took on the responsibility of dealing with several ongoing investigations, including one involving the possible sale of drugs by staffers, and was directed to conduct extra due diligence on matters such as fire drills and additional drug counts.

Shortly after the grievant was hired the State hired a lead work, Ms. Hadjiyanis, referred to through out this proceeding as Ms. Hadjiyanis, who was in the home on a regular basis. She noticed problems almost the very first day she arrived she noted that when the staff returned with the residents from a field trip one of the staff grabbed a resident by the back of the shirt.

It was later determined that this particular resident liked to run away and if he got the chance would do so unless someone was watching him constantly. Ms. Hadjiyanis noted that there were reports that one resident was masturbating while staff watched him do so out in the open and that there was a report that one resident was made to lie on the floor in the bathroom after he threw a washrag into the toilet. These are just some examples, but Ms. Hadjiyanis almost immediately began reporting these observations and other things she was hearing about to the grievant. See June 25 and June 30, 2009 e-mails to the grievant.

Ms. Hadjiyanis also began communicating her fear of retaliation to the grievant and indicating that the relationships between and among staff was very poor. She used words like “harassment,” “intimidation”, toxic” and “hostile.” There was some evidence that Ms. Hadjiyanis may well have brought some of this on herself and there was further evidence of complaints by other staff against her. This will be discussed more below but is mentioned here by way of background to set the stage for the discussion. Suffice it to say that the working environment at the Scandia home was indeed something bordering on the pathological. Several staff people had been suspended for their actions with respect to staff and there was some fear that there would be retaliation of some kind when they returned.²

There was further some evidence that while the grievant did investigate these allegations at first she frequently either did not get back to Ms. Hadjiyanis or other staff right away or at the very least was late in doing so, leaving staff to wonder what if anything was being done about their allegations. Other staff people notified the grievant of the poor working environment at Scandia as well and of possible instances of maltreatment of the VA’s there. These too will be discussed more below.

² At one point during the testimony, Ms. Hadjiyanis related a story where she was staying in the home overnight and heard noises and the locked gate opening up outside. She was fearful of some sort of actual physical harm during this event but there was no solid evidence as to what she actually heard or whether staff people were involved or what their motivations were. Fortunately, nothing untoward actually happened that night.

In mid-September 2009 Ms. Hadjiyanis informed the grievant that she was about to file a complaint regarding the continuing harassment going on at Scandia. The grievant denied seeing this at the hearing but the evidence showed that during the investigation she indicated to the investigators that she had seen it or at least knew about it. Shortly after that, she met with Ms. Hadjiyanis and gave her an unsatisfactory evaluation and extended her certification period, Ms. Hadjiyanis was at that time probationary. Ms. Hadjiyanis was reasonably upset by this and felt that it was in retaliation for the complaint, which was not actually filed but there was some threat to do so given the messages during the summer of 2009.

The evidence showed that Ms. Hadjiyanis was frustrated by the lack of action after reporting these events. Having said that, the evidence also showed that the grievant did take some steps to investigate the complaints by talking to the affected staff and to her direct supervisor, Ms. Viarello about them. The grievant informed Ms. Hadjiyanis that she was not able to divulge the contents of an ongoing investigation about another staff person. This was entirely appropriate and consistent with policy and law. Thus even though there was some frustration by Ms. Hadjiyanis and the rest of the staff, some of this was beyond the grievants control.

There was another staff person, RS, who sent e-mails to the grievant as well outlining things he had seen and/or heard about at Scandia. Some of these matters, if true, would clearly have been matters worthy of investigation either as maltreatment of VA's or of possible harassment by staff towards each other. No names were included in his e-mail, of December 2, 2009, and that was done so the grievant would contact the staff person directly to discuss it. The evidence showed that no such contact was ever made and that the response was an email sent to the entire staff exhorting them to work more cooperatively together and focusing on the positive aspects of working at Scandia and the need to care for the residents there and to treat each other with respect. On balance there was nothing wrong with those e-mails from the grievant but they did little to upend the already difficult and often toxic atmosphere at Scandia.

Finally, there was evidence that the grievant should have contacted HR for assistance in dealing with this. Mr. Tolefree, from MSOCS HR, testified credibly that he would have been more than willing and able to help and give some guidance and perhaps even intervene directly in this situation but that he was unaware of all of this until much later. It was established that the grievant thus should have contacted HR much earlier and more frequently in order to deal with the complaints and other issues that were being raised by various staff at Scandia.

There was no evidence that the grievant actively discouraged any staff person or told anyone not to file a complaint but that she asked them to write matters up so they could be investigated. She felt that there was nothing she could do without these despite the language of Ms. Hadjiyanis' e-mails and the evidence showed that she could have but may not have been aware of that despite the training she received.

As noted, other staff filed complaints of harassment against Ms. Hadjiyanis. The grievant investigated this and no discipline resulted from these investigations. See Parties' Stipulation at Para. 11. Some weeks later, Ms. Hadjiyanis finally did file her complaint and this resulted in the investigation that eventually led to the grievant's discharge. The investigation took place over the course of approximately two months and resulted in a recommendation of discharge. The grievant was removed from Scandia and given no access to the files or records there during the investigation. This provided a reasonable explanation for why she was unable to provide immediate specific answers to many of the question posed to her by investigators. On this record, there was insufficient evidence to establish that the grievant was hiding information or was being evasive in her investigation.

Also, there was some indication that the investigation delved into matters which occurred prior to the grievant even being hired at Scandia. While these were not used as the basis of the discharge it was somewhat curious that these matters were included or that questions about them were asked and raised some doubts about the investigation itself. These issues will be discussed more below.

It is against this thumbnail sketch factual backdrop that this matter proceeds.

**ALLEGATIONS THAT THE GRIEVANT FAILED TO INVESTIGATE
ALLEGATIONS OF WORKPLACE HARASSMENT MADE BY MS. HADJIYANIS**

Initially it should be noted that the witnesses for the State acknowledged that if these had been the sole allegations against the grievant she would not have been fired but rather subject to some other form of discipline and/or training regarding the way to handle allegations such as these. Still though they formed a major part of the State's case against her and would certainly be relevant to any discussion of penalty in the event the totality of the allegations did not rise to the level that discharge were appropriate. On balance the totality of evidence presented something of a mixed bag.³

The messages from Ms Hadjiyanis became increasingly alarming and more desperate as time went on. Her initial e-mails raised what should have been serious concerns about how staff were interacting with each other and with the residents. There was some evidence that the grievant took these seriously at first and investigated them appropriately. As time went on however, it also became clear that staff had considerable problems getting along with Ms. Hadjiyanis and eventually filed complaints against her as well. As a manager this was something of a "no-win" situation and while the grievant tried to sort this out it was obvious by the late summer of 2009 that some, although not all, of the complaints raised by Ms. Hadjiyanis were of a fairly petty nature. Staff would not socialize with her, would not talk to her, etc. Others were more serious – staff invading personal space by talking very close to her and making threatening remarks and gestures. In many of the e-mails she sent she used the words, "toxic," "intimidating," "hostile" and the like. These should have been enough to trigger the grievant to get HR involved and to more directly involve her supervisor regarding what to do. If there was a failure here it was certainly that – the grievant should not have been telling Ms. Hadjiyanis or other staff that they needed to file something more.

³ It should be noted that there was a very extensive documentary record in this case as well as testimony. The matter was tried over the course of two full days with literally hundreds of pages of investigatory notes, e-mails, and other documents pertaining to this case. As noted, some of these documents provided support for the State's case while others frankly cut the other way and showed that the grievant was faced with allegations by and about staff going both directions and that while she did her best to deal with it the task was somewhat overwhelming.

In addition, the evidence showed that there were many times when the grievant failed to respond to these e-mails in a timely fashion and that there were times when she was very difficult to reach. The State alleged that this may have been due to her holding a second job and working on her parents' farm in southern Minnesota. There was insufficient evidence to show that this was why the grievant was not responding nor was there evidence to suggest that these other jobs were a conflict. The evidence showed that people frequently do hold other jobs and that there is nothing wrong with that as long as there is no conflict in positions or in schedule. However, for whatever reason, the grievant was at times difficult to reach and frequently took a very long time to get back to people on matters such as this or did not get back to them at all. This too was troublesome especially even what the grievant already knew about the work environment at this house.

Clearly her responsibility was not to act or react without adequate information but the messages were quite clear that something was very wrong with what was going on at this home. While the grievant testified credibly that she spent more time at Scandia than at the other houses she supervised it is certainly true that it is not always apparent what the actual problems are while the supervisor is there. She should have and could have done more to investigate this and provide a greater sense of security for Ms. Hadjiyanis and the other staff.

Having said that however, it was clear that the grievant did take some steps to make sure staff followed appropriate rules. She issued some discipline and did speak to staff and train them in appropriate behavior at work. Some things did change for the better.

Many repairs were made to the house and there was a stricter application of the rules once the grievant took over. She did in fact reiterate the no-smoking policy and while some of the staff apparently flaunted those rules, they were told about it. The grievant arranged for one of the residents who smoked to move.

Still, even though a supervisor cannot be there all the time it is incumbent on them to enforce these rules, especially in this situation given the one resident's PICA condition. The grievant should have done more to enforce these rules if for no other reason than to create a less hostile work environment and there were clear indications of that.

The grievant had three houses to supervise and by definition could not be at all of them at the same time. The evidence showed that the grievant took an active role in the affairs of the home, sometimes helping out with daily chores and interacting with staff there as well as the residents to get a better understanding of the work dynamic. That however is not really why she was terminated.

The issue raised by the State was the lack of follow through on the many complaints raised by staff. Here the evidence showed that the grievant was lax in responding, either by conducting an investigation or in simply telling the staff who reported something that she was working on it and had at least received the message but was too busy to get to it right that moment,.

Further the grievant should have contacted HR on many of the complaints, especially when there were clear warnings that somebody was concerned about a hostile work environment – even if that person was crying wolf or greatly exaggerating the problems. While the record shows that at some points she did consult her manager about these matters, on many she did not. On balance, the grievant could have and should have availed herself of the resources that were available to help rectify and deal with this situation. While this failure would not have resulted in termination, it was troublesome that she did not use all the tools around her to deal with this difficult situation.

Moreover, the evidence did support the allegation that the grievant may have retaliated against Ms. Hadjiyanis for her filing not only the complaint drafted in September 2009 but for her many e-mails and messages, which undoubtedly were an annoyance and took a great deal of time. Only Ms. Hadjiyanis was given an evaluation and while it is not uncommon for the supervisor's to be late doing them it is somewhat suspicious that only she received an evaluation and that it was a negative review and extended her probation.

On this record the evidence supported that it certainly appeared to Ms. Hadjiyanis that there was retaliation for her complaint in September 2009. Further, the grievant failed in her responsibility to follow through appropriately and timely to the complaints of a hostile and toxic work environment. Note that no decision can be made as to whether there actually was such an environment there but that is not the true question – the question is whether the grievant responded to these complaints and conducted an investigation or followed through with the HR department. On this record there were staff at the home that felt understandably neglected and ignored by the grievant's actions.

Having said that however, it was clear that not everything went awry nor was Ms. Hadjiyanis without some responsibility for the poor working environment at Scandia. The grievant had to deal with both sides of this issue and her main failure here was not involving the HR department sooner and more extensively than she did. In sum, she tried to do too much by herself and that led to delays and a sometimes confusing response. Clearly this could be rectified by additional training and assistance from HR and was a factor here but would not have been sufficient to warrant termination.

VULNERABLE ADULT ACT VIOLATIONS

As noted above, the main thrust of the State's case against the grievant is the allegation that she failed to report or to verify that appropriate reports had been filed with respect to several allegations and reports that maltreatment of the VA's in the home had been committed. It is incumbent on all staff in such a home, as mandatory reporters, especially a supervisor, to be aware of any possible maltreatment, neglect or abuse of the VA's and to report that to the Common Entry Point immediately.⁴

⁴ The Statute requires that such report be made to the Common Entry Point within 24 hours. This is of course to facilitate immediate cessation of any abuse and the ability to investigate it right away.

There is also a separate responsibility for the supervisor to contact the Common Entry Point to ensure that a report of maltreatment has been made where another person under their supervision has reason to believe maltreatment has occurred. See Employer exhibit 12, Policy # 9615, Procedure, paragraph C 3 and 4. The evidence showed too though that not all incidents are reportable as maltreatment and that even where a resident has fallen or been hurt that does not always rise to the level of a reportable event. Certainly too, a VA does not need to be physically injured in order for there to be a valid report of maltreatment. The evidence showed that there is some discretion about the question of what is reportable and what is not. It is against this backdrop that the matter proceeded.

THE FLOSSER INCIDENT

One of the main focuses in the State's case dealt with a flosser fashioned out of a pen with the flossing attachment taped to the head of the pen. State witnesses indicated that once the grievant became aware of this she should have either reported this as abuse or ascertained whether any other staff had reported it and contacted the Common Entry Point to assure that a report had been made.

The evidence showed several things that undercut the State's case on this point. First, there was insufficient evidence that the use of the flosser constituted true maltreatment. To be sure, the use of such a device might have arisen to that level but the flosser was not produced at the hearing nor was there any pictorial evidence of what it looked like. The State asserted that the flosser was thus unsanitary and could have resulted in infections when used. However there was no evidence that the use of a pen to fashion a handle out of this was any more unsanitary than the use of a regular plastic handle on a tooth flosser. These are not surgical instruments that require strict disinfection.

More to the point, it is not for an arbitrator to decide what is and what is not a reportable incident under the Act. Here, the grievant consulted her supervisor to determine what to do once she found out about the flossers. She did instruct the staff to throw them away and she got new ones. On this score it was clear that her actions were entirely appropriate.

Further, and most significantly, she contacted her direct supervisor, Ms. Viarello, who indicated that the use of these flossers was not a reportable incident and instructed the grievant accordingly. One can scarcely imagine a more measured and considered response by the grievant than this. She instructed the staff to do the appropriate thing; she contacted her direct supervisor about what to do and followed her advice. On this record, the State's claims against the grievant was unsupported by sufficient evidence of a policy or other rule violation to warrant discipline, much less discharge

THE DUMPING INCIDENT

In another incident of alleged maltreatment, the State asserted that the grievant became aware that a resident had been "dumped" out of a chair. The facts showed that the resident had balance and gait issues and sometimes had trouble getting in and out of chairs. There is an approved way of tipping the chair so the resident is helped out of it but the State provided credible evidence that this must be used sparingly and only when the resident is safe. Here the report was that the resident fell on her knees and that she was not tipped but rather dumped out of the chair by a staff member.

Several things undercut the State's case here as well. First, there was no question that the grievant did not witness this event.⁵ Moreover, there was insufficient evidence to establish that she in fact even knew it had happened.

Ms. Hadjiyanis testified that she left a voicemail message on the grievant's cell phone about this but there was no corresponding e-mail or other way of verification. This was somewhat at odds with the other clear evidence in the file that Ms. Hadjiyanis frequently sent e-mails about virtually every other event that occurred in the home. Why there was not one about this event, especially in light of how serious both she and the State made it sound, was never made clear. On this record this evidence supported the grievant's claim that she did not receive any information about this incident.

⁵ It was clear that the grievant was not personally involved in any of the incidents of alleged maltreatment involved. The basis of the case against her is that she received reports about these incidents yet did nothing about them and failed to follow up with the Common Entry Point to verify that reports had been appropriately made. It should be noted too that if the grievant had in fact witnessed this incident and had failed to report it the result would have been very different.

The grievant indicated that she would have initiated an investigation about this had she known of it and would have made an appropriate report or made sure one had been filed. She would also have taken appropriate disciplinary action against the staff members found to have maltreated the resident.

On balance, there was insufficient evidence to warrant disciplinary action based on this event since there was insufficient evidence to establish that the grievant was aware of it.

THE “POWER STRUGGLE” INCIDENT

The next issue involved an incident where a staff member became embroiled in a power struggle with a resident and stood in her way in order to direct her to the bathroom when the resident did not want to go there. Apparently the resident had recently been to the bathroom and the staffer wanted the resident to go again. When the resident resisted going the staff person stood in her way and blocked her from going where she wanted to go and directed her to the bathroom. During the tete a tete with the resident she fell down.

The State alleged that staff is not to become involved in such struggles with residents and that this was a clear violation of the Act and should have been reported to the Common Entry Point. The State characterized this as a “no-brainer” and argued that there should have been no doubt whatsoever about whether to report this – a resident was essentially knocked down by a staff person in a power struggle with the resident. The State asserted that there can be little doubt about this incident.

The grievant acknowledged that she was aware of this incident, investigated it and determined that no abuse occurred. It was apparent that she assumed that the resident, who had gait issues, simply lost her balance by accident and fell. The resident was not hurt and she determined that no report needed to be filed. Again, the grievant talked to her supervisor about this who also felt that this was not a reportable event and that it was simply an accident.

While the fact that the grievant checked with her supervisor mitigates this a bit, frankly this should have been reported, whether the grievant and her supervisor felt it was arguably a reportable incident or not. Here the distinguishing factor was that the resident fell. The grievant is experienced working with vulnerable adults and should know that in this type of instance, a report should at least be filed and that it is not for her to make the determination of whether this was maltreatment or not.

While the grievant can in some cases hide behind the assertion that her supervisor did not direct her to report this at some point the grievant must make her own decisions about reporting. Certainly reporting it would not result in her being in violation of the policy. In fact internal reporting is not required, although it is encouraged but reporting this to the Common Entry Point would certainly not have resulted in any repercussions against the grievant. See Employer Exhibit 12 at page 7 of 10.

On this point the determination is that the grievant should have reported this incident. Further, the grievant should also have conducted a more thorough investigation than what was done here. Accordingly, while there were some mitigating factors here, on balance the grievant should have done more to protect the resident here.

JUNE 30, 2009 INCIDENTS

The next items involve e-mails the grievant received regarding a resident who was masturbating while staff watched and another involving a resident who was made to lie on the floor in the bathroom. These were both reported on June 30, 2009 by e-mails from Ms. Hadjiyanis. Clearly the grievant knew about these incidents. The question is whether her response warranted discipline.

The State asserted that the grievant did not respond to Ms. Hadjiyanis in regard to these e-mails. The simple answer is that she did not have to. The grievant's responsibility was then to conduct an investigation and either make a report or to verify that a report was appropriately filed with the Common Entry Point.

There was no obligation to get back to or to respond to Ms. Hadjiyanis over this. See Employer Exhibit 12, Procedure C 3. If a resident is injured or at risk of injury a supervisor must take action and Procedure, C6, at page 8 of Employer Exhibit 12, requires the supervisor to notify the individual's legal representative and case manager. There is no clear policy that would have required that the grievant to notify Ms. Hadjiyanis; and in fact there may well be a cogent argument that she had no right to this information especially during the investigation.

The Association asserted that the grievant did verify that there had been a report filed about these incidents and that once she had determined that, she no longer had any further obligation to report. However, Procedure C4 requires that a supervisor contact the Common Entry Point to ensure that a report has been filed. On this record, there was insufficient evidence to establish that the grievant actually contacted the Common Entry Point for this incident. Again, while this alone would not have been sufficient to warrant discharge it was a factor considered in determining the remedy.

The Association further asserted that these two incidents were not included in the questions asked of the grievant during the investigation and that she did not specifically recall how she responded them especially since she was not given access to the records during the interview. The evidence showed that these were reported but that the grievant did not follow up as she should have to ensure that they were. There was some evidence in addition that several reports were made but that they may not have been appropriately filed by the grievant. The record was a bit sparse on this point and there were no specifics as to which reports were not filed as they should have been. Still though there was evidence that matters that should have been reported and investigated went unanswered or were left hanging without any action for long periods of time. Further, even though it was clear that the grievant had a huge load she did not ask for help from HR with the complaints or from anyone else who could have assisted her in making sure these critical reports of maltreatment had been filed.

On balance, the record showed that the reports on these incidents may well have been filed but that the grievant failed at least technically in her responsibility to ensure that they had been and in following up to make sure there was an internal investigation being done to protect the safety of the residents. While this alone was not enough to warrant discharge it did show some lack of judgment on the grievant's part.

LOUDERMILL AND DUE PROCESS ALLEGATIONS

The Association raised a procedural issue and asserted that the State failed to give the grievant adequate notice and opportunity to be heard under Loudermill and the terms of the CBA at Article 6. The main thrust of this argument was that the investigators did not give the grievant or the Association adequate notice of the exact charges that were being leveled against her and did not provide a meaningful opportunity for the grievant to explain what happened or why.

The State on the other hand asserted that there was adequate opportunity to be heard after the discharge and that Loudermill is not intended to be a full blown hearing but rather an initial check against mistaken decisions and to assure that the charges against the grievant are true and that there was adequate notice of that here.

Frankly, this process could have been done better. There was evidence that investigators asked about incidents that occurred before the grievant was even at the home, originally were looking at 18 or more allegations many of which were never included in the charges against the grievant but narrowed that down to only five. Further, the person representing the State at the Loudermill hearing had little or no information about what the actual charges were or exactly why the grievant was being fired. The parties' CBA provides at Article 6 that the supervisor "shall be furnished with the reason(s) therefore and the effective date of the discharge." The Association asserted that it had no opportunity to rebut any of the charges because no one at the Loudermill knew what they were. There was some merit to that assertion even though on this record this procedural defect did not warrant overturning the entire case against the grievant.

Here though since the grievant had already been interviewed at length and since both the grievant and the Association were generally aware of the charges, the State narrowly met the requirements of Loudermill and the CBA. This was a somewhat close call however but there was some merit to the State's assertion that there was no actual prejudice to the grievant due to these procedures and that the decision would likely not have been overturned since there was no new evidence that the grievant had regarding the allegations.

That is not however to say that all a public employer need do to avoid a Loudermill violation is to assert that "it wouldn't have made any difference anyway" lest the employer unwittingly run afoul of the allegation that there was not a fair investigation and that the decision was made long before the facts were in. The question is whether there was a violation of policy as the result. As noted above, some undisputed facts resulted in very different conclusions. It is also true that a Loudermill hearing is not necessarily the place to adjudicate disputed facts but to provide the Association and the grievant a chance to provide any explanation for what happened in an effort to avoid discipline. Here that was done and the claim that the entire case should be thrown out due to these deficiencies is rejected.

HIPAA AND PRIVACY AND OTHER POLICY ENFORCEMENT CONCERNS

Finally there was evidence that the grievant was lax in enforcing HIPAA and other privacy concerns at the home. A medical record was found out on a table along with an employee's driver's license. This is certainly sensitive data that must be protected. The grievant argued that it was possible that others could have left this information lying out but the evidence did not support that allegation. There would have been no reason for anyone to have done that in the interim and the weight of the evidence showed that this information was left out under the grievant's watch. Further, there was evidence of lax enforcement of other policies, particularly the no smoking policy and issue pertaining to cell phones and how staff interacted with each other and with residents.

On balance the grievant should have and could have done a far better job enforcing these policies and instructing staff on the appropriate policies. Again her manager may have let her down here but as a supervisor it was the grievant's responsibility to seek out the resources necessary to make sure these policies were enforced, including going to HR if necessary to get whatever assistance she needed to do her job.

These too were not transgressions that would likely have gotten the grievant fired on this record but were certainly concerns and were taken into account in determining the appropriate remedy here.

PENALTY

The state asserted that these transgressions were so egregious that they can no longer trust the grievant's judgment and that she cannot be effective as a manager of such homes in the future. As noted however, the grievant was guilty of some but not all of the allegations against her. Further, especially with regard to the allegations of maltreatment and her response to those, the Association and the grievant were able to show that by appropriate training the grievant can certainly be effective and that it is unlikely that such future problems will recur.

Further, the grievant was to some degree the victim of her own supervisor's advice on several of these actions. Clearly, if Ms. Viarello had instructed to report these incidents there is no question that she would have. In addition, and significantly, the grievant was not personally involved in any of these incidents nor was she a witness to any of them. To that extent she was forced to rely on the reports about them from others, some of whom testified here and some of whom did not. To essentially second guess her now could well result in manifest unfairness if discharge were imposed.

The State pointed out other managers who have been terminated, See Employer Exhibit 13. The state argued that it has discharged other managers for similar violations and pointed to one in particular. A review of this scenario on the face of the letter shows several very distinctive features.

First, it was apparent that there were several very specific counseling sessions with the manager in which there were specific directives given on how to deal appropriately with these same types of situations. It was further apparent that despite that training she did not perform within those directives. His evaluations were consistently poor whereas the grievant here was certified and was otherwise told by her direct supervisor she was doing a good job. The other supervisor was denied pay increases due to his poor performance. In other words, he was given several chances whereas this grievant was given only one.

On this record discharge is not the appropriate remedy for the proven charges.

Several options were considered. First there was reinstatement with full back pay and benefits. This was rejected due to some of the problems in reporting of the VA violations and due to her failure to respond timely and appropriately to staff concerns. Further there was the showing that there may well have been some retaliatory motivation for the poor performance evaluation of Ms. Hadjiyanis. Irrespective of whether he deserved the extension of probation, and there was some evidence that this may well have been appropriate; it was concerning that hers was the only evaluation done by the grievant during her tenure at Scandia. The timing of it was also troublesome given the fact that it was apparent that the grievant saw the complaint within a week or two of the evaluation.

Reinstatement without back pay was also considered. This is always something of a difficult call since it is unlikely that any employer would mete out a 12 month suspension.

The difficulty here is to formulate a remedy that sends a clear message to the grievant that some of her actions were inappropriate and that she must conform her reporting procedures to the needs of the State. Certainly in the future, she needs to consult HR to avoid repeats of what occurred at Scandia, i.e. with the multitude of messages about poor working atmosphere and a hostile environment, and to be able to explain to staff that something is being done within the confines of privacy and HIPAA concerns.

After considerable thought it was determined that the grievant is to be reinstated to her former position with back pay and benefits subject to a 30-day suspension for the policy violations set forth above. Some consideration was given to a lesser penalty since Ms. Hadjiyanis was given a far lower penalty for her failure to promptly report VA Act violations and that Ms. Viarello was given a lesser degree of discipline even though she was clearly a part of the concern here. The grievant was a supervisor and responsible for setting an example to the rest of the staff – more so than even Ms. Hadjiyanis as a lead worker. Further, even though her manager was involved, the evidence here showed that she in many cases only tangentially so. The grievant was the person getting the bulk of the e-mails here and was the person at the home responsible for putting that home on the right track.

On this record, termination was deemed inappropriate given the fact that only a portion of the State's case against was proven by a preponderance of the evidence. However, the penalty set forth herein is warranted for the reasons set forth herein. As many arbitral commentators have warned, arbitrators must be careful not to dispense their own brand of industrial justice, even where there is clear discretion and authority to fashion a remedy. Here the remedy was based on the record as a whole, taking into consideration the seriousness of the VA issues as well as the other management issues in the running of the Scandia home.

This should provide the needed message that the reporting of Act violations is very serious and that merely discussing it with a supervisor may not be enough and that one must err on the side of protecting the VA's in such a situation. While it is understandable why the grievant did what she did under these circumstances, such actions, especially in failing to absolutely verify that reports of possible maltreatment be reported, cannot continue in the future.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. The grievant is to be reinstated to her former position within 10 working days of this Award with back pay and benefits subject to the 30 day suspension noted above. Back pay is subject to mitigation for any wages or salary earned as well as for any unemployment, Government or other wage replacement benefits paid to the grievant in the interim herein. The grievant and Association shall provide any appropriate documentation to verify the interim earnings.

Dated: August 1, 2011

MMA and State of Minnesota, Oian award

Jeffrey W. Jacobs, arbitrator