

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 5, Local 1164**

and

IMMANUEL ST. JOSEPH'S HOSPITAL

DECISION AND AWARD OF ARBITRATOR

BMS # 12-HA-0050

JEFFREY W. JACOBS

ARBITRATOR

January 16, 2012

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

Immanuel St. Joseph's Hospital, ISJ.

DECISION AND AWARD OF ARBITRATOR
BMS #12-HA-0050
Suzette Benton Grievance matter

APPEARANCES:

FOR THE UNION:

Teresa Joppa, Attorney for the Union
Suzette Benton, grievant
John Liebhard, former ISJ employee
Joyce Siebenbruner, former ISJ employee
Sue Seys, Central Stores Aid employee
Lois Jaskulke, Union President

FOR THE EMPLOYER:

Paul Zech, Attorney for the Employer
Laurie Bentsdahl, Manager of Central Stores
Chuck Parsons, Dir. of Supply Chain Operations
Kim Rogers, Logistics Lead
Amanda Hansen, Employee Experience Partner

PRELIMINARY STATEMENT

The hearing in the above matter was held on October 26, and November 23, 2011 at the Hilton Garden Inn in Mankato, Minnesota. The parties submitted Post-Hearing Briefs dated December 21, 2011.

ISSUE PRESENTED

Did the Employer have just cause to terminate the grievant? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from September 1, 2008 through August 31, 2011. Article 16 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

EMPLOYER'S POSITION:

The Employer's position was that there was just cause to terminate the grievant for a long list of infractions, warnings, notices, coaching/counselings and poor evaluations dating back to 2007 and even prior to that. In support of this position the Employer made the following contentions:

1. The Employer acknowledged the grievant's many years of experience and service to the Employer but argued that her performance record for years, even prior to 2007, has been poor at best. The Employer noted that overall, despite her long record, the Employer had had enough of her poor performance, bad attitude and general insubordinate actions and argued that despite multiple warnings and attempts by the Employer to correct her behavior the grievant was simply unwilling to conform her behavior to the expectations of the hospital and her managers.

2. The Employer asserted that this history of both disciplinary warnings as well as non-disciplinary counseling and coaching and other conversations with the grievant demonstrates both the appropriateness of discharge as well as notice to the grievant of the need to change her performance and workplace attitude and demeanor.

3. The Employer further asserted that the Hospital is affiliated with the Mayo Clinic health care system and that as a critical care facility it is crucial that the hospital know what materials and supplies it has on hand to meet the health care needs of its patients. The grievant's position in the Stores area is a critical link in that system and that accuracy and adherence to policy is very important.

4. Employer exhibit 3 sets forth the job functions in the Stores department and the expectations for employees. The Employer asserted that the job description include the following set of reasonable duties and expectations that the employees are required to meet and that the grievant was well aware of, as described below:

Embracing the Hospital's primary values, including that the needs of the patient come first.

Greeting patients, visitors and colleagues alike in a positive manner.

Seeking opportunities to recognize the work of others.

Placing the needs of colleagues before self.

Working cooperatively with others in a positive manner, volunteering to help them to achieve team and organizational goals.

Respect and sincerity in contacts throughout the day.

Being an advocate in promoting a positive work environment.

Seeking opportunities to improve personal performance.

Responding positively and openly to feedback and ideas focusing on solving the problem rather than placing blame.

Keeping current, and understanding and adhering to organizational policies.

5. The Employer further noted that the materials handling here, as in all hospital settings, is a vital piece in health care delivery and that teamwork is an essential part of the employee's function. Overall, the Employer's case is that the grievant was deficient in most of these areas. She displayed a poor attitude, made numerous errors, failed to change with the changes in the materials handling area, refused to comply with the directives of management even to the point of insubordination, frequently diverted blame for her own errors on others, undermined the relationships with her co-workers and was generally a very difficult and sometimes unpredictable employee who was disliked by co-workers and who frustrated her supervisors. The supervisors tried time and again to counsel the grievant and provide her with help and direction but she consistently refused. The events of February 9, 2011 were simply the last straw.

6. While the grievant has indeed been with the Hospital for more than 30 years her performance has not been good over time. The Employer first noted that her previous supervisors were quite lax and did not hold her accountable for her performance. More to the point, since 2007 her new supervisors have been consistently telling the grievant of the need to change her performance. While the grievant may feel that her tenure exempts her from these requirements, it does not. She needs to conform to what her supervisors and managers are telling her to do – her tenure does not, in the Employer's eyes, create different standards for her. Her current supervisor has been in that role since 2007 and almost immediately, in the 2008 evaluation, noted problems with attitude and work relationships. She also demonstrated a reluctance to adapt to change and even a downright refusal to comply. See Employer Exhibit 5D.

7. Her 2009 evaluation also showed deficiencies in these same areas, e.g. poor attitude, work performance and relationships with her co-workers. Again, the Employer noted, the grievant refused to change her behavior and even refused to acknowledge that there was a problem. She noted in all her evaluations that her perception of performance was meets or exceeds expectations when this was clearly not the case. Her supervisors were telling her for literally years that her performance and workplace demeanor needed vast improvement. See Employer exhibit 5C.

8. The same thing occurred in her 2010 evaluation, done only a few months before her termination. See Employer exhibit 5A. In this last evaluation the grievant was once again told of her lack of team work and poor attitude and of the need to adhere to the directives of management and to work more cooperatively with her co-workers and adapt to the changes in the department.

9. In addition, the Employer pointed to multiple informal counseling and coaching sessions with the grievant wherein she was told repeatedly of the problems in adapting to change, workplace demeanor problems and sometimes disrespectful behavior toward co-workers. The grievant would sometimes comply for a few weeks or months but eventually all too soon would fall back into the same pattern of behavior of poor attitude, attendance problems and disrespectful behavior towards co-workers and managers alike. See e.g. Employer exhibits 6B, 6C, 6D, 6J, 6K & 6M.

10. In addition to the evaluations, in which the grievant was told repeatedly about the problems with her performance and her workplace demeanor and attitude, the grievant was disciplined several times prior to her termination. The Employer noted that these were not grieved or were grieved initially but later dropped. They are thus on the grievant's record and cannot be re-litigated now. As discussed below, these prior disciplinary warnings were taken into account in deciding whether to terminate the grievant or whether to impose a lesser form of discipline.

11. In August 2007 the grievant was given a disciplinary warning for insubordination in refusing to attend a mandatory training. The Employer noted that the grievant was specifically told to attend and initially refused. When she was finally ordered to go she reluctantly went but immediately left after she asked the trainer to leave saying, falsely, that she had work to do in her department.

12. First, she was told that her work would be covered by others and second, she did not inform the trainer that she had been ordered to go and was essentially “playing one supervisor off against the other.” The warning was not grieved and is now part of her record. Thus it matters little that she thought she was “doing her job.” The Employer asserted that the fact remains that the grievant felt she could overrule her supervisor’s orders. Her claim now that she did not want to go to the training because it was about a shooting at a high school is disingenuous. Not only is this the first time she made that claim, health care workers cannot choose which emergencies they respond to.

13. She received a second disciplinary warning for her actions on November 13, 2007. See Employer exhibit 6E. The Employer argued that she should have been fired then but the managers decided to give her a break due to her seniority and because they still hoped she might conform her behavior to their expectations. This was once again a warning for insubordination and job performance when she refused to do assigned tasks. She got other workers to do it for her despite being told she was to do them. This too is “on her record” and cannot be revisited on its merits here.

14. The Employer asserted that by July of 2009 the grievant had once again reverted to her old pattern of behavior and she was given yet another warning. She even became indignant, refusing to accept any responsibility for her poor attitude and performance and claiming that she would not “babysit” her co-workers and would just do things herself. The Employer asserted that this recalcitrant response was indicative of the grievant’s attitudinal problems and shows a complete lack of accountability for her actions. See Employer 6F. This was grieved initially but that grievance was dropped. Thus, it too is part of the grievant’s record and must be taken into account in determining the level of discipline.

15. As late as January 2011 the grievant was given yet another “final” written warning due to her intentionally inaccurately listing certain equipment as received when she knew it was not. She indicated that 20 blades had been received when there were in fact only 14. Such an error could lead to the false impression that more equipment was in stock than was the case and could have led to a compromise in care. The Employer argued that it goes without saying that accuracy in such matters is a crucial and essential part of the job. She was given yet another warning for this, which was also not grieved by the Union. This was only a few weeks before her termination.

16. The event that gave rise to her discharge occurred on February 9, 2011. The Employer noted that in December 2010 the department was given a memo, which the grievant clearly received because she signed off on it, that indicated that the Stores employees were to assist the delivery drivers in order to get stock out of the hallways and to get it stored faster. On February 9, 2011, a delivery driver arrived and started making his delivery. A co-worker, named Jeannie, with whom the grievant has had some personality problems in the past, began assisting when the grievant asked her in a confrontational manner what she was doing and directed Jeannie back to the Stores area, in clear contradiction to the management memo received only a few weeks before. A verbal confrontation ensued in which both women argued and yelled loudly enough at each other that other employees were concerned enough to call for a supervisor to come down to intervene.

17. The Employer asserted that the supervisor gave very credible testimony that she heard both women screaming at each other and intervened to calm things down. She gave the grievant and the co-worker a chance to explain but neither was very forthcoming. The Employer noted that the grievant was given several opportunities to provide her side of this story but refused.

18. Based on the grievant's history and the clear evidence from supervisory as well as line employees, it was determined that the grievant had engaged in very inappropriate behavior and escalated this confrontation. Both women were disciplined for this interaction but the grievant was discharged due to the history of problems described above.

19. The Employer asserted that the investigation was adequate to determine what happened and that there was no rush to judgment here nor any sort of “conspiracy” to terminate the grievant before all the facts were known. The grievant and the Union were given ample opportunity to provide their side of the story prior to the termination being taken but refused. The Employer then based its decision on the clear evidence and history described above.

20. The Employer noted that the witnesses called in the grievant's defense either actually corroborated the Employer's story, such as Mr. Liebhard, or had little or no foundation for their testimony. Her supervisor Ms. Siebenbruner was the supervisor more than 15 years ago and has not worked for the facility since then. She clearly has no knowledge of more recent events; certainly not as much as the grievant's current supervisors, who have been spending inordinate amounts of time trying to get the grievant to do what she is supposed to pursuant to facility policy. Ms. Jaskulke has only been with the Hospital since 2005 and works in the mailroom. She only occasionally works on a substitute basis in Receiving and Central Stores. Finally, Ms. Seys left the department where the grievant worked approximately three years ago and has no personal knowledge regarding any of the facts and circumstances that led to the Grievant's discipline. Further, she further supported the Employer's main assertion here and indicated that the grievant would “laugh off” any problems noted with her performance. The Employer noted that it was significant that neither Jeannie nor any of the grievant's current coworkers were called to testify. The inference is that they all are aware of how difficult the grievant can be to work with.

21. The Employer asserted that there is no reason to believe that the grievant will ever permanently conform her behavior to the requirements of the department and that reinstatement would be entirely inappropriate and will simply lead right back to this same place.

22. The Employer then asserted that the arbitrator must take into account the entire history. Her history is not being used to determine whether the grievant was guilty of the actions on February 9, 2011; the grievant's own testimony as well as the testimony from Supervisory personnel was more than enough to do that. The history though is clear evidence of the appropriateness of the discharge and shows a pattern of behavior that the grievant either cannot or will not change. Finally, the Employer noted that the Union's request to transfer the grievant is outside of the arbitrator's jurisdiction. The Employer has no obligation under the CBA to create a job for her nor to take a problem in one area and merely move it to another department.

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

UNION'S POSITION

The Union's position was that the Employer violated the labor agreement when it refused to accommodate the grievant's disabilities and find her alternate work. In support of this position the Union made the following contentions:

1. The Union pointed out that the grievant is a very long time employee of the Hospital and has devoted most of her working life to her job. The Union also asserted that prior to the new manager coming on board, the grievant's evaluations were quite good and that she was regarded as a valuable and dedicated employee.

2. The Union further noted that the grievant has gone above and beyond many times for this Employer; working when she was ill, working when was in labor with one of her children, working when family members were ill and she could have taken time off, she worked when she had a broken toe due to a work related accident and working during several emergencies, including the St. Peter tornado. She has come in extra hours and done everything asked of her for more than 30 years.

3. The Union also assailed the Employer's case and asserted broadly that the Employer had not shown any workplace offense that warrants termination. The Union further asserted that there was a woefully inadequate investigation done in this case. A more thorough and objective one would have revealed that the grievant has been the target of bullying and workplace discrimination for a long time and that the Employer was aware of it but did little to stop it.

4. The Union also argued adamantly that the violations relied upon by the Employer to demonstrate a supposedly poor work record were minor in nature and in some cases invalid and even wrong. The Union asserted that the grievant's evaluations until 2007 were quite good; it was not until her current set of managers took over that the problems began.

5. The Union asserted that the Employer should have recognized these issues and transferred the grievant or at least given her different supervisors. Instead they let the problem fester and allowed a good employee to have her record sullied by poor supervisors.

6. The Union argued that this is simply a case of "mudslinging" by an Employer attempting to throw so much at the wall that it hopes some of it will stick. The Union asserted that when these incidents are examined more closely they do not amount to anything more than a personality conflict between the grievant and her supervisors over the best and most efficient way to do the job. The grievant was in fact not being insubordinate; she was trying to do the best job she could to further the Employer's interests. For this she was disciplined and the arbitrator should reject the Employer's attempt to make the grievant the "troublemaker" here and recognize her positive contributions to the workplace environment by holding others accountable for their mistakes and inattention.

7. The Union also asserted that even though there were prior instances of discipline, they cannot be used to establish guilt or innocence of the offenses alleged on February 9, 2011. While they can be used to determine the appropriate level of discipline the Employer argued that the arbitrator should fire the grievant largely based on her prior record, which is inappropriate. The question here is whether the offense, even if proven, (and the Union asserted that it was not), rises to the level of discharge. Here, the Union asserted, it does not.

8. The Union noted that the Policy in place requires just and fair treatment of employees, and indeed the underlying notion of just cause for discipline requires it as well. The policy provides in relevant part as follows:

... ISJ Regional Medical Center believes in a just culture (Just Culture Policy) and in a process of corrective counseling and action, in order to give employees a reasonable chance to improve their performance and/or behavior. Corrective action may include verbal warnings, written warnings, suspension, and involuntary termination...

See Employer Exhibit Tab 4, page 4.

9. That same policy provides for a variety of offenses that can result in termination immediately. The grievant committed none of these. Further, any minor offenses, such as are alleged here, must be adequately investigated by the Employer to determine the facts and if discipline is appropriate. That did not happen here according to the Union.

10. The Union noted that the HR person in charge of this investigation never even talked to the grievant before being part of, and perhaps even dictating, the decision to terminate the grievant. This sort of procedural failure cannot be ignored since the Employer relied on only the version of the facts given by the supervisors. They therefore had only one side of the story and made the decision to terminate before even giving the grievant a chance to explain what happened on February 9, 2011. The Union asserted most strenuously that this is exactly the sort of misstep that must result in the granting of this grievance and in the grievant's reinstatement.

11. Turning to the events of February 9 2011, the Union asserted that the grievant did not start this; rather a co-worker with who the grievant has had trouble in the past, did. The Union asserted that the co-worker was a favorite of management and that the grievant, who had tried time and again to hold her accountable for errors and inefficiency, was singled out and made to feel outcast by her supervisors. Thus, when the events of February 9th occurred, the managers jumped to conclusions and simply assumed that the grievant had started things that day when she in fact did not.

12. The Union asserted that the co-worker approached the grievant and started “getting in her face” asking her in a snide and disrespectful way if she was “having a bad day,” was she “in a bad mood” and making other inappropriate and resentful comments to her. The grievant did not respond in kind but rather averted her eyes and looked down at her computer screen in response to Jeannie’s tirade. Co-workers then began looking for the memo from December regarding who is to help the drivers and under what circumstances. This took time and all the while Jeannie continued her verbal and near physical assault on the grievant. The investigators were never aware of this and were thus never aware that they were holding the grievant to a different standard of conduct.

13. By the time Ms. Bentsdahl, the supervisor, got there, things had calmed down. When asked about this incident Jeannie said that it was “no big deal” and the grievant said nothing about it at all. The grievant knew that her supervisor would not believe her anyway and she did not want to antagonize Jeannie any further at that point. Based on this sparse evidence though the grievant was fired and Jeannie received only a written reprimand.

14. All the grievant did that day was to remind Jeannie, when she went to help the driver that there was work to do in the department and that she needed to help there rather than to help the delivery driver. The response was a tirade of epic proportions by Jeannie that was the source of the noise and of the call to supervisors to come down and calm things down. The grievant was simply trying to get work done in furtherance of the Employer’s interest; rather than some delivery driver.

15. As further evidence of the lack of investigation and of the one-sided nature of it, the Union pointed out that the termination letter was already typed even before the meeting with managers, the grievant and the Union. Just cause requires that there be a fair and unbiased investigation and that discipline, especially termination, be conducted in a fair and even handed manner and that the result not be pre-judged before the grievant even has a chance to tell his/her side of the story. Here that was lacking; the Employer had made the decision, probably on the day in question, to fire the grievant and assumed things that were not true about the events that day.

16. The Union argued too that even if these incidents were true, this relatively minor spat between coworkers is not at all enough to warrant terminating a 30+-year employee. The Union argued that this was a simple misunderstanding about a relatively recent change in the department regarding assisting delivery drivers and that the grievant simply forgot that things had changed.

17. The Union also noted that her prior record, when examined in the light of objectivity, did not support the Employer's claim that the grievant has been troubled and insubordinate. The 2007 meeting incident was an example. The grievant knew that the meeting would entail her sitting for hours doing nothing when there was real work to do in her department. She told her supervisors that but complied when directed to go to the training. When she got there she asked for, and received, permission to leave. When she was later directed to go back she did. This can hardly be called insubordination. Further, she knew that the disaster drill was a mock shooting at a high school and the grievant could not face the prospect of thinking about young children being shot or killed.

18. Further, the other disciplinary warnings in 2007 are both old and again showed that the grievant's complaints about people bullying her were not taken seriously. The Employer seems to overlook the fact that the grievant is a long term employee who has a system in place that works for her job and that the changes being directed by management were both difficult to implement and hard to follow at times, even contrary to the way thing had been done for years in this department.

19. Her warning from July 2009 was, according to the Union and the grievant an error made by a co-worker for sending a package to the wrong location. The grievant felt justifiably frustrated by this and said she was tired of babysitting her co-workers, one of whom was Jeannie, and covering for their mistakes. She decided to do things herself so they were done right rather than be called on the carpet for the mistakes of others. This was understandable and reasonable given the atmosphere of mistrust in the department. The grievant had no choice at that time but to rely only on herself to get the job done.

20. Her reprimand for missing too many days of work was due to a workplace injury and should never have been considered as disciplinary. The Union argued that this too showed a clear bias against the grievant – no one should get a reprimand for missing work due to a work related injury. Further, the grievant requested a transfer but this was denied – again showing that the Employer had a longstanding and secret desire to rid itself of a long-term employee without justifiable cause.

21. The last written warning in January 2011 was again a minor mistake involving 14 blades that were delivered. The grievant wrote down 20 but knew that the rest would be coming very shortly. She immediately corrected the error when it was pointed out to her and there was no adverse consequences to anyone or to the facility.

22. The Union requested that the arbitrator use the broad discretion under the just cause standard and order the grievant back to work but in a different area where she can at last have a fresh start and a fair chance to perform.

The Union seeks an award of the arbitrator sustaining the grievance, reinstating the grievant with full back pay and accrued contractual benefits but in a different area. The Union requests that the arbitrator retain jurisdiction in order to resolve any disputes or issues that may arise with the grievant's reinstatement.

DISCUSSION

The Hospital is an acute care facility located in Mankato, Minnesota. The Stores Department is a fast-paced and important department that is to ensure that supplies are appropriately received and accounted for and delivered in a timely fashion. There was clear evidence to suggest that the management of these supplies are potentially crucial to patient care. The Hospital's medical and nursing staff must know what they have and be able to get it quickly to deliver appropriate patient care. Accuracy and teamwork are essential to this function.

The grievant began her employment in 1979 in the Sterile Processing Department. By 1998 the grievant had moved to a position within the Stores area, which is sometimes referred to as the stockroom, the storeroom or the Materials Management Department. As will be discussed below, her work record until 2007 was relatively good but after that her performance reviews began to reflect considerable problems with both performance and workplace attitude and behavior. None of these were frankly so serious as to warrant termination on their own but did provide a record that was certainly not exemplary.

The Union argued that her prior supervisors liked and respected her. This was true. Ms. Siebenbruner testified that she thought very well of the grievant and that she believed her performance and workplace demeanor was appropriate in every way. She however has not worked with the grievant for many years and left the Hospital in the early 1990's. Her testimony was therefore of less probative value than it could have been had she been in a supervisory capacity closer in time to the events in question.

Likewise for other witnesses called on the grievant's behalf. These witnesses either worked with the grievant long ago or had only occasional opportunities to work with her. While it is clear that some of her co-workers like and respect her abilities greatly, others do not.

Her supervisors since 2007 testified credibly that the grievant has been a source of considerable frustration for them. They also provided credible evidence that the health care system in general, and this facility in particular, has undergone significant changes in the way supplies and equipment is handled and accounted for. These changes have affected the way in which the grievant and the Stores department does its work over the past few years. The evidence on this record supported the Employer's claim that the grievant has been reluctant for whatever reason, even recalcitrant to adapt to these changes. While it is true that she has been with the Employer for a very long time, it is also true that there is always a need to adapt to the reasonable requests by management to alter the way in which the work is performed in response to technological, economic and other factors. It is for management to decide how the work is to be done and how best to utilize technology and how best to most efficiently manage the workforce and the workload. It was apparent that the grievant had other ideas about this and frequently attempted to substitute her judgment for that of her managers and supervisors.

Her past record reflected a long history, at least since 2007, of coaching, counseling's, warnings and actual written reprimands outlining in many cases similar problems. Her evaluations showed repeated warnings about the need to work more cooperatively with others and to maintain appropriate workplace demeanor. The Union asserted that the grievant was the victim of bullying and discrimination by her co-workers but there was insufficient evidence to establish this. The grievant herself felt that she was the victim of this but there was other evidence on this record to suggest that it was the other way around – and the grievant was the one doing the bullying. Frankly on this record it was impossible to say whether this was true or not. What was clear was that the work environment within the department was poor at times and that the grievant was repeatedly warned about this. There was no evidence that other employees were being similarly warned about this and, significantly, little corroborative evidence from witnesses or other evidence that supported the Union's claim that others in the department were the instigators of this poor work environment.

Moreover, it was clear that the grievant and her supervisors met frequently to discuss these issues and the grievant was told time and again about her demeanor towards co-workers, her occasional difficulty interacting with them. There was evidence that the grievant would occasionally ignore them, refused to acknowledge co-workers and supervisors, gave them the “silent treatment” and the like and that this happened for no apparent reason. There was further evidence that the grievant was unapproachable by some yet helpful to others and that this too varied.

It was thus clear that for whatever reason, the grievant's supervisors were very concerned about this; so much so that they made it a frequent point in her evaluations and in many other communications that she needed to change her behavior and soon. There was no evidence of any untoward animus toward the grievant and no reason given for why they would have singled her out for any nefarious or illicit reason. On this record the testimony of Ms. Bentdahl, Ms. Rogers and Mr. Parsons was accepted as both persuasive and credible in this regard.

Further, on the question of prior discipline it was clear that the parties spent considerable time re-arguing that which was already on the record. While it is axiomatic that a prior disciplinary action remains part of the grievant’s record and unless it has been overturned or withdrawn or “falls off the grievant’s record’ due to a contractual obligation to do so in some fashion, is part of the record and may be taken at face value by the arbitrator in determining the appropriate level of discipline once the instant offense has been shown.¹

The evidence showed that her prior discipline was either not grieved or, in one case, was grieved initially and dropped. Those disciplinary warnings and reprimands were thus considered for purposes of determining the appropriate penalty only. Having said that, a brief discussion of those is appropriate in that regard before getting to the question of the events of February 9, 2011.

¹ Prior discipline is typically not used to determine guilt or innocence of the instant offense. Thus, while the Employer argued that the grievant had a propensity to berate others and to try to be a lead person in her department, her prior record was not considered in making that determination. The prior record was thus relevant and probative only on the question of the penalty. The question of whether there was a violation of Policy or other directive on February 9, 2011 was considered only on the facts as presented as to that date.

The grievant was given a reprimand in 2007 for failure to attend a mandatory disaster drill. She complained that she had too much work but the record showed that she was specifically told that supervisory staff would cover her work. Despite that she continued to argue about having to go and was finally given a direct order to get to the disaster drill. Once she got there, she immediately approached the trainer, who of course did not know of the order for her to be there, and asked to be excused. The record showed that the grievant made the independent determination that she did not need to be there and that it was a waste of her time to do so. She left the training and was approached by the supervisors in the hallway who asked why she was not at the training. Once again, when specifically told to get to the training she argued the point. Finally she complied but this scenario did little to demonstrate the grievant's claim that she always has the best interests of the Employer at heart.

She was reprimanded again in November 2007 for, among other things, bullying behavior, inappropriate actions and use of profanity towards co-workers. See Employer exhibits 6 D & E. This too was not grieved and is part of the record. This is significant too because it demonstrates a pattern of behavior for a similar set of allegations to those which occurred on February 9, 2011. While these earlier disciplinary warnings do not prove the offense on February 9, 2011 they undercut the claim that the grievant should be reinstated once those later offense are proven.

The grievant was again disciplined in July 2009 for sending a package to the wrong location. It was at this point the grievant vented her frustration and announced that she would not babysit her coworkers any longer. Had there been evidence that these mistakes were in fact the result of another employee's mistakes this might even have been justified at the time but there was not. There was no evidence that this was overturned in any fashion so this too is part of the record.

She was reprimanded again in January 2011 for inaccurately reporting that there were 20 blades in stock when she knew there were only 14. This was more than a mere error in counting or a typo but appeared to have been as the result of a judgment made to enter 20 when she knew there were not that many in stock. See Employer Exhibit 6N.

This was again a third written warning and occurred only weeks before the events leading to her termination. This was not grieved either and is part of the grievant's overall record.

There were other instances of coaching and counseling for poor performance and workplace demeanor. See e.g. Employer exhibits 6, I & J. These were considered not so much for the appropriateness of the penalty since they were not formal discipline but for the purpose of showing notice of the deficiencies and the need to improve her overall work performance and attitude. These were on her record and were thus used for that purpose.²

Turning to the events of February 9, 2011, it was apparent that there was a wide disparity in the versions of the story. Overall though the record demonstrates that both women were yelling loudly at each other but that the grievant had as much to do with escalating this as her co-worker.

Some background for this discussion is necessary. First, the Union claimed that there had been a longstanding tension between the grievant and her co-worker Jeannie. There was some evidence of this, i.e. the babysitting comment but that was not specific. It was further clear that the frequent comments about the need to get along better with co-workers and to treat her coworkers with greater respect was in part due to the ongoing personality clashes with Jeannie. However, how that manifested itself was never made completely clear.³ As noted herein, since Jeannie was not called to testify, the decision must therefore be based on the evidence presented.

² There were other disciplinary notices which were part of the grievant's record but these were for unrelated matters, such as attendance issues. There was also some evidence that she was written up for being gone to recover from a workplace injury. See Employer exhibit 6J. These were given very little weight, mostly because they did not relate to the February 9, 2011 incident.

³ It should be noted that Jeannie was not called to testify by either party and no inferences or other conclusions were made as the result of the fact that she was not called. There was no explanation for why the only other person who was directly involved in the action leading to the grievant's discharge was not called. Thus, this decision was made based solely on the evidence presented at the hearing

The second factor necessary to place this in context is the memo from December 16, 2010 regarding the change in policy to assist the drivers. See Employer exhibit 7F. This memo and the testimony from Employer witnesses about it, showed that the Stores employees were told to assist the drivers to get stock out of the hallways faster and to reduce congestion. The evidence clearly also showed that the grievant received and acknowledged this memo. Whether she forgot about it or decided to ignore it on February 9, 2011 was not known and on this record largely immaterial. The fact is that the grievant again ran afoul of the clear directives she had been given for many months to follow the directions of her supervisors and not to continue to “do things her way,” as she had been wont to do in the past. The Employer noted that the grievant was incorrect about her direction to Jeannie. Indeed, the December 16, 2010 memo showed that the Stores employees had been told to do exactly what Jeannie was doing that day and that the grievant was simply wrong to tell her to do otherwise – irrespective of whether it was her role to tell Jeannie to do anything.

Further, while it was certainly inappropriate for Jeannie to respond the way she apparently did, the grievant’s actions in essence caused this problem and she also escalated it as well. It may never be known exactly what these two said to each other but it was certainly offensive and disruptive enough that other employees called for supervisory personnel to go to the Stores area and break it up.

Here, that evidence strongly supported the Employer’s case that indeed the grievant was not as pure as the Union suggested she was in this incident. Mr. Liebhard, called on behalf of the Union, testified that the grievant initiated the conversation with Jeannie after she began helping the driver who delivered product that day. This did not help the grievant's case much since she claimed that Jeannie started this by berating her with comments about being in a bad mood, etc.

While there is some truth to the old adage about needing two to tango, there is also much truth to the even older adage, perhaps dating to Biblical times, that this all started when he hit me back. Clearly, both women were guilty of shouting at each other. The Union asserted that the grievant was a shrinking violet in this altercation but the evidence showed otherwise.

The evidence was clear that supervisors were called when there were reports by co-workers of “two wildcats” in the Stores department. Clearly too this screaming match could be heard for quite a distance and it was clear that both women were shouting.

Ms. Bentsdahl also testified credibly that she heard both women as she approached the department and that it was quite loud and disruptive. She also indicated that she asked both what was going on and that Jeannie, who also likely was aware that they were in trouble, indicated that it was “no big deal” or words to that effect. Significantly, the grievant was allowed to give her explanation of what happened to her supervisor but chose not to give any explanation at that time.

One of the Union’s main arguments is that there was a failure to perform an adequate investigation and that if one had been done, it would have revealed a far different story than the one management decided to use to terminate the grievant. To be sure, this investigation was lacking in some significant ways. It is generally required of a just cause analysis that the investigation be thorough, generally include the grievant unless the grievant flat out refuses to talk, and that it be fair and objective and not pre-determine the result. The Employee Experience representative, as that department is now known, indicated that she did not even talk to the grievant before taking part in the discussion to terminate the grievant. On a slightly different set of facts, this could well have been very damaging, even fatal, to the Employer’s case and provides a valuable lesson in how to undertake an investigation of this nature.

It should be noted that the lack of a perfect or completely thorough investigation does not in and of its self undercut the Employer’s case but does give the Union the opportunity to bring forth evidence for which there may not be a rebuttal by the Employer. On this record, the explanation given by the grievant did not square well with the other compelling evidence in the case and it is on that basis that the case proceeds.

Frankly, if that had been the only investigation done here the result might well have been very different; perhaps 180 degrees different. Here though, there were other factors that supported the Employer's case on this record.⁴

First, as noted, the supervisor did give the grievant a chance to explain herself and she chose not to. Second, the Employee Experience person was not the only one involved in the decision to terminate the grievant. Third, those who did make that determination did take the grievant's record into account, both the good and the bad. Finally, the December 16, 2010 memo made it clear that the grievant was out of line when she admonished Jeannie not to help the driver.

At the end of the day, the evidence showed that the grievant was very much involved in this and that she initiated the altercation. While both were responsible for escalating it, the grievant was by no means innocent. Thus, the conclusion is that the grievant violated policy and multiple work directives by her actions on February 9, 2011. The remaining question is to determine the appropriate penalty given this conclusion.

Determining the appropriate penalty and fashioning a remedy is traditionally the province of the arbitrator in any just cause analysis. Several options were considered. Reinstatement without back pay or with a lesser degree of back pay was considered. This was rejected though based on the grievant's past record. A poor work record does not automatically disqualify an employee from reinstatement. Part of that determination is whether there is a reasonable chance that the grievant will use this experience to change their behavior to comply with the reasonable directives of the Employer.

⁴ The Union raised concerns that the termination letter was already drafted before the meeting with the grievant at which she was terminated. This did not undercut the Employer's claim of just cause. It is not terribly uncommon that the Employer believes there is just cause for the termination of an employee and has a draft letter prepared but gives the employee a chance to explain what happened before giving it to him. This record showed that there was an opportunity to provide this explanation prior to the actual termination, albeit not by very much. A grievant can certainly chose to stay silent as is their right generally but then takes the risk that the facts adduced at the hearing, as here, will not support their case. Thus, the question here is not so much whether the investigation was adequate but rather where on this record there was sufficient evidence to show that the grievant's actions were in contravention of Policy and other directives. As noted herein, they were.

Here, the grievant's record was particularly relevant in making that difficult assessment. She has demonstrated an unwillingness and/or inability to change her workplace behavior or performance as the Employer wants. Keep in mind that the Employer gets to call the shots here in terms of what it expects from its employees. That someone has been doing it in a particular way for years does not carry the day. The question is whether they are doing it the way the Employer wants it done now. Here the grievant has a demonstrable problem doing that.

Further, there is little reason to believe that the grievant's relationships with co-workers and supervisors alike will improve appreciably if reinstated. This was not a one-time event but was the culmination of several years of difficulty that has been pointed out to the grievant many times. If ever there was a case of the straw breaking the camel's back, it might well be this one.⁵

Finally, the Union's request to place the grievant back at the Employer but in a different department was considered but rejected as outside of the arbitrator's power. The arbitrator does not have the power to compel the Employer to create a job for the grievant nor is there jurisdiction to place her in a job she may not be qualified.

Accordingly, the conclusion is that there was just cause to prove that the grievant's actions on February 9, 2011 were in violation of the Employer's policy and were inappropriate. Further, based on her overall record, discharge is determined to be appropriate on the facts presented.

AWARD

The grievance is DENIED.

Dated: January 16, 2012

AFSCME and Immanuel St. Joseph's AWARD.doc

Jeffrey W. Jacobs, arbitrator

⁵ As the parties have correctly pointed out, there are instances of single violations that are so severe that discharge is warranted. There are also situations, as here, where a series of minor offenses, none of which individually rise to the level of termination but the cumulative effect is to provide sufficient evidence that the employee can no longer work in this setting for whatever reason. Here the Employer demonstrated that this is the case.