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IN THE MATTER OF THE ARBITRATION BETWEEN

STATE OF MINNESOTA, )  
DEPARTMENT OF CORRECTIONS, )  
Employer )  
)  
and )  
)  
MINNESOTA ASSOCIATION OF )  
PROFESSIONAL EMPLOYEES, )  
Union )

Three-Day Suspension, Five-Day  
Suspension, and Termination of  
Theodore Harmon

Arbitrator: Laura Cooper

Hearing Dates: January 23, 2012, Oak Park Heights  
January 24, 2012, Oak Park Heights  
February 3, 2012, St. Paul

Date Record Closed: March 16, 2012

Date of Award: May 14, 2012

APPEARANCES

FOR THE EMPLOYER: Joy Hargons, Attorney  
Labor Relations Representative, Principal

FOR THE UNION: Gregg M. Corwin, Attorney  
Cristina Parra Herrera, Attorney

JURISDICTION

The State of Minnesota (Employer) has recognized the Minnesota Association of Professional Employees (Union) as the exclusive representative of certain professional employees and entered into a series of collective bargaining agreements. This grievance arises under the parties' Labor Agreement covering the period from July 1, 2009 to June 30, 2011. The Employer's Department of Corrections (DOC) operates a statewide correctional system including a super-maximum security facility at Oak Park Heights (OPH). Theodore Harmon was initially employed by the DOC as a Correctional Officer. In September of 2007, he commenced

work as a Corrections Program Therapist 2 in the Mental Health Unit (MHU) at OPH. In 2010, Harmon was the subject of three disciplinary actions by the Employer. He was notified of a three-day suspension on January 4, 2010, and a five-day suspension on February 10, 2010. On March 29, 2010, the Employer notified Harmon that his employment was terminated, effective on that date. The Union, on behalf of Harmon, submitted to the Employer grievances challenging each of the disciplinary actions.<sup>1</sup> The three grievances have been consolidated for consideration in this arbitration proceeding. The parties stipulate that the grievances are substantively and procedurally arbitrable.

A hearing was conducted to consider the grievances on January 23, 2012, January 24, 2012, and February 3, 2012. At the hearing, each party had a fair and equal opportunity to present its case. Witnesses testified under oath and were subject to cross-examination; documents were introduced into the record. The arbitrator, the parties, and their representatives also toured the OPH facility. The record closed on March 16, 2012, when the arbitrator received the parties' post-hearing briefs. The parties granted the arbitrator an extension for submission of the award to May 16, 2012.

### **STIPULATED ISSUES**

Did the Employer have just cause to issue a 3-day suspension to the grievant, Theodore Harmon?

Did the Employer have just cause to issue a 5-day suspension to the grievant, Theodore Harmon?

Did the Employer have just cause to terminate the grievant, Theodore Harmon?

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<sup>1</sup> A grievance challenging the three-day suspension was filed at Step 2 on January 22, 2010. A grievance challenging the five-day suspension was filed at Step 2 on January 22, 2010. A grievance challenging the termination was filed at Step 2 on March 31, 2010.

If not, what would the appropriate remedies be?

### **RELEVANT CONTRACT LANGUAGE**

#### **Labor Agreement, 2009-2010**

#### **Article 8, Discipline and Discharge**

##### **Section 1, Purpose**

Disciplinary action may be imposed on employees only for just cause and shall be corrective where appropriate.

##### **Section 2, Association Representation**

The Appointing Authority shall not meet with an employee for the purpose of questioning the employee during an investigation that may lead to discipline of that employee without first advising the employee of the nature of the investigation and offering the employee an opportunity for Association representation. Any employee waiving the right to such representation must do so in writing prior to the questioning. However if any employee is being questioned during an investigation of resident/patient abuse, the employee, upon request, shall have the right to Association representation.

##### **Section 3, Disciplinary Action**

Discipline includes only the following, but not necessarily in this order:

1. Oral reprimand (not arbitrable)
2. Written reprimand
3. Suspension, paid or unpaid . . .
4. Demotion
5. Discharge . . .

##### **Section 5, Discharge of Employees**

The Appointing Authority shall not discharge any employee without just cause. . . An employee found to be unjustly discharged shall be reinstated in accordance with the conditions agreed to between the parties, if appropriate or the decision of the Arbitrator.

### **BACKGROUND AND CHRONOLOGY**

The Grievant, Theodore Harmon, was initially employed by the DOC in February 2003 as a Correctional Officer at the Employer's Rush City correctional facility. For a time in 2005, he transferred to a position at the Employer's correctional facility at Lino Lakes, but in August

2005, he was directed to return to his position at Rush City because the Warden at Lino Lakes declined to certify him as a correctional officer there because of performance issues. The Warden's August 12, 2005 non-certification letter to the Grievant identified the issues as the Grievant's failure to communicate with staff in a manner in which he did "not argue or be confrontational," and for inadequate attendance, including three instances of no-call/no-show.

In September 2007, the Grievant accepted a position as a Corrections Program Therapist 2 (CPT) in the MHU at OPH. Diane Medchill, a program manager in the MHU, hired Harmon and became his immediate supervisor.<sup>2</sup> Medchill is licensed in Minnesota as an independent clinical social worker, authorized to practice independently and to perform clinical supervision.

The MHU at OPH serves as a 47-bed mental health unit for the entire Minnesota correctional system to serve offenders with serious and persistent mental illnesses. Inmates assigned to the MHU may have such diagnoses as psychotic disorders, depression, bipolar disorder, traumatic brain injury, antisocial personality disorder, and low intelligence. Inmates may be assigned to the MHU from other prisons in the state, as well as from other units within OPH including the administrative control unit (for offenders who require the highest level of control and security) and segregation (for offenders who are serving a disciplinary sanction for violation of prison rules). The challenge for the MHU is to provide treatment for patients with severe and persistent mental illness, including some of the potentially most dangerous offenders in state custody, within a secure correctional environment. Captain Stephen Ayers, responsible for security at OPH, testified at the hearing that operating a prison involves "calculated risk" and an effort to make the facility as safe as possible while recognizing that safety within a prison

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<sup>2</sup> At the time Medchill hired Harmon, she did not check his employment records and therefore was unaware of the Lino Lakes non-certification.

cannot be guaranteed. He said that incidents involving assaults of staff members by inmates have occurred in every area within the prison and that such assaults occur no more frequently in the MHU than in other units.

At the time of the Grievant's employment in the MHU it was led by Psychological Services Director, Peter Puffer, a licensed psychologist. He supervised two Program Directors, one of whom was the Grievant's direct supervisor, Medhill. The other Program Director was Tom Soles. Soles supervised other CPTs and the Grievant did not directly report to Soles, but Soles provided supervision and direction to the Grievant. CPTs, like the Grievant, who did not possess a licensure that permitted them to provide psychological therapy independently are permitted to provide therapy only under the direct supervision of a licensed professional, such as Medhill, Puffer or Soles. Under the direction of a licensed professional, an unlicensed CPT may help develop treatment plans, provide group therapy, and interact with individual patients. Only a licensed professional can make diagnoses and authorize treatment plans. The treatment provided by the unlicensed CPT must be reviewed on a regular basis by the licensed supervisor.

Staff meetings are held twice daily for the licensed and unlicensed therapeutic staff, along with security staff, to review the needs of the unit and its residents. During these staff meetings, both licensed and unlicensed employees are encouraged to participate in discussions, and to voice alternative suggestions for proposed treatment plans, but it is the licensed supervisors who are responsible for determining and approving treatment plans and making other decisions regarding the functioning of the MHU. The structure of the MHU and its operational needs result in the position description for the CPT2 position emphasizing communication with other members of the MHU staff and the need to "[s]eek and utilize supervision in an effective

manner” and to “[s]eek and utilize support and feedback from peers,” as well as to “[c]ontribute valuable input to the treatment team.”

Article 8, Section 3, Performance Appraisal, of the parties’ Labor Agreement provides that each employee shall receive a performance appraisal at least annually. The Section also encourages, but does not require, that a performance review occur at the approximate midpoint of an employee’s six-month probationary period in a position.<sup>3</sup>

Within the first several months of the Grievant’s commencement of work in the MHU there were some incidents in which staff members were assaulted by inmates in the MHU. According to the post-hearing brief submitted by the Union, there were two incidents of principal concern to Harmon. The first occurred in late December 2007 when Harmon was one of the staff members who intervened when an inmate started striking a sergeant. The second occurred in January 2008 when an inmate assaulted Correctional Officer Dan Payne. Payne was injured in the assault and did not return to work.<sup>4</sup> Harmon was not present at work when Payne was assaulted. Harmon expressed concern about other incidents including one or more inmates throwing an unknown liquid at a staff member and an inmate throwing a food tray at the head of an officer. The Grievant expressed his view to Medchill that the MHU had not been as vigilant as it should have been to prevent the assaults and he accused another staff member of mishandling interactions with inmates in such a way as to create safety risks to staff. Medchill encouraged the Grievant to utilize the Employee Assistance Program if he wanted additional support in dealing with inevitable safety risks, told him that she thought the MHU was doing as

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<sup>3</sup> “Whenever practicable, an employee serving a probationary period shall receive at least one (1) performance counseling review of his/her work performance at the approximate midpoint of the probationary period.”

<sup>4</sup> Payne later died without returning to work, but there was no evidence presented at the hearing that his death was the result of the workplace assault.

well as it could in managing risks, and counseled him to be more professional in expressing his disagreement about the conduct of other staff members.

Medchill was sufficiently satisfied with the Grievant's work performance during his six-month probationary period that she took no action to prevent him being certified in the position.

On May 14, 2008, Medchill provided the Grievant with his first Performance Review in the MHU.<sup>5</sup> On that review she rated him "Below Standards" for failing to learn clinical skills from supervisors and peers and for not being receptive to feedback from supervisors and peers. The evaluation noted that he had "made comments that are insulting and demeaning of colleagues' work or views" and that he had communicated at times in an unprofessional manner. Medchill stated that within the next review period Harmon needed "to significantly improve his ability to communicate professionally and respectfully with others, increase his openness to learning, and how to become part of the MHU treatment team." His overall performance rating for the review was "Unsatisfactory," which was further defined on the form as follows: "The employee does not meet job requirements or expectations. Substantial improvement is needed to justify retention in the position." Harmon, in his comments on the performance review form, did not seek to deny the accuracy of Medchill's comments about his performance. He said, however, that he did not believe that the negative comments about his performance would have been made had he not expressed his concerns about unit safety. He wrote that he did not think he should be "forced out" for raising concerns about safety issues. Harmon did not appeal his performance evaluation. Medchill wrote a memorandum to Harmon upon receipt of his performance review comments. In the memo, she reaffirmed the unit's commitment to safety

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<sup>5</sup> Harmon never submitted a grievance to allege that the absence of an earlier performance review violated his rights under the parties' collective bargaining agreement.

and, in reply to his assertion of being “forced out,” she said that she was committed to helping him improve his performance and development as a mental health professional.

Medchill asked the Grievant to complete a Professional Development Plan. She expected that in it he would address the performance issues that had been noted in his performance evaluation. He submitted his Plan on June 5, 2008. In response to the question of career goals that he would like to address in the coming year, he made no reference to those performance issues, writing only, “I need a class in biology.”

In an August 13, 2008, e-mail to Medchill and Puffer, Harmon noted that one particular inmate had six times over a period of six months been involved in assaults involving staff members and incidents in which unknown liquids were thrown at staff members. In the message, Harmon said that his prior expressions about workplace safety at best were unheard “and at worse brought retaliation.” Puffer replied to Harmon on August 14, 2008, and said that the state was legally mandated to provide mental health services to inmates who needed them, regardless of whether the inmates had a history of assaults. Puffer instructed Harmon to, in the future, address concerns directly within his “chain of command.” Puffer told him that “mass distribution” of e-mails expressing concerns would lead to “staff splitting.”

Medchill issued a second performance review to Harmon on October 15, 2008. The report noted that feedback from supervisors and co-workers had not resulted in Harmon altering his approach in treating clients with personality disorders. Another comment said: “Ted does not work as part of a team. He engages in behavior that causes splitting among staff. He has not been receptive to supervisory or peer feedback.” It said that he continued to make comments to colleagues that were “insulting and demeaning of colleagues’ work or views” and “to communicate in an unprofessional manner verbally and through emails.” The overall rating was

“Unsatisfactory.” In the final comment section, Medchill wrote: “He continues to engage in unprofessional communication and behavior that sabotages the provision of treatment on MHU.” Harmon included comments on the performance review form that said that his rating “isn’t accurate.” He said that he was not receiving training to correct previously noted deficiencies and that he had not received adequate responses from his supervisors for his expressed concerns about safety. Harmon did not appeal the evaluation.

In Fall 2008, Harmon wrote three communications. In one to the Human Resources Department at OPH, he said that his supervisors were responding to his safety concerns with intimidation and harassment rather than dealing with the substance of the concerns. Another memo to Human Resources asserted that Soles was “gunning” for him because of Harmon’s safety complaints. In an incident report he complained that Soles had improperly left a note about Harmon’s performance inside a offender’s mental health chart. These communications generated a response to Harmon in the form of a letter, dated December 9, 2008, jointly signed by the Associate Warden, Kent Granlienard and Steve Allen, the Director of Behavioral Health Services for the DOC. (Allen was above Puffer in the DOC chain of command.) The letter said that the placement of the performance note in an inmate’s file was unfortunate and inadvertent. The memo said that Harmon’s performance feedback was not retaliatory or hostile but rather based on his workplace performance. It said that he would be receiving soon a letter of expectations to identify needed improvement. The letter further stated: “Finally, you report that you were denied Association representation during a supervision meeting. You are not entitled to Association representation in meetings that are non-disciplinary in nature.” The memo asserted the facility’s concern about security, while noting the inevitability of risks and

recommended that Harmon bring any further concerns and suggestions regarding safety to those in his chain of command.

On December 12, 2008, Medchill issued Harmon a Letter of Expectations. The letter listed a number of expectations, including some regarding professional communication and receptivity to professional feedback. It offered training and regular supervisory guidance. It noted that while the letter was not itself discipline, failure to meet the outlined expectations could result in discipline.

On February 23, 2009, Harmon wrote an e-mail to Puffer objecting to allowing an inmate who had committed two assaults in the past from being allowed to have limited movement within the MHU. Harmon's concluded by saying that he was not seeking a reply, but merely an opportunity clearly to express his concerns.

In a supervisory session with Harmon on February 27, 2009, Medchill reviewed a list of what Medchill considered failures by Harmon to follow directions and to communicate in a professional manner. Overall, she noted that he was not working as part of the clinical team and that he was continuing to have a negative effect on the mental health and security staff. She restated that he was not meeting the expectations that had been outlined for his performance. Following that meeting, Harmon wrote an e-mail to Puffer saying that because of his dissatisfaction with the responses of his "superiors" to his concerns he was going to share copies of his previous e-mails with his co-workers to ask them about the adequacy of the supervisors' responses, but that he was going to give Puffer the opportunity to respond to him first. Puffer responded to Harmon by a memorandum on March 2, 2009, that said that Medchill's meeting with Harmon was appropriate supervisory guidance and that Harmon's safety concerns had in fact been appropriately addressed. Puffer encouraged Harmon not to distribute his e-mails to co-

workers, saying that they concerned confidential performance issues and that their distribution would be divisive within the staff.

On March 13, 2009, Medchill conducted a supervisory conference with Harmon. In a confirming memo to Harmon following the meeting she noted that it had discussed his "insubordination and unprofessional behavior." She noted in the memo that he had failed to complete several tasks that had been outlined for him in the Letter of Expectations. Among Harmon's assignments from the December Letter of Expectations remaining undone was completion of an Individual Learning Plan. Harmon submitted his plan on March 17, 2009. The Plan did not list any items that were designed to deal with the issues of respectful professional communication and acceptance of supervisory guidance that had been the focus of the Letter of Expectations.

On April 12, 2009, Harmon wrote to Tammy Nelson, Director of Human Resources, sending a two-page letter and twenty-one pages of attachments. He asserted in the letter that his supervisors were angry and vindictive and that his working conditions had become intolerable. He included a complaint of general harassment against Soles and Puffer. Nelson responded to Harmon's complaints against Soles and Puffer by saying that the allegations contained in his complaints did not constitute a violation of the policy on general harassment. Nelson told him: "General harassment does not include the negative effects that an employee may experience as the result of actions taken by a supervisor that are within the scope of the supervisor's responsibilities and are considered reasonable and appropriate actions."

On June 2, 2009, at a time when Medchill was on vacation, Soles sought to provide supervisory guidance to Harmon. According to Soles' testimony and a contemporaneous memorandum by Soles, Soles described to Harmon concerns that Soles had about Harmon's

behavior in a recent staff meeting in which Soles thought that Harmon was variously disengaged and overly forceful in the manner in which he disagreed with the views of co-workers. Harmon responded with sarcasm and comments that focused on whether Soles made English usage errors in his word choices rather than addressing the substance of Soles' suggestions on how Harmon might better interact with colleagues.

The accumulated concerns of Medchill and Puffer led Grandlienard and Allen to request OPH Program Director Barbara Stoltz to conduct an investigation of misconduct by Harmon. The focus of the investigation was three allegations: (1) Harmon's failure to meet expectations outlined in the December 2008 Letter of Expectations; (2) unprofessional conduct in a June 2, 2009 staff meeting; and (3) Harmon's lack of receptivity to professional supervisory feedback on job performance. Stoltz commenced her investigation on June 25, 2009. According to Stoltz's investigatory report, Harmon admitted that some of his e-mails to Puffer could be considered insubordinate, that he had not accomplished all of the tasks his supervisor had assigned to him, and that he has difficulty accepting feedback from supervisors. This investigation led to a verbal reprimand that was given to the Grievant on July 10, 2009.<sup>6</sup>

The Grievant received a third Performance Review with a rating of "Unsatisfactory" on August 24, 2009. Medchill, after listing Harmon's Letter of Expectations, supervisory conference and verbal reprimand, stated:

In spite of all these efforts there has been no change in Ted's attitude or approach to his position. He is unwilling to accept supervisor feedback or instruction but instead denies he has any of the performance issues and that the issue is that supervisors are targeting him. Ted continues to display unprofessional and disrespectful behavior and communication, especially when he is given feedback that he doesn't agree with. . . . Ted has been given a significant amount of coaching and ideas to improve his performance but has shown no willingness to follow through on these.

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<sup>6</sup> No grievance was filed to challenge the verbal reprimand.

Also on August 24, 2009, Medchill gave Harmon a revised Letter of Expectations. The letter restated expectations listed on the earlier Letter and also included two additional ones—that he was to “Communicate clinically relevant information to other staff in a professional way,” and that he would receive “Training on Axis II disorders and clinical approaches.” Puffer was present when Harmon received the performance evaluation and revised Letter of Expectations. Puffer documented, in a memorandum, Harmon’s responses at this meeting and affirmed in his testimony at the arbitration hearing the accuracy of the memorandum. Puffer reported that Harmon said that he didn’t want to listen to his supervisor’s explanation of the documents and instead wanted just to leave and review the documents and then “maybe” get back to his supervisors in “a couple of weeks.” When they did focus on the specifics of the evaluation and letter, Harmon kept asking for the meaning of words contained in the documents that he should, in his position, fully understand, such as “clinical skills” and “active listening.” For example, although stating he didn’t understand the meaning of “active listening” he said that he had taught such a skill to offenders.

On September 21, 2009, Medchill sent an e-mail to Puffer and Nelson reviewing Harmon’s performance issues since he received a verbal reprimand in July 2009; an attachment listed fourteen occurrences that Medchill considered problematic. Allen requested that Puffer conduct an investigation to determine whether the incidents listed in Medchill’s memorandum demonstrated that Harmon had failed to meet the expectations listed in his Letter of Expectations or failed to satisfy the responsibilities included in his position description. Puffer commenced his investigation on October 23, 2009. Puffer interviewed ten individuals. Harmon was accompanied by a Union representative when interviewed by Puffer. In his report, dated December 4, 2009, Puffer made findings on each of the fourteen incidents listed in Medchill’s

memorandum of September 21, concluding that each allegation was substantiated by the evidence obtained in the investigation.

By letter dated January 4, 2010, DOC Health Services Director Nanette Larson notified Harmon that he was being suspended for three days. Larson's letter stated the reasons for the suspension: (1) "hostile, sarcastic and disrespectful interactions with your peers and supervisors;" (2) repeatedly being "uncooperative and insubordinate with the Mental Health Unit management team;" and (3) "lack of cooperation with [his] supervisor's efforts at clinical supervision" with him.

In December 2009 and early January 2010, as Puffer's investigation was nearing its conclusion and his report was under review by officials at the DOC for possible disciplinary action, Medchill identified other incidents that concerned her about Harmon's work performance. Medchill identified what she perceived as an angry, hostile and sarcastic response by Harmon when she sought to question him about communication with an offender's father on December 3, 2009, as well as a refusal to answer questions in the absence of Union representation about communications with the offender's father. Medchill also believed that Harmon had been scheduled to work, but had failed to report for work over the weekend of December 12-13, 2009. Medchill also asserted that, on December 30, 2009, Harmon had refused a verbal directive from her to transfer Behavior Control Plan (BCP) notes he had made on Christmas Day to a three-ring binder maintained by the MHU for reference, stating that he would not follow any such directive unless it was put in writing. On the following day, Puffer verbally instructed Harmon to follow Medchill's directive from the day before regarding the BCP notes and Harmon again responded that he would not follow either directive in the absence of a

writing. Later, Harmon concluded that e-mails from Puffer constituted a written directive and Harmon then transferred the notes.

These new allegations led to two further investigations. Stoltz investigated the no-call/no-show allegation and the Grievant's responses to Medchill's inquiries about Harmon's communications with the offender's father. Mike Hermerding, a state program administrative manager, investigated the alleged refusal to transfer the BCP notes. The Grievant had Union representation when interviewed in these investigations.

Stoltz commenced her investigation on December 17, 2009, and submitted her report on January 11, 2010. The two allegations that she investigated concerned Harmon's absences on December 12 and 13, 2009, and the allegation that he had been unprofessional and insubordinate toward Medchill on December 3, 2009. Stoltz interviewed Medchill, Harmon, and Soles (who had heard the exchange between Medchill and Harmon on December 3). Stoltz found the allegation that Harmon had been unprofessional and insubordinate on December 3 to be substantiated. With regard to the December 12-13 attendance issue, Stoltz initially concluded it was "partially substantiated." While she found that Harmon neither appeared for work nor called in regarding those dates, she also found that the schedule was inaccurate on other dates and that Medchill had signed a slip approving December 11th for Harmon as a vacation day which, on the schedule, appeared as a scheduled day off for him. (A person scheduled to work the weekend—December 12 and 13 were on a weekend—would typically take the preceding Friday as a scheduled day off.) Subsequent to her submission of the investigatory report on January 11th, Stoltz made further inquiries with regard to the attendance issue. On January 14, 2010, she submitted an addendum to her investigation report. In the addendum, she reported further information obtained from Medchill, including that schedules were posted initially about six

months in advance and that final schedules are posted two weeks in advance, that no changes were made in the schedule for December 12-13, and that Harmon had not disputed that December 11th was treated for him as a day off, rather than a vacation day on his payroll records. Stoltz's addendum made these further statements of facts, but did not suggest any amendment of her earlier finding that the allegation regarding the no-call/no-show was "partially substantiated."

Hermerding conducted an investigation of the allegation that Harmon had refused to comply with verbal directives from Medchill and Puffer to transfer temporary BCP notes to a permanent file. His investigation commenced on January 4, 2010. In the investigation, Harmon admitted that he had refused to comply with the directives from his two supervisors. Harmon nevertheless maintained that he acted appropriately in refusing the verbal directive because in a memorandum to him on December 14, 2009, Medchill had directed Harmon to submit to her documentation for offenders' files and only put entries into the BCP log without approval of a supervisor "on weekends where no supervisor is present." In his January 19, 2010, report, Hermerding concluded that the allegations that Harmon was insubordinate in refusing directives from Medchill and Puffer to enter notes in the BCP binder were sustained.

By letter dated February 10, 2010, Nanette M. Larson, the DOC Director of Health Services, notified Harmon that he was being suspended without pay for five days. The letter referred to the Stoltz and Hermerding investigations as having found that Harmon had "engaged in unprofessional and insubordinate behavior and specifically that he had failed to follow the directives of Medchill and Puffer. It also stated that he had failed to show up or call at a time he was scheduled to work. The letter said that it constituted a "last chance" for Harmon to correct his behavior and retain his employment. It specifically advised Harmon that any further

violation of DOC policies, failure to fulfill his position description, or failure to behave in a professional and respectful manner could result in his termination.

On March 6, 2010, shortly after Harmon returned to work after serving the five-day suspension, he was asked to meet with Puffer and Allen. In the meeting, Allen told Harmon that this was now Harmon's "last chance" to improve his performance. Allen told Harmon that continuation of the sort of conduct that had led to Harmon's recent discipline (including insubordination, or being argumentative, sarcastic or intimidating) would lead to his termination. Both Puffer and Allen described Harmon's conduct in the brief meeting as argumentative, sarcastic and disrespectful. On March 26, 2010, Mike Hermerding submitted an investigatory report of the March 6, 2010 meeting, in which he concluded that Harmon had been sarcastic and disrespectful in the meeting.<sup>7</sup> The DOC's Work Incident Review Committee, which serves as an advisory committee to Larson, recommended termination of Harmon's employment as a result of review of Harmon's employment record and Hermerding's report on the March 6 meeting.

In fact, however, another incident occurred on March 26, 2010, that directly led to the Grievant's termination. Medchill e-mailed Harmon to schedule a meeting, stating that its purpose was "supervision" (to discuss Harmon's cases) and invited Puffer to the meeting. Harmon e-mailed Medchill, prior to the meeting, saying: "I am insisting on union representation for any meeting with any supervisor or manager." Harmon appeared at the meeting with Medchill and Puffer, but rather than participating in a discussion of his cases, Harmon instead repeatedly read from a prepared statement of employees' *Weingarten* rights.<sup>8</sup> Puffer told

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<sup>7</sup> Hermerding wrote in his report that when he questioned Harmon, with a Union representative present, about what had occurred during the meeting with Allen and Puffer, his responses did not contradict the reports of Allen and Puffer, but instead Harmon reported the dialogue similarly to their accounts, or said that he did not recall.

<sup>8</sup> In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the U.S. Supreme Court, interpreting the National Labor Relations Act, held that an employer interferes with the protected rights of an employee represented by a union if it refuses to permit the employee to have a union representative present when the employer conducts an investigatory

Harmon that this was not a disciplinary meeting but rather a clinical supervisory meeting for the purpose of reviewing Harmon's cases. Harmon proceeded to read the statement of *Weingarten* rights three more times and to state that he would not answer any questions from his supervisors in the absence of Union representation. In the face of Harmon's refusal, the supervisors ended the meeting. Puffer sent an e-mail to Larson, Nelson and Allen reporting on the meeting in which Harmon had refused to respond to any questions from his supervisors. Shortly after receiving the e-mail message, Larson decided to terminate Harmon's employment because she concluded that it would be unlawful for an unlicensed therapist to provide therapeutic services in the absence of direct clinical supervision by a licensed professional. In her March 29, 2010, letter to Harmon notifying him of his termination, effective that day, Larson stated the basis of the termination:

This action is being taken because of your ongoing failure to comply with Department of Corrections Policy 103.220 Personal Conduct of Employees and failures to meet the letters of expectation provided to you as well as key expectations in your position description. These violations are represented in your refusal to respond to direct supervision, and a persistent pattern of disrespectful and unprofessional behavior.

On March 26, 2010 you met with your direct supervisor Diane Medchill, LICSW and Psychological Services Director, Peter Puffer, MA, LP for clinical supervision - an expectation of your position. This was not a formal investigation. You refused to cooperate with any attempts to engage you in the supervision process or any discussion [whatsoever].

Your ongoing refusal to recognize and engage direct clinical supervision as required for the performance of duties outlined in your position description significantly compromises the care and treatment of offenders under the care of the Department of Corrections and can no longer be tolerated.

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interview with the employee about circumstances that might lead to the employees' discipline. Although the employment rights of government employees, including those of the DOC, are not governed by the National Labor Relations Act, the Department of Employee Relations of the State of Minnesota has directed state agencies to grant *Weingarten* rights to their union-represented employees. (Memorandum from Paul Larson, April 8, 2003, Employer Exhibit 19, at p. 7) A guarantee of *Weingarten* rights also appears in Article 8, Section 2, of the parties' collective bargaining agreement. Larson's memorandum includes the following sentence: "Furthermore, neither the contracts nor Weingarten provide an employee with a right to representation during the presentation of discipline, during a supervisory conference, or during a performance review."

## CONTENTIONS OF THE PARTIES

### Position of the Employer

The Employer contends that it had just cause for all of its disciplinary actions. It maintains that it had just cause to issue a three-day suspension to the Grievant because he received clear notice of the Employer's expectations for his performance, a fair investigation provided sufficient proof of his misconduct, the level of discipline was appropriate, and the discipline imposed was not inconsistent with the Employer's treatment of other employees. The Employer asserts that it had just cause to suspend the Grievant for five days because he engaged in multiple acts of misconduct including unprofessional, insubordinate and disrespectful conduct; failure to report for work as scheduled; and a deliberate refusal to comply with directives from his supervisors. It contends that the misconduct that gave rise to the suspension was documented in a fair and thorough investigation. The Employer asserts that it had just cause to terminate the Grievant's employment because he refused to participate in any clinical supervisory meetings, which are both a legal necessity and a requirement of his position description. It argues that the Grievant was afforded Union representation in all investigatory meetings. It maintains that all of its disciplinary sanctions were responses to the Grievant's misconduct and were not retaliation for the Grievant's expressed concerns about safety issues in the MHU.

### Position of the Union

The Union contends that the Employer lacked just cause for each of its disciplinary sanctions of the Grievant. With regard to the three-day suspension, the Union maintains that the Employer failed to use progressive discipline, that its investigation was fundamentally flawed, and that its allegations against Harmon lacked merit. It asserts that the five-day suspension lacked just cause because of a failure to afford progressive discipline, in particular, that the

alleged conduct giving rise to the five-day suspension occurred before the three-day suspension was issued. The Union maintains that the allegation of insubordinate conduct was not sustained because the Employer failed to conduct a thorough investigation. It argues that Harmon was not insubordinate in response to directives from Medchill and Puffer regarding BCP entries. With regard to the no-call/no-show allegation, the Union contends that the Grievant reasonably believed that he was not scheduled to work on those days, that other employees were not disciplined for similar conduct, and that his discipline was retaliatory for his invocation of *Weingarten* rights. Finally, the Union contends that there was no just cause for the Grievant's termination as, under the circumstances, a request for respect of *Weingarten* rights was appropriate as he believed the purpose of the meeting was investigatory and would lead to discipline. Moreover, the Union contends that the Employer's failure to conduct any investigation of the incident prior to making the discharge decision was a violation of due process. More broadly, the Union maintains that the Grievant's poor performance evaluations and his disciplinary sanctions were imposed by the Employer in retaliation for the Grievant's voicing of concerns about workplace safety.

### **DISCUSSION AND ANALYSIS**

The parties' Labor Agreement permits the Employer to discipline an employee "only for just cause." In this arbitration proceeding, the Employer bears the burden of persuasion to demonstrate that it had just cause for imposition of three disciplinary sanctions—a three-day suspension, a five-day suspension, and its termination of the Grievant's employment.

#### **Three-Day Suspension**

Larson issued the Grievant a three-day suspension on January 4, 2010. The letter notifying Harmon of the suspension identified the reasons for which it was imposed as: (1)

hostile, sarcastic and disrespectful interactions with peers and supervisors, (2) repeatedly being “uncooperative and insubordinate with the Mental Health Unit management team,” and (3) failing to cooperate with his supervisor’s efforts to supervise his clinical work. The Union challenges the three-day suspension on the grounds that the Employer’s allegations against Harmon lacked merit, that its investigation was fundamentally flawed and that its imposition was not consistent with progressive discipline.

The three-day suspension was based on the results of an investigation of Medchill’s fourteen allegations of misconduct by the Grievant. It is not necessary in order to assess whether the employer had just cause for the three-day suspension to address here the merits of each of the fourteen allegations. The relevant question is whether the employer, at the arbitration hearing, showed by a preponderance of the evidence that the Grievant engaged in conduct or omissions that demonstrated the factual accuracy of the specific grounds for discipline listed in the disciplinary letter. Several of Medchill’s allegations, which were substantiated by the investigation and by testimony at the arbitration hearing, supported the conclusion that the Grievant had been hostile, sarcastic and disrespectful in interactions with peers and supervisors. With regard to the tone of interactions, for example, CPT Patrick Hoel said that in a staff meeting in which both he and Harmon were questioned about their failure to read meeting notes after missing a meeting, Harmon’s response was excessively loud, argumentative and sarcastic and made Hoel feel uncomfortable. In another example, in the course of the investigation, Puffer asked Harmon if he recalled previously seeing a memo from Puffer and his response to supervisor Puffer was, “I do remember that . . . yeah, the typos.” In another circumstance, when Stillwater CPT Kara Richter asked Harmon about the reasons why an offender was to be released to Stillwater rather than to Rush City, the institution from which he had been transferred to OPH,

Harmon told her that that his supervisor's decision was "kinda bogus" and "political," even though the decision was based on the inmate's allegations that he had been sexually assaulted at Rush City.

The investigation and testimony at the hearing also provided evidentiary support for the statement in the letter imposing the three-day suspension in part for conduct considered insubordinate and uncooperative. For example, on August 13, 2009, Medchill e-mailed Harmon with an explicit directive that he contact Rush City by the end of the day to tell persons there that the offender would be going to Stillwater rather than returning. Rather than complying immediately, which could have been satisfied simply by an e-mail to Rush City, Harmon on August 16, 2009, drafted and sent a six-page e-mail to Medchill offering excuses for why he didn't notify Rush City as requested. He didn't actually convey the information to Rush City until August 18th. In another instance of insubordination, when Medchill directed Harmon to read and then discuss with her educational materials on effective listening skills, Harmon refused to comply, saying that the materials, which were general purpose resources on communication skills, were "treatment material" and that he refused to be treated by his employer. The evidence also supported the suspension letter's assertion that Harmon was uncooperative. He did not follow policy requirements including those to read the minutes of staff meetings that he had not attended, and to preface the names of offenders in written reports with the term "Mr."

The third basis for the three-day suspension was that the Grievant failed to cooperate with Medchill's efforts to supervise his clinical work. The evidence showed that in two incidents Harmon failed to report promptly to Medchill about events that were of critical importance to the psychological status of an inmate assigned to Harmon. The inmate had a terminal degenerative neurological disease. Harmon did not provide timely notification to Medchill that a conference

was being held with a psychologist and the OPH Director of Nursing about the diagnosis so that the professionals could coordinate their provision of services. Nor did he report back to her promptly after the inmate received the diagnosis, even though Medchill was extremely anxious how the inmate would respond in light of the inmate's suicidal history.

I therefore find, contrary to the Union's assertion, that there was evidence supporting the factual accuracy of the three types of misconduct listed in the three-day suspension letter as reasons for the discipline. The Union, however, also claims in this proceeding that the employer's investigation was fundamentally flawed and that the discipline lacked just cause because of the absence of progressive discipline.

The Union asserts that the investigation that led to the three-day suspension was fundamentally flawed because it was conducted by Puffer. The Union claims that Puffer was biased because one of Medchill's listed items related to comments the Grievant made about Puffer and because Puffer had been present at a supervisory meeting between Medchill and Harmon at which performance expectations had been discussed. Evidence about the Grievant's comments regarding Puffer did not originate with Puffer but rather came to his attention by a communication from a court psychologist to whom Harmon made the comments. The psychologist said that Harmon's negative comments to her about Puffer had made her uncomfortable. Neither in the investigation nor in the arbitration hearing did Harmon deny making the comments and the psychologist affirmed the accuracy of Puffer's report of what Harmon had said to her. There is thus no indication that the fact that the comments concerned Puffer in any way affected the accuracy of his reporting of the evidence concerning the conversation between Harmon and the psychologist. With regard to Puffer's having been present at a supervisory meeting regarding performance expectations, the Union does not explain why

his presence at the meeting did, or could have, biased his investigation. I therefore find no merit to the assertion that there was any violation of due process that tainted the Employer's understanding of the factual claims that gave rise to the three-day suspension.

With regard to the matter of progressive discipline, the Union asserts that the Employer was obliged to issue a written warning to Harmon rather than moving directly from a verbal reprimand to a suspension. The parties' Labor Agreement, however, explicitly does not require that the steps of progressive discipline outlined in Article 8, Section 3, be applied in a fixed order. Rather the section says that "[d]iscipline includes" the enumerated steps, but they need "not necessarily" be applied in the order listed.

Overall, therefore, I find that the Employer had just cause to issue the three-day suspension to the Grievant.

#### **Five-Day Suspension**

The Employer's February 10, 2010, letter to the Grievant imposing the five-day suspension stated that it was based on the results of the Stoltz and Hermerding investigations which, it asserted, supported three findings of misconduct: unprofessional and insubordinate behavior (regarding an incident on December 3, 2009, in Medchill's office); a no-call/no-show for December 12 and December 13, 2009; and refusal to follow directives of Medchill and Puffer to transfer Christmas Day BCP notes to a binder of inmate records. The Union contends in this proceeding that the Employer lacked just cause for issuance of the five-day suspension for several reasons—that the Employer's investigation with regard to the December 3, 2009, incident was insufficiently thorough; that the refusal to transfer the BCP notes was justified and thus not insubordinate; that he should not be disciplined for failing to report for work because he reasonably believed he was not scheduled to work on December 12-13; that imposition of the

discipline for the no-call/no-show was not consistent with discipline imposed on other employees for similar conduct; and that the discipline was imposed in retaliation for his invocation of *Weingarten* rights. Apart from its objections to the imposition of discipline for each of the Employer's three allegations of misconduct, the Union maintains that the five-day suspension lacked just cause because all of the incidents on which it was based occurred before the Grievant received his three-day suspension and were, it argues, thus inconsistent with the principle of progressive discipline.

The first question then, is whether evidence at the hearing supported the three findings of misconduct that formed the basis of the five-day suspension. The first finding pertained to the Grievant's conduct at a meeting in Medchill's office on December 3, 2009. Medchill testified that she asked to meet with Harmon on December 3 to discuss some concerns raised by an inmate's father about Harmon's communications with the father. Medchill said that when she asked Harmon about the specifics of what he had said to the father and told Harmon that he could not preclude the father from also communicating directly with Medchill, Harmon became angry and sarcastic. She said that Harmon was yelling and pointing at her and making her feel very uncomfortable. Following this meeting, Medchill decided that she would not thereafter conduct supervisory meetings with Harmon by herself but would instead make sure that Puffer could also be present. Soles testified that he overheard the conversation and that it got his attention, from the distance of his office, because Harmon was excessively loud and aggressive. Soles told the investigator that Harmon's conduct was so hostile that he considered leaving his office to intervene, but decided against it because Harmon had previously responded negatively to Soles' supervisory direction. In the investigation, after Stoltz reminded Harmon of the subject matter of the discussion on December 3 (about communication with the father of an

inmate), Harmon said that he had not been angry or upset in that meeting. He also testified at the hearing that he had conducted himself professionally in the meeting.

In the course of the investigation of the December 3 incident, Harmon told Stoltz that a co-worker, Cynthia Caserez, might have been nearby and overheard the conversation. Stoltz testified at the hearing that she made further inquiries and learned that Caserez had not been in the area at the time. When asked at the hearing about whether Caserez might have overheard the conversation, Harmon said he didn't know if she was in her office at the time of his conversation with Medchill on December 3.

I find, by a preponderance of the evidence, that Harmon behaved in the December 3 conversation as reported by Medchill and Soles. Harmon's recollection of the incident was vague, while those of Medchill and Soles were detailed and documented contemporaneously. The assessment that Harmon's conduct was unreasonably confrontational is also supported by the fact that, following the incident, Medchill decided never thereafter to conduct supervisory meetings with Harmon unless her own supervisor, Puffer, was also present. Harmon's perception of his general communication style as professional in tone was at odds with the consistent testimony of all of his co-workers on that question. CPT Kristin Muhl testified that in meetings Harmon was negatively sarcastic and disrespectful to the point of making her feel uncomfortable. CPT Jessica Parker said that Harmon was argumentative, aggressive, condescending, mocking, and emotionally intense—making it uncomfortable for the rest of the group. CPT Patrick Hoel said that Harmon in meetings could be loud, angry and sarcastic and made Hoel feel uncomfortable. While this testimony of co-workers did not concern the specific events of December 3, their consistent testimony contributed to the assessment that Medchill's and Soles' perceptions of Harmon's conduct on December 3 were more likely accurate than

Harmon's assessment of his own conduct. I also find unpersuasive the Union's assertion that Stoltz's investigation of the incident was incomplete for failing to question Caserez. Stoltz had inquired and learned that Caserez was not present in the office at the time. At the hearing, Harmon offered no evidence that Caserez was present, he testified that he did not know whether she was present, and he did not seek to call her as a witness.

The second assertion of misconduct that formed the basis of the five-day suspension was that Harmon was assigned to work on December 12 and 13, 2009, and that he neither reported for work nor telephoned to let supervisors know that he would be unable to come to work. Medchill testified that in order for employees to plan their personal activities, employees are assigned to weekend shifts years in advance. No changes are made in weekend assignments unless the employees agree to a trade of shifts, in which case the schedule is corrected. The schedule for December 12 and 13 indicated that Harmon was assigned to work on both of those days. There is no dispute that Harmon neither worked those days, nor notified supervisors that he was unable to work on those days. At the hearing, Harmon testified that he had not reported for work because he did not believe he was scheduled to work on those days. In the investigation of this incident, Harmon said that the schedule must have been changed without his knowledge. However, an assignment to work on a weekend would not be changed except for a trade of shifts, so there could not have been a change in the schedule without his knowledge and assent. The standard procedure when an employee will be working on the weekend is that the employee is not scheduled to work on the Friday immediately preceding the weekend work. On Medchill's calendar for that week, Harmon is listed as the weekend CPT and the calendar for Friday, December 11 includes the notation "Ted off." Similarly, on the calendar for all the MHU staff, Harmon is listed as not scheduled to work on December 11. Nevertheless, on November

16, 2009, Harmon signed a request to Medchill that he be able to take a vacation day on Friday, December 11. On November 30, 2009, Medchill signed Harmon's request form, indicating approval for his taking a vacation day on December 11. When she signed the approval, Medchill apparently did not check the schedule to notice that Harmon had not been assigned to work on December 11. Medchill told Stoltz in the investigation that it was her practice to sign vacation request slips regardless of the schedule. None of the witnesses contradicted Medchill's testimony that employees were responsible for knowing their own schedules. I therefore find that Harmon was assigned to work on December 12 and 13, that the schedule was not changed prior to that date, and that he did not work on those days or notify supervisors that he was unable to work on those days.<sup>9</sup>

When Medchill realized, on Monday, December 14, that Harmon had not worked on the previous weekend, she sent him an e-mail that said in relevant part: "You were scheduled to work this weekend and didn't show up or follow-up procedures for calling in. I need an explanation of this also. I expect a response by the end of the day." Harmon's e-mail response said only the following:

If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working condition, I respectfully request that my union steward, representative, or officer be present at the discussion. Without representation, I choose not to answer any questions. These are my rights under a Supreme Court decision called "Weingarten."

The Union contends that, even if Harmon did not report or call, the Employer lacked just cause to discipline him for a no-call/no-show because other employees who had done the same thing were not disciplined and because the disciplinary sanction was retaliatory for his assertion

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<sup>9</sup> That Harmon, at least in retrospect, understood that he had been scheduled to work on December 12-13 is suggested by the fact that he did not challenge the payroll records that treated December 11 for him as a day on which he was not scheduled to work, rather than a vacation day.

of *Weingarten* rights. With regard to whether other employees were disciplined for instances of no-call/no-show, Harmon testified that he was aware of one or more instances in which an employee had failed to report for work on a weekend. He acknowledged that in those instances the employee had apologized, explained that the weekend assignment had been forgotten, and received counseling rather than discipline. It is not therefore accurate to say that Harmon was similarly situated to employees who were guilty of a no-call/no-show violation because, unlike them, Harmon did not explain the reason for his absence or accept responsibility for it. When Medchill asked him to inform her of the reason for his absence on December 13 and 14, he refused to respond. The issuance of discipline to Harmon for the no-call/no-show incident was therefore not disparate treatment. Nor was it retaliatory for Harmon's assertion that *Weingarten* permitted him to refuse to respond. Harmon was disciplined for not responding to his supervisor and not acknowledging his responsibility to be aware of his work schedule. The assertion of *Weingarten* rights was no excuse for refusing to respond as *Weingarten* applies to circumstances in which management is questioning an employee in the course of an investigatory interview that may lead to discipline. Even assuming that one could have reasonably believed that a request for an explanation of an absence could itself lead to disciplinary action, this request did not occur in the course of a face-to-face investigatory interview where *Weingarten* could arguably be applicable. The U.S. Supreme Court in *Weingarten* recognized the right of representation in an in-person investigatory interview because the context created a legitimate concern for employee anxiety or intimidation interfering with fact-finding. No such concern arises in this case where Medchill's request for an explanation was contained in an e-mail message seeking a response by the end of the day. If Harmon felt a need to consult with a Union representative before responding, there was no reason suggested why he could not have done that and still answered

the e-mail in the time frame requested by Medchill. Invocation of *Weingarten* rights did not make Harmon's no-call/no-show and his refusal to respond to his supervisor's reasonable e-mail inquiry any less appropriate grounds for imposition of discipline. Discipline imposed for the unexplained no-call/no-show was thus not retaliatory for any legitimate assertion of employee rights.

The third basis for imposition of the five-day suspension was the Employer's assertion that Harmon was insubordinate in refusing to enter BCP notes in a binder despite being directed to do so by both Medchill and Puffer, the incident that was the subject of the Hermerding investigation. In an effort to provide further direction to Harmon to assure that his casework was adequately supervised, on December 14, 2009, Medchill provided Harmon with a memorandum entitled, "Outline and Structure for Supervision." The memorandum included, as Paragraph 1, the following: "As of this date, you are to submit to me (or my designee\*) for signature, any and all documentation authored by you and placed in any offender's mental health file/chart. The only exception to this relates to entries made in the daily BCP log on weekends where no supervisor is available."<sup>10</sup> Harmon worked on Christmas Day of 2009, a holiday when, like weekends, no supervisor was on duty. On the holiday, Harmon had made temporary notes regarding inmates' behavior control plans (BCP), but hadn't entered the notes into the inmates' permanent charts. Instead, on December 28, Harmon submitted the notes to Medchill. Medchill, on December 30 returned the notes to Harmon and told him to enter the notes into the permanent charts without her signature. Harmon responded that under the terms of the memo (of December 14) he needed her signature before he could do so. Medchill said that entry of notes from a holiday was within the signature exception noted in the memorandum (weekends when no

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<sup>10</sup> The asterisk in the memorandum referred to the following note: "Designee will follow [your] chain of command unless otherwise defined: Diane Medchill, Tom Soles, Peter Puffer."

supervisor was present) and that Harmon needed to complete the task by the end of the day. Harmon continued to refuse to enter the notes, telling Medchill that he would not comply unless she put the directive in writing. Harmon also wrote an e-mail to Medchill, copied to Puffer, reiterating that Harmon would not follow Medchill's directive to transfer the notes unless she put it in writing. Puffer responded to Harmon's e-mail on December 31, advising Harmon that his refusal to follow Medchill's directive was insubordinate and said: "You are to complete these entries as directed." Later in the morning, after sending the e-mail, Puffer saw Harmon at Harmon's workstation. Harmon told Puffer that he had not entered the notes and that he would not do so in the absence of a written directive. Puffer then directed Harmon immediately to enter the notes. Harmon again refused to comply with the directive in the absence of a writing. Harmon did finally transfer the notes in the afternoon on December 31 after he decided that Puffer's earlier e-mail constituted a written directive.

The Union contends that Harmon was not insubordinate because he did not refuse to enter the notes; that he only refused to enter them in the absence of a written directive. It argues that he was justified in insisting on a written order because there had been previous disagreements between him and his supervisors regarding their expectations. A refusal to comply with a supervisory directive, so long as it is lawful and does not risk the safety of oneself or others, is insubordination, whether the directive is verbal or written. It is irrelevant that Harmon perceived a conflict between the verbal directive and the previous memorandum. Medchill was the author of the memorandum and was certainly a more authoritative interpreter of its meaning. But more important, even if the two conflicted, it was Harmon's obligation to abide by the more recent directive—in this case, the order to enter the notes. Mike Hermerding, who had worked for the DOC for 38 years, testified that it was departmental policy that,

regardless of whether supervisory directives are oral or written, employees are to follow a supervisor's most recent order. Andy Lieffort, a Union representative who had worked for the DOC for 22 years, agreed with Hermerding's testimony that it is DOC policy for employees to abide by a supervisor's last order regardless of whether the orders involved are oral or written. I therefore conclude that Harmon had no legitimate basis for refusing the directives of Medchill and Puffer so that his refusal to enter BCP notes constituted insubordination.

The final objection raised by the Union is that, apart from the merits of its challenges to the individual grounds for the five-day suspension, the discipline lacked just cause because it was not consistent with progressive discipline. The Union's argument is that imposition of the five-day suspension was not progressive because Harmon had no opportunity to correct his behavior following issuance of the three-day suspension. More specifically, the five-day suspension was based on conduct that occurred on December 3, December 13-14, and December 30-31, while the three-day suspension was not issued until January 4, 2010.

First of all, as previously noted, Article 8, Section 3 of the parties' Labor Agreement, explicitly permits the imposition of disciplinary sanctions in any order. It says that "[d]iscipline includes" the enumerated steps, but that they need "not necessarily" be applied in the order listed. Moreover, if the Union's argument were true, an employee issued a preliminary level of discipline would be able to engage in continued misconduct with impunity so long as the new misconduct occurred sufficiently close in time to the issuance of the initial discipline. In any case, if the purpose of progressive discipline is to give employees notice of conduct that an employer finds problematic and in need of correction, and an opportunity in which to attempt such correction, the Grievant had such notice and opportunity. The three-day discipline was based on Puffer's investigation of fourteen allegations of acts or omissions by Harmon. On

November 2, 2009, Puffer discussed each of the fourteen allegations in a meeting with Harmon and his Union representative. Thus Harmon had several months of opportunity to attempt to match his conduct to his supervisors' expectations, but there is no indication that he sought to do so.

### **Termination**

Although the DOC's Work Incident Review Committee recommended to DOC Health Services Director Larson that Harmon's employment be terminated on the basis of his employment record and his conduct at a March 6, 2010 meeting with Allen and Puffer, the March 6 meeting was not ultimately a basis for Harmon's termination. In Larson's letter of March 29, 2010, advising Harmon of his termination, the basis stated was his "refusal to respond to direct supervision, and a persistent pattern of disrespectful and unprofessional behavior." The letter specifically listed as the basis for the finding of such refusal Harmon's unwillingness to participate in clinical supervision with Medchill and Puffer on March 26, 2010. As described in the previous chronology, on that date, when Harmon appeared for a scheduled meeting with his supervisors for clinical supervision to discuss his cases Harmon refused to answer any of his supervisors' questions and instead merely read four times from a prepared statement of *Weingarten* rights. As Harmon was not a licensed therapist who could provide psychological therapy independently, and as he was refusing to participate in clinical supervision that was legally required for him to provide any therapeutic services, Larson decided to terminate his employment immediately.

The Union contends that the Employer lacked just cause to terminate the Grievant's employment on the basis of the March 26 meeting because the only thing he did during the meeting was to request Union representation. The Union's argument, however, neglects to note

that the Grievant was not terminated for what he did, but for what he refused to do—he refused to participate in the clinical supervision required for him to serve as a therapist. It is true that refusal to participate, in the absence of union representation, in an investigatory interview reasonably anticipated as possibly to result in employee discipline does not provide just cause for discipline. The meeting on March 26, however, was not an investigatory interview. Puffer and Medchill were not there to ask Harmon about identified prior allegations of misconduct. They had notified Harmon in advance, by e-mail, that the purpose of the meeting was clinical supervision. They were there to carry out the ordinary requirements of the legally-mandated relationship between a licensed clinical supervisor and an unlicensed therapist—reviewing the cases handled by the unlicensed therapist. Instead of participating in that supervisory conference, Harmon told his supervisors, “Without representation, I choose not to answer any question.” Under the circumstances, Harmon could not have a reasonable belief that the meeting was investigatory. He was aware of, and indeed had forwarded to his supervisors, Paul Larson’s memorandum on behalf of the Department of Employee Relations stating, “Furthermore, neither the [collective bargaining agreements] nor Weingarten provide an employee with a right to representation during the presentation of discipline, during a supervisory conference or during a performance review.” The distinction between a supervisory meeting and an investigatory meeting had also been articulated to Harmon in a letter to him dated March 9, 2008 from Associate Warden Granlienard and DOC Director of Behavioral Health Services, Steve Allen. That letter had included the following: “Finally, you report that you were denied Association representation during a supervision meeting. You are not entitled to Association representation in meetings that are non-disciplinary in nature.” In his testimony at the hearing, Union representative Andy Lieffort acknowledged that an employee does not have the right to Union

representation when engaged in a routine supervisory meeting or when discussing performance with a supervisor. When Harmon was asked at the arbitration hearing if Lieffort had ever instructed him that he had no right to Union representation at supervisory meetings, Harmon responded, "I do not recall." As there was no arguable right to Union representation in the supervisory meeting on March 26, and Harmon was on notice that there was no such right, Harmon's complete refusal to submit to clinical supervision necessary for him to perform his job provided just cause for his termination. The fact that the Employer did not conduct an investigation of the events of March 26 did not render the decision lacking in due process because there was no dispute about what had occurred at the meeting and what occurred at the meeting rendered the Employer unable to retain Harmon in his position.

**The Allegation of Employer Retaliation for the Expression of Safety Concerns**

In addition to the variety of arguments that the Union makes to challenge the validity of the substance of each of the Employer's disciplinary sanctions, the Union more broadly maintains that the Employer's negative performance evaluations and disciplinary sanctions were the result of Employer retaliation against the Grievant for his repeated expressions of concern about inadequate workplace safety protection. As the record makes abundantly clear, Harmon believed that the Employer's policies and practices were not sufficiently reducing the risk of inmates assaulting staff members, and he repeatedly, over a period of months, brought his concerns about workplace safety to the attention of his co-workers, his supervisors, and to higher officials at OPH and, above them, within the DOC.

The Union, however, presented no evidence in the arbitration proceeding to draw any connection between Harmon's expression of safety concerns and his discipline. As noted above, for each disciplinary sanction imposed, the Employer articulated a performance-based reason for

the discipline and the evidence at the hearing demonstrated the factual basis for each assertion of a performance deficiency. The Grievant's non-certification at Lino Lakes for similar performance issues further supports a conclusion that the performance issues identified by supervisors at OPH were the true reasons for the Grievant's discipline at OPH. The Grievant's articulation of safety concerns started early in his time at OPH, in his probationary period. If the Employer had actually sought to retaliate against him for his expression of safety concerns, it could have denied him certification in the new position as a CPT, without recourse, but it did not do so.

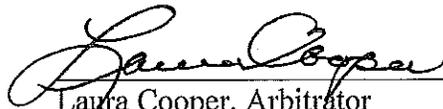
Other evidence presented at the hearing also supported the conclusion that the Employer's disciplinary sanctions were not retaliatory. The evidence indicated that the policies and practices of the MHU were designed to maximize workplace safety to the extent possible, consistent with the mandated provision of a therapeutic environment for inmates with serious and persistent mental health conditions. Safety was a frequent topic of discussion in staff meetings. There was no evidence that any employee in the MHU or at OPH had ever previously been disciplined for the expression of concerns about safety. CPT co-worker Jessica Parker testified that supervisors welcomed open communication, and that she would sometimes disagree with supervisors, but that she was never reprimanded for such disagreements. CPT Patrick Hoel testified that he had personally voiced concerns about safety in the MHU, and had never been discouraged from doing so or disciplined for it.

I therefore find no evidence in the record to support a finding that the Employer's discipline of the Grievant was retaliatory for his expression of concerns about workplace safety.

**ORDER**

On the basis of the entire record and the foregoing discussion and analysis, I find that the Employer had just cause to suspend the Grievant, Theodore Harmon, for three days; just cause to suspend him for five days; and just cause to terminate his employment. The grievances are denied.

Issued and ordered this fourteenth day of May, 2012, in Minneapolis, Minnesota.

  
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Laura Cooper, Arbitrator