IN RE ARBITRATION BETWEEN:

MINNESOTA ASSOCIATION OF PROFESSIONAL EMPLOYEES, MAPE

and

STATE OF MINNESOTA – CENTURY COLLEGE

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

May 23, 2012

IN RE ARBITRATION BETWEEN:

MAPE,

and

Century College, State of Minnesota.

DECISION AND AWARD OF ARBITRATOR
Larry Sheehan grievance matter

APPEARANCES:

FOR THE ASSOCIATION:

Rich Ransom, Business Representative
Larry Sheehan, grievant
Greg Zimmerman, Steward

FOR THE STATE

Jodean Thronson, DOER Labor Relations Principal
Bonnie Meyers, Supervisor
Tricia Wyman, Faculty member
Todd Oseby, Supervisor

PRELIMINARY STATEMENT

The hearing was held on March 6 and 7, 2012 in the BMS offices in St. Paul. Post-hearing Briefs were submitted on April 24, 2012 and the record closed at that time. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

The Parties agreed on the issues to be determined as follows:

Did the employer have just cause to suspend the grievant for 2 days under Article 8 of the Agreement between the parties? If not, what is the appropriate remedy?

Did the employer have just cause to discharge the grievant under Article 8 of the Agreement between the parties? If not, what is the appropriate remedy?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2009 through June 30, 2011. Article 9 provides for submission of disputes to binding arbitration.

STATE'S POSITION:

The State's position was that there was just cause for both the suspension and the discharge. In support of this position the State made the following contentions:

1. The State noted that the grievant has a short tenure with the College, having been hired in May 2007 and in that relatively short time demonstrated severe deficiencies in his work performance and attitude toward co-workers and supervisors alike. His position was that of a Buyer 2 at the College's business office. His duties included creating contracts, negotiating prices for contracts and awarding those contracts. He was responsible for making sure that the appraise funds were encumbered to cover these contracts and that all details of them were accurate and correct. See Joint Exhibit 4. The State alleged that he failed in many ways, including the failure to pay attention to important details of the contracts, failure to process them in a timely fashion and a frustrating lack of accountability for his actions when his mistakes were shown to him.

2. The State's witnesses asserted that the grievant would demonstrate sometimes childish behavior, such as literally turning to face the wall when in meetings with his supervisor, blaming others and even lying to cover up his errors.

3. The State also noted that the grievant received multiple coachings and counseling sessions regarding his lack of accuracy, timeliness and attendance and eventually received a letter of expectation regarding these deficiencies. See Association Exhibit 7. He also received a formal written reprimand due to his continued failure to follow the directives of his supervisors and his continued failure to simply get along with supervisory staff. See State Exhibit 6. That letter outlined a number of instances of the grievant leaving early, coming late, failure to follow the specific directives of his supervisor and poor work performance.

4. The State alleged that when his supervisor began holding him accountable for lateness of work and attendance problems in 2008 by giving him a letter of expectation in August, and a letter of reprimand in October 2008, the grievant not only did not conform his behavior to the standards expected of him he filed a sexual harassment complaint against his supervisor, Ms. Reese Urban. The State noted that the harassment complaints was fully investigated and dismissed as unsubstantiated. See Association Exhibit 4.

5. Further, the complaint was filed a year after the alleged misconduct in question and followed closely on the heels of the letters referenced above. The State asserted that the harassment compliant was false and that the sole reason for filing it was to divert attention from the problems he was having with his attendance, attitude and work performance.

6. In response to the ongoing difficulties and inability to get along with his supervisor, the grievant was placed under the supervision of Ms. Meyers in June 2009. Even though there was a change of supervisors, the grievant's behavior and poor performance did not change. In fact, Ms. Meyers tried repeatedly to coach and counsel the grievant and spent hours trying to get him to communicate more effectively and to do his job – all of which was apparently in vain. See State exhibits 8, 10, 12, 15 and 16. The State further denied that there was any attempt by Ms. Reese Urban to "poison the well" or to get Ms. Meyers to continue to try to get the grievant fired and noted that there was no direct evidence of any such "conspiracy."

7. As evidence of the grievant's lack of moral compass, the State asserted that he attempted to bribe another State employee by giving her money to look up Ms. Reese Urban's sick leave usage. He was given another written reprimand for this behavior after a full investigation by Ms. Bryant. See State Exhibit 9.

8. Ms. Meyers became aware of a number of deficiencies in the grievant's performance in late spring of 2009 and began preparing yet another disciplinary notice. As she was investigating several instances she discovered four more deficiencies wherein the grievant had inaccuracies in contracts and his timesheets. While some of these were minor in amount, there could certainly have been a much greater discrepancy since it was obvious the grievant was not being careful to make sure the contracts were accurate. See State exhibit 11. His response to that letter suspending him was telling – he simply asserted that it was not his job to make sure the contracts were proofread; merely that the funds were encumbered correctly. See July 10, 2009 letter Association Exhibit 11.

9. The State asserted that this is simply an example of the grievant's failure to take responsibility for his actions and his defiant attitude toward what he has been told time and again – make sure the contracts are accurate. The State asserted that it matters not what he believes his job description is; what matters is what he was told by his supervisor and that his job was to perform his work as directed and file a grievance later. He is not entitled to ignore the clear directives of his supervisor and blame others for mistakes later.

10. The State alleged that there was ample cause for the 2-day suspension here given the grievant's long history of inaccuracies and other errors, untimely work, poor attitude and the history of coaching and counseling he received from his supervisor. Further, the notion that there was some sort of conspiracy between Ms. Meyers and Ms. Reese Urban is preposterous and without foundation.

11. The State asserted that his performance and attitude did not improve despite having been assigned a new supervisor and having been given the 2-day suspension. See Employer exhibits 12, 15 and 16 and testimony of Ms. Meyers. The State asserted that despite all these efforts between the time of the 2-day suspension and the summer of 2010, the grievant's performance did not improve appreciably and that while at times it would improve for a short time; overall it remained subpar. See Grievants' performance evaluations. State Exhibit 13.

12. The precipitating factor that lead to the discharge was the Bruns contract and the allegation that the grievant intentionally changed/forged the date of that contract to cover the fact that he had been dilatory again in processing it. The State introduced evidence that the first draft of the contract had a date of July 26, 2010, which was the date on which Ms. Bruns was to begin her contract with the college. The contract was delivered to the grievant on or about July 9, 2010 and he assured Ms. Wyman, the faculty member who arranged for Ms. Bruns to facilitate the SEED[1] program for the college, that the contract would be ready by July 26th. It was not and the second draft had a date of July 30, 2010 on it.

[1] "Seeking Educational Equity and Diversity".

13. The State asserted that the grievant must have altered the date even though Ms. Bruns in fact did start on the 26th. He was thus both lax in processing the contract and then committed the inexcusable act of altering the contract to cover his error. See State Exhibits 19 and 21.

14. The investigation revealed that the grievant had the contract for several weeks and that indeed the typed date on the front page had been changed from July 26 to July 30. The only person with any incentive to do this was the grievant and it is reasonable to assume that he did so to once again hide the fact that he had failed to properly process it in a timely fashion. His error not only caused additional work in having to file a so-called 16A form but was also a serious breach of ethics. The State alleged that his dishonesty and deceit cannot be tolerated and that he must be discharged for this. Moreover, his other errors, i.e. constant inaccuracies, difficulty communicating, poor work ethic and poor performance in general continued well past the time he altered this contract and showed a complete lack of ability to perform his duties. Discharge is thus the only option.

15. The State argued that all of the necessary elements of just cause have been met here and that the investigation, despite the Union's claims of bias, was fair and objective. While Ms. Meyers and Ms. Wyman expressed their frustration in somewhat graphic terms, these assessments were based on a long history with the grievant and were not meant to somehow "poison the well," as the Association contended, but rather were their honest assessments of the grievant's workplace demeanor and ethics.

16. The State argued that the penalties were appropriate here. The 2-day suspension had followed several written reprimands that had obviously not worked to get the grievant to conform his attitude and performance to what was expected of him. Accordingly, a more severe penalty was necessary to get the grievant's attention. Further, the ongoing nature of the same issues again and again coupled with the apparent intentional alteration of the Bruns contract shows that the grievant cannot be trusted to deal with contracts where honesty and accuracy are crucial. The State asserted that termination is appropriate in this instance.

Accordingly the State seeks an award of the arbitrator denying both grievances in their entirety and upholding the suspension and the discharge.

ASSOCIATION'S POSITION

The Association's position was that there was neither just cause for the suspension nor the termination and that the grievant should be reinstated with back pay and all contractual benefits. In support of this position the Association made the following contentions:

1. The Association asserted throughout the case that the grievant is a victim of a deliberate attempt by his supervisors to fire him for minor and even trumped up infractions. The Association asserted that his first supervisor, Ms. Reese Urban sexually harassed the grievant and then made certain that Ms. Meyers continued the vendetta against him after she was made his supervisor. As discussed below, her messages were laced with slanderous statements made about his personal characteristics; she bullied him and subjected him to a standard that she held no one else to. She required him to do things with regard to his contracts that were not in his job description and then wrote him up for that even though these matters were outside of his position description. The Association contended most strenuously that her personal vindictiveness and personal animus toward the grievant for filing the sexual harassment compliant against Ms. Reese Urban bordered on malfeasance. It certainly showed a lack of professionalism and personal resentment that tainted the State's investigation and its conclusions in this matter.

2. The Association noted too that Ms. Reese Urban's performance was also quite questionable. Her probation was extended because of her failure to interact appropriately with the grievant. See State Exhibit 3. Further, she made inappropriate sexual advances toward the grievant and when those were spurned she engaged in a pattern of harassment to make the grievant's life a living nightmare. Ms. Reese Urban was eventually demoted due to her performance as a supervisor and transferred to another department. See Association Exhibit 9.

3. The Association pointed out that even though the grievant has been with this department since 2007 he has in fact been with the State for more than 17 years and has a very good history and work record during most of that time. It was not until Ms. Reese Urban became his supervisor that the troubles started and asserted that those started when she began asking him for sexual favors and making highly inappropriate sexual advances toward him.

4. The Association noted that the investigation was cursory at best and should not have been done internally. The Association asserted that there was far more to these allegations than the College was willing to uncover and that it simply gave those allegations a quick review and dismissed them because they were not witnessed by anyone other than the grievant and his harasser. The Association also pointed out that it was curious that Ms. Reese Urban was never called to testify at the hearing of this to deny any of those charges or to dispel the clear evidence that there was a vendetta of sorts to get rid of the grievant. The Association asserted that Ms. Meyers' attitude toward the grievant from the very outset of her interactions with him as supervisor was to point out the smallest of errors and even to make up errors that did not exist and to blame him for her errors. The Association asserted most vehemently that her communications to him showed an obvious intent to set him up for failure and that she was resentful of the allegations he made against the prior supervisor.

5. The Association noted that initially the grievant's performance was regarded as excellent. E-mails between Ms. Meyers and Ms. Reese Urban from 2007 showed that he was regarded as having "a lot of great qualities" and that he was "working out." See Association Exhibit 11 and 15. Prior to the sexual harassment and his subsequent rejection of those advances he was regarded as a good employee and was well liked and respected by everyone. The Association asserted that what changed that perception had little to do with his performance and more to do with his relationship with his supervisor at the time.

6. The Association asserted that the harassment charges were not fully investigated and that his requests not to work in close quarters with Ms. Reese Urban were ignored. He told Ms. Meyers he felt extremely uncomfortable even being in the same room with Ms. Reese Urban and when Ms. Meyers forced them both into a small office he moved away from her because of it. This was not "childish" behavior as alleged by the State but rather was the manifestation of his discomfort at having to sit next to the person who had been sexually harassing him. The Association characterized Ms. Meyers' actions as retaliatory and deliberate and that her demeanor towards him clearly showed an evidence of bias against him that manifested itself in an warranted and unsubstantiated allegations of poor work performance. The Association asserted that Ms. Meyers was on a mission not to improve the grievant's performance but instead to get him fired at all costs.

7. As evidence of what it terms a pattern of retaliation, the Association pointed to the written reprimands given to the grievant in November 2008; one regarding use of sick time and the other for scheduling a meeting until 4:00 p.m. when his work day was scheduled to end at 3:30. Both were eventually removed from his file after grievances were filed but demonstrated a clear pattern of unfounded allegations and general; harassment through these constant trumped up charges against him. See Association Exhibit 6.

8. The Association asserted that even the reprimand he received for allegedly "bribing" a co-worker to get what was public information anyway, was also incorrectly reported and should never have been warranted. That too was reduced to a mere written reprimand by Ms. Bernadine Bryant after a more balanced person reviewed the evidence. Association Exhibit 21. Even upper management of the College recognized that these charges were largely unfounded and tacitly acknowledged that there was a pattern of retaliation against the grievant. The Association vehemently denied that there was ever a finding of bribery in the reprimand issued by Ms. Bryant and asserted later that this allegation, found in Mr. Oseby's termination letter was simply incorrect.

9. With respect to the 2-day suspension the Association argued that the grievant was never told of the alleged problems and that in any cases the errors if they can be called that, were so minor as to warrant perhaps a coaching session but did not rise to the level of a disciplinary matter at all. The Association relied heavily on the grievant's written response to the suspension, Association Exhibit 11. The Association went through each of the allegations listed in the letter of suspension and asserted that they are either inaccurate or blown way out of proportion and that there was no just cause for any discipline, much less a suspension. In one instance the grievant was simply unaware that he could change the contract code form 450 to 425 and when he was educated about that he did not commit that mistake again. Another contract was for $1,000.00 and he encumbered it for $999.00 – one single dollar. This is hardly the sort of matter that makes the 6:00 O'clock news. The grievant further explained why this occurred. He transposed some of the figures on a purchase order – this too was an innocent and explainable error that anyone could make. In others there was no adverse consequences to anyone and even though there were some minor errors or omissions these did not delay the contracts nor "cost" the college anything. Further, no one else in the department was subjected to the sort of scrutiny that the grievant was and the Association reiterated its main argument that the grievant was subjected to a different, far higher standard than other employees.

10. The Association noted that the grievant is responsible for over 780 contracts per year and that to err is human and that a few minor mistakes in this number of contracts is understandable. No one can achieve perfection and that even though there were instances where Ms. Meyers made mistakes; she expected perfection from the grievant. See e.g. Association Exhibit 23; e-mail from Ron Fields of June 18, 2009 wherein Mr. Fields indicates that the grievant was correct and that the criticism of his handling of the contract at issue in that chain of e-mails was unwarranted. The association noted that in that particular instance Ms. Meyers had made the error yet was never called on the carpet for it and instead she blamed the grievant for her mistake.

11. In another allegation, the grievant was criticized for not proofreading the document thoroughly enough. The Association and the grievant responded that it is not the grievant's job to proofread the contract for accuracy or typographical or grammatical errors but merely to determine if the funds have been encumbered or not. The Association contended that Ms. Meyers was once again trying to fault the grievant for something that he should not have even been doing and perhaps she should have. See Association Exhibit 11.

12. The Association went through the "other 4" allegations in the suspension letter and noted that time sheet errors are in fact common and was simply an attempt to "pile on" allegations that are without foundation. Further, that the allegation there was an "error" in a contract that was for $173,000.00 when the written number was "hundred seventy three thousand' rather than "*one* hundred seventy three thousand" is laughable and again shows how far Ms. Meyers was willing to go to create an allegation against the grievant. The Association characterized these allegations as trivial at best.

13. Regarding the termination, the Association and the grievant denied flatly that he altered the contract and noted that several people had access to the contract and had as much incentive to alter the date as anyone. Further, the association objected to the introduction of the computer screenshot as it was taken after the grievant's termination. Once again, the Association asserted that the State's investigation was sorely lacking here and that they did not even bother to check the computer before terminating the grievant.

14. The Association asserted most strenuously that the overt attempt to poison the relationship between the grievant and has brand new supervisor should have resulted in the discipline of Ms. Wyman for making such slanderous and untruthful statements. Moreover, Ms. Wyman admitted that she did not know the grievant well yet she felt qualified to make a psychological assessment of him.

15. The Association asserted that it was only after he received the slanderous allegations contained in Ms. Wyman's e-mails and the pressure from Ms. Meyers that he "decided' to terminate the grievant. The Association also pointed out several material errors and other mistakes in the termination letter itself and noted the irony of terminating a person for minor errors when there were so many such errors in the very document used to fire him. The Association pointed out at least one material misstatement as well; i.e. that this was the "second" occurrence akin to bribery and noted that the grievant was never disciplined for bribery and that Mr. Oseby admitted that this statement was untrue under cross examination.

16. The Association also noted that the alteration of a contract could be and was easily fixed through a 16A form and that should have ended the matter. Further, the terms of the contract itself provided that it would become effective "upon the date the final required signature is obtained by MnSCU, whichever occurs later." Thus there was no issue with the changed date in any event.

17. The Association also noted that there were no "repeated" attempts at coaching and mentoring; in fact there were none. Mr. Oseby had only taken over as the grievant's supervisor 3 months before the termination and the only interaction he had with him was regarding the Bruns contract referenced above. It was further apparent from the e-mails Mr. Oseby sent to Ms. Wyman that he had no intention of terminating the grievant but rather wanted to try to rectify and repair the situation.

18. The Association noted that the grievant asked several times for feedback after the 2-day suspension regarding his performance but never received it nor was he given any help or suggestions on how to improve. Even after his performance review in July 2009 he asked for specific performance measures but never got any. The Association asserted that there were thus no repeated attempts at coaching and in fact there were none at all.

19. Finally, with respect to the third allegation on which the State based the termination, the Association asserted that this is simply specious. There were never any issues with customer service or staff relations, other than perhaps with Ms. Wyman who has virtually no basis for making the sorts of unsound and unfounded allegations she did.

20. The Association also assailed the state's allegations that the grievant was remiss in failing to get tags for the college's vehicles and asserted that this was not one of the allegations used as the basis for the termination and noted that this was a new contract with which the grievant was not familiar. Once he noticed that the vehicles were not tagged he got the tags within a week.

21. The Association made much of the fact that the Loudermill hearing was conducted by people who did not even know the grievant, certainly not well and that Mr. Opatz' decision was unduly influenced by the information he received the statements made by Ms. Meyers and Ms. Wyman in their e-mails about the grievant. See Association Exhibit 19. Mr. Opatz did not testify and the Association asserted that his opinion was unduly influenced by the statements made about the grievant and should be rejected.

22. Further, after the second step grievance meeting, the response upholding the termination was in the MAPE office before the Association's representatives were even back. The Association asserted that it was abundantly clear that the decision to terminate the grievant was made well before the Loudermill hearing and before the grievant ever had the chance to explain his idea of the story making this an evidently biased investigation that was designed from the outset to get the result the college wanted – termination of the grievant and was exactly what Ms. Meyers had been seeking for many months. There was nothing impartial or objective about the investigation nor about the conclusions reached.

23. The essence of the Association's case is that the State's case is retaliatory and was motivated by animus from Ms. Meyers toward the grievant for filing the harassment charge. His performance was actually quite good when compared to the number of contracts he oversees and that he was subject to a double standard where his errors were held to exceedingly high scrutiny while mistakes by his own supervisors were ignored and minimized.

The Association seeks an award of the arbitrator reinstating the grievant to his former position with all back pay and accrued benefits as well as an award sustaining the grievance on the 2-day suspension and reinstating all lost back pay and benefits for that suspension as well.

DISCUSSION

FACTUAL BACKGROUND

The grievant was employed from May 2007 as a Buyer 2 for Century College. His position description is set forth at Sate Exhibit 4 and shows that he had considerable authority to perform the duties of the job and act independently. His general job required him to act "under limited supervision/procedural control" and that he was responsible for purchasing a wide variety of equipment, supplies, materials and services on behalf of the College. He was required to invite proposals, negotiate contracts and pricing with various other agencies and private vendors. While it was not entirely clear from the position description, there was some evidence that he was responsible for ensuring the accuracy of the terms of those contracts both regarding their actual terms and whether appropriate funds were encumbered at the proper time to cover the cost of the contract. There was evidence to suggest that he dealt with hundreds of such contracts, perhaps as many as 750+ per year.

His first supervisor was Ms. Joan Reese Urban. State exhibit 2 showed that she was hired as the supervisor on June 28, 2007 and that the grievant was initially hired in May of 2007 so it was not entirely clear whether he had a direct supervisor for that approximately 4 to 6 weeks but suffice it to say that Ms. Reese Urban served as his direct supervisor until May 31, 2009.

There were apparently some problems between the two of them. State Exhibit 3 shows that Ms. Reese Urban's probationary period was extended due to concerns over her relationship with the grievant. Both the letter extending the probationary period as well as the mid term review made direct commentary about the grievant and how Ms. Reese Urban was handling and coaching him. Ms. Meyer's comments in the extension letter advised that she would "contact EP through the Minnesota Department of Employee relations and ask them to help you and Larry [the grievant] find a more productive, effective way to work together.

There was evidence to suggest that the grievant was going through a difficult time personally at that time and that troubles with his pending divorce and other family issues were adversely affecting his work. The Association made much of the fact that Ms. Reese Urban gave several letters of reprimand and coaching that were eventually removed from the file. See State Exhibit 6 and 9 (the latter was a reduction of a suspension to a letter of reprimand.

The Association argued that the mere fact that some of these reprimands were reduced and/or removed from the file suggested that it was a pattern of harassment by Ms. Reese Urban toward the grievant. The evidence showed that these were reduced as a normal part of a functional grievance process and working relationship between Association and management to adjust grievances and discipline to an appropriate level if there is not enough to establish just cause for any given discipline. It was not clear on the record if this was a tacit acknowledgement by the College that this was a pattern to harass the grievant and make his life difficult.[2]

[2] It was not clear why Ms. Reese Urban was not called to testify in this matter as her testimony might well have been valuable in determining whether there was some sort of "conspiracy" to get the grievant out as alleged by the union. At this point, we are left with the reasonable inferences to be drawn from the evidence that remains in the file and from the testimony and evidence adduced at the hearing. As discussed more herein, there was some merit to the Association's contentions and several of the e-mails discussed below were crucial in that regard.

What was clear was that several of the letters were reduced and removed from his file and that the suspension he initially received for ethically inappropriate behavior when he gave a co-worker a small amount of money to give him Ms. Reese Urban's sick leave usage was reduced to a letter of reprimand. That remains on his record and is not part of this grievance and must therefore be taken as a part of the grievant's overall disciplinary record.

Having said that though, it was abundantly clear from the evidence that the grievant and Ms. Reese Urban did not get along well and that he filed a sexual harassment charge against her in late 2008. See Association Exhibit 4. The College did an internal investigation of this and determined that it could not verify whether sexual harassment occurred and dismissed the charges. See Association Exhibit 4 and letter dated February 5, 2009 from Ms. McKee. There was no evidence that the grievant took the claim any further, i.e. filed it with the EEOC or in some other forum. On this record, no determination is or can be made as to whether sexual harassment occurred.[3] The decision in this matter is thus based on the record made and evidence adduced at this hearing.

The Association alleged that Ms. Meyers was upset by the fact that the grievant filed this action and began a deliberate campaign against him by continually holding him to a higher standard than other similarly situated employees, by adding tasks that were not part of his job description and then disciplining for failing to adhere to those and by discriminating against him in a number of ways. The basis for this claim was that Ms. Meyers was somehow offended by the fact that the grievant even filed the harassment charge. On this record there was insufficient evidence to establish that Ms. Meyers was retaliating against the grievant for filing the charge.

[3] The evidence showed that the charges were filed approximately a year after the alleged harassment occurred and followed closely on the heels of the letters of reprimand made by Ms. Reese Urban. The State suggested that this timing was suspect and that the charge of harassment was an attempt to divert attention from the real problem which it alleged was the grievant's lack of attention to detail and his failure to follow the orders and directives of his supervisors.

Ms. Meyers took over as the grievant's supervisor in June of 2009 and within a few days gave him the 2-day suspension referenced herein. The State alleged that there had been multiple instances of coaching and counseling prior to this and while the record showed that there was considerable interaction between Ms. Meyers and the grievant regarding his work performance there was not much evidence of such interaction with Ms. Reese Urban. The Association did not however raise this as an issue thus on this record the interactions between Ms. Meyers and the grievant are taken at face value irrespective of whether she was his "direct supervisor" or not. It was clear that she functioned in a supervisory role. The 2-day suspension will be examined first herein.

THE 2-DAY SUSPENSION

The grievant received a 2-day suspension in June 2009 and the Association grieved this and seeks a determination of whether there was just cause for that here. The Association asserted that the substance of the suspension alleged minor even trivial infractions that should never have been allowed to rise to the level of a disciplinable matter. See e.g. allegation wherein the grievant was alleged to have encumbered a contract incorrectly by $1.00; the "discrepancy" in a contract for $173,000.00 where the written amount was "hundred seventy three thousand" rather than "one hundred seventy three thousand." There was some merit frankly in the Associations claim that these allegations were not only unfounded but also almost curious as to why they were even raised as errors. However there were several other allegations that the grievant had no adequate explanation for or wherein he acknowledged that he made the error but just did not think the error was that significant or where he claimed that someone else should have caught it. As described above, the supervisor made it his job to catch these errors and on this record, those errors were shown to have been made.

A review of the letter shows that some of the alleged offenses are seemingly very minor. The State however countered this claim by showing that the grievant had been told multiple times that he was responsible for making sure the contracts and the funds that were encumbered by them were accurate. It was also true that he was told directly that it was his job to do that despite his response indicating that he was not responsible for ensuring the accuracy of the contracts.

A review of is job description provided some truth to his assertions but the bottom line here is that he was given direct orders from his supervisors to do this and his avenue of appeal at that point was to obey and grieve later rather than to allege discrimination after failure to adhere to the directives of the supervisors. He further provided no other reasons for several of these failures and provided no evidence as to why he was unable to conform to the directives of Ms. Meyers in this regard.

Thus on their face while some of the allegations are in fact very minor (although some are not), on this record the suspension was appropriate given the long history of counseling and warnings she gave him over the course of several months.

The next question is whether 2 days was appropriate or whether a lesser penalty on this record is warranted. The Association made much of the fact that several of the prior letters of reprimand had been reduced or even removed from the file. Indeed some had, but one in particular, the reprimand from Ms. Bryant for the ethically inappropriate behavior, was not.

It was also of some significance that these disciplines came so close together at a time when the record showed that the grievant's attitude toward his supervisors was strained at best and that his performance was falling below standard. Further, while there was not much direct evidence of this, there was evidence on the record to suggest that outside stressors were playing a part in the grievant's performance and that even he acknowledged the need to do better.

This on this record, it is determined that a 2-day suspension was appropriate given the overall record and the fact that a written reprimand had been issued only a few months before and that was not removed from his record. The written reprimand was on his record as of the time of the suspension and would be a "normal" step in a progressive disciplinary process. Despite the Association's claim of personal animus at least as of the time of suspension the discipline appeared to be corrective in nature rather than merely punitive, although as discussed below, it was quite apparent that this situation changed as of the time of the termination.

Finally, as noted above, there was insufficient evidence on the record to show at that time that the relationship between Ms. Meyers and the grievant had deteriorated so much that it could be concluded that there was a personal animus toward him that tainted the discipline in any way. Accordingly, the grievance on the 2-day suspension is denied and the discipline is allowed to stand. As discussed below however, something drastic changed between the time of the suspension and the termination that undercut the State's contention that termination was appropriate. This will be discussed next.

THE TERMINATION

The central basis of the termination was that the grievant had failed to respond to what it termed repeated attempts by supervisory staff to rectify the situation and to counsel and coach the grievant to do a more appropriate job. Several things were missing though in this assertion. First, as noted above, Mr. Oseby was new in the role of supervisor and he made few, if any, attempts to coach the grievant; there simply was not that much time after he became supervisor to do so and the record showed that they had not interacted much at all by the time of the termination. Further, there was even some sense that matters were improving. Perhaps that was due to the assignment of a new supervisor although that was not entirely clear.

The other major assertion was that the grievant intentionally falsified the Bruns contract. Clearly he had been given that contract on or about July 9, 2010 and that Ms. Wyman expected that the contract would be in order with all appropriate signatures affixed and funds encumbered by July 26, 2010, when it was planned for the contract to start. Clearly too the first draft of that contract had the date of July 26, 2010 on the typed front page. That was the draft of the contract sent to Ms. Bruns for her signature.

Further, there was another draft of that contract that had the date of July 30, 2010 on it. The State asserted that the grievant must have changed it to cover for the fact that he had neglected to get the contract finished in time. The State throughout the case alleged that timeliness was a problem and that the grievant could not always be counted upon to get things done in a timely manner.

While it was clear on this record that the contract was changed it was not clear how that happened nor was it entirely clear that the grievant was responsible for that change. The State argued that he was the only person with motive to change it even though he was not the sole person with an opportunity to do so. Moreover, it was not clear how he would have or could have thought the change would not be noticed given that he was the one who sent out the July 26th date in the first place. Finally, while there was considerable dispute about the 16A form and who was to complete it, there was no evidence that the changed date was fatal to the contract or cost the college anything.

Certainly, if there had been clear and convincing evidence that the grievant changed this contract to avoid some dire consequence or to cover his mistake the result here might well have been different. On this record though, despite some evidence that he accessed the contract on July 28th, there was insufficient evidence to establish by even a preponderance of the evidence that the change was intentional or designed to deceive or defraud anyone.[4]

[4] The State provided a computer run showing the grievant had accessed the contract on the 28th but on cross examination, the State's witness on this point acknowledged that this piece of evidence was not even discovered until after the termination action had been taken and that it certainly could have been if anybody had bothered to check the grievant's computer during the investigation. It is well established that for the most part, a discharge action must rise or fall on the evidence known at the time of the discharge. Evidence garnered after that is given little or no weight especially where it could have been obtained as part of a fair and thorough investigation done before the discharge action. This frankly is one

Finally, and most significantly, after thoroughly reviewing the evidence, the key e-mails and the witness testimony in this case, the Association's main assertion that there was considerable personal animosity between Ms. Wyman and the grievant and that her messages to Ms. Meyers and Mr. Oseby in particular has some merit. This is an unusual situation but several critical facts contained in the various messages were important and frankly swung this case in the Association's direction.

First, in the e-mail exchanges between Ms. Wyman and Mr. Oseby about the Bruns contract it was clear that Mr. Oseby took responsibility for the actions of the grievant and offered to make it right by both completing the 16A form and to coach the grievant about this. It was apparent that Mr. Oseby at least at first was not inclined to termination of the grievant for his role in the Bruns contract and spoke in terms of being able to "fix" him as he had apparently done with a unit to which he had been assigned while in the military.

It was also apparent that Ms. Wyman was a tenured faculty member and was not at all satisfied with this response and, sadly, took it a step further by making what on this record were unsubstantiated allegations about the grievant's psychological state and even went so far as to offer a psychological diagnosis of him to Mr. Oseby.[5] It was also apparent that Ms. Meyers held similar views of the grievant and expressed them quite candidly both before and after the investigation was over. She too effectively called the grievant a liar and a sociopath and put that in a written e-mail that was submitted in evidence at the hearing of this matter.

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of those rare cases where the investigation evidence must be given little weight because of the timing and the claim that the evidence could have been altered to bolster the State's case. Given the clear evidence of personal animosity against the grievant by several of the key witnesses in this case, that possibility cannot be discounted. Where the employer carries the burden of proof such evidence can be crucial in the determination of whether it proved the case for just cause.

[5] Ms. Wyman testified at the hearing that her background is in the psychology field. That is certainly true; the evidence showed that she does in fact carry appropriate degrees in that field, which was exactly why she should never have made the statements she did. She had no clinical relationship with the grievant and admitted she had very little personal contact with him. For her to make such a statement was curious at best and proved very damaging to the State's case in this matter.

Clearly the e-mails set forth above and the comments about the grievant's moral compass" may have adversely affected the investigative and deliberative process here. This evidence severely undercut the State's claim that there was a fair and impartial investigation and disciplinary process.

While Ms. Wyman and Ms. Meyers are certainly entitled to their opinions, the point here is that the State had an obligation to conduct a fair and impartial investigation and on this record it was clear that the opinions expressed to Mr. Oseby, a relatively new supervisor, who had earlier indicated a clear preference for a lesser form of discipline and a desire to fix the grievant's issues, was tainted by that, frankly through no fault of his own but tainted it was just the same.

Accordingly, discharge would be inappropriate even if the grievant did alter the contract for the reasons set forth above. The question now is what an appropriate remedy should be given the evidence and conclusion reached above. Reinstatement with full back pay was rejected due to the clear fact that the grievant still has communication issues that need to be fixed. Here, whether he changed the contract or not he sent out two copies of it with two different dates on it and he had been specifically warned to watch for such discrepancies repeatedly in the past. Finally, he was also somewhat dilatory in getting the contract out on time. The evidence showed that it was supposed to commence on July 26th but was not finalized until after that. On that score Ms. Wyman was justified in being upset because she had been told the contract would be ready and that 2 weeks was adequate time to do so.

Reinstatement without back pay was also rejected as being far too harsh given the findings above and given the length of time that has elapsed between the discharge the date of the hearing. At this point the grievant has a written reprimand and a 2-day suspension on his record for similar matters and the penalty here must be appropriate to fairly send the message that the grievant must adhere to the directives of his supervisors and work with them cooperatively to assure that his performance is up to standards they set for him. On the other hand, it must also reflect the notion that those standard be fairly applied and that the working relationship must remain professional and positive even though that will no doubt be challenging.

Accordingly, reinstatement to his former position but subject to a 30-day suspension is deemed appropriate. Other periods were considered but rejected as either too lenient given the record or too harsh given the investigation and the facts of the matter and the need to send the clear message to the grievant set forth above.

Any back pay is subject to mitigation for any government benefits paid to the grievant and any salary and wages he has earned in the interim. The Association and grievant are directed to provide any appropriate documentation of such payment/wages paid to the grievant between the date of his discharge and the date of reinstatement hereunder.

AWARD

The grievance regarding the 2-day suspension is DENIED as set forth above.

The grievance regarding the terminations is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated to his former position within 5 business days of this Award subject to the 30-day suspension set forth above.

The parties' grievance procedure at Article 9 calls for the losing party to pay the full fee. Here since this was a somewhat split decision the parties are ordered to split the fee equally.

Dated: May 23, 2012

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Jeffrey W. Jacobs, arbitrator

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