

IN THE MATTER OF a VETERAN'S PREFERENCE HEARING

-between-

DOUGLAS VICKMAN, EMPLOYEE

B.M.S. Case No. 12VP180

-and-

**THE MINNESOTA DEPARTMENT
of VETERANS AFFAIRS
MINNEAPOLIS, MINNESOTA**

Re: Proposed Dismissal

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Employer: Paul A. Larson, Representative

For the Employee: Cristina Parra Herrera, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed between the American Federation of State County and Municipal Employees (A.F.S.C.M.E.) Council 5 and the Minnesota Veterans Home in Minneapolis, provides in Article 17 for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the grievance procedure. However, as an honorably discharged veteran, the accused employee has the option to seek resolution of his complaint pursuant to the Veterans Preference Act, Minn. Stat. § 197.46

through a hearing on his proposed dismissal. On February 16, 2012, Mr. Vickman exercised that option and thereafter the under-signed was mutually selected as the neutral by the parties. A hearing was subsequently convened on July 12, 2012, in St. Paul. Following receipt of position statements, testimony and supportive documentation, each side was given the opportunity to make an oral summary argument. Thereafter the hearing was deemed officially closed.

At the commencement of the proceedings, the parties stipulated that this matter was properly before the arbitrator for resolution based upon its merits, and that the following represents a fair description of the issue.

The Issue-

On December 27, 2011, the Employer gave notice to Douglas Vickman of its intent to terminate his employment at the Minneapolis Veterans' Home. Was this intent to terminate based on misconduct or incompetence of Mr. Vickman? If not, what shall be the appropriate remedy?

Preliminary Statement -

The record developed during the course of the proceedings indicates that the Grievant, Douglas Vickman, (hereafter "Grievant" or "employee") was hired by the Minnesota Veterans Home in Minneapolis ("Employer," "Agency" or "Home") in December of 1979 as a Home Cashier ("cashier"). In that capacity, he was a member of the bargaining unit represented by A.F.S.C.M.E. Council 5. The Veterans Home in Minneapolis is a skilled nursing and living care facility housing approximately 245 residents – all of whom are classified as veterans (or their spouses) – and are either physically or mentally impaired and therefore considered to be "vulnerable adults."

Mr. Vickman's job duties as a cashier is to provide banking services for the residents of the Home. As such he is responsible for accepting and recording receipts for various funds and accounts established at the facility for the residents. Two in particular are relevant to this matter. One is considered a maintenance account, and the second a trust or personal account. The former is earmarked primarily for payment of the resident's room and board at the facility, and the latter established for miscellaneous spending by the resident as he/she (or their designated guardian) deems appropriate. As the primary cashier at the Home, Mr. Vickman routinely receives cash or checks from the residents or their representative (normally a

family member) for deposit in these accounts. His responsibilities thereafter are spelled out in the Home's policies as follows:

"The Home Cashier Office will accept cash and check deposits from or on behalf of current residents of the Minnesota Veterans Home-Minneapolis during the hours of normal operation. In each case, the resident will be given a receipt stating the resident's name, account number, date, and the amount deposited and will include the signature of the person receiving the deposit. Funds will also be accepted in payment of the maintenance accounts of deceased or discharged residents.

* * *

Monies received from Home residents, either as a deposit to their Personal Account or as payment for their individual maintenance charge, will be noted on the Cashier Daily Counter sheet. It will be noted that the receipt was either cash or check.

* * *

The Home Cashier and the individual counting the cash at the end of the day [from the Financial Management unit] must both sign the appropriate counter sheets.

The Home Cashier and the reviewing official then both sign the Daily Reconciliation sheet to indicate that the cash counted and the transactions reported reconcile to one another and that each person concurs with the final cash account" (Book 1, at Tab 9).¹

During the last week of June, 2011, a representative of the Home met with a spouse of a resident regarding a complaint she had concerning

¹ The Agency's written evidence was entered into the record in four exhibit books, each containing a number of separate labeled (tabbed) documents. They are referred to here as "Book _, Tab _."

missing (cash) funds that had been placed in her husband's account in April of that same year. She indicated that she had deposited the sum of \$1,396.69 into her husband's maintenance account, \$1,380.00 of which was in cash. She had a receipt for the deposit signed by Mr. Vickman, but discovered subsequently that only the amount of the check (\$16.69) had been credited to the account. The representative (Melissa Foster) then reviewed the records for possible accounting errors and searched the cashier's office in an attempt to locate the missing money, but was unsuccessful. She then contacted the Office of the Legislative Auditor (OLA) to report the discrepancy, and seeking assistance to review the records.

On July 7, 2011 the spouse of another resident contacted Ms. Foster with a similar concern. She explained she had deposited \$50 in cash into her husband's trust account in February of 2011, received a receipt for the deposit, signed by the Grievant, but thereafter learned that money had not been credited.

The State's Office of the Legislative Auditor ("OLA") and the Home each initiated an investigation into the missing funds. The State's was launched in July 2011, and the Home's in September of the same year. The Employer's inquiry was conducted by the Agency's internal auditor David Salchow and Business Manager Karen Onken. The Grievant was interviewed

with his Union representative present (at which time he was given a Tennesen warning) as well as others who were believed to have possible information related to the discrepancies. At the conclusion of the investigations both the Employer and the OLA reached the same conclusion: that Mr. Vickman was the only employee who had both access to the Cashier's Office; that he was present in the office during the time when the suspicious transactions occurred; that his explanations were not "plausibly supported" and; that he did not properly deposit or credit the funds into the residents' accounts – either delaying their deposit for up to six weeks or failing to account for the monies altogether which were never located (Book 1; Tab 23).

As a consequence, the employee was notified on December 27, 2011 that the Administration was discharging him for misconduct and substandard performance (Book 1; Tab 1). Thereafter, he exercised his option to proceed under the terms of the Veterans Preference Act appealing the decision to binding arbitration.

Relevant Rules and Policy Provisions:

From Minnesota Administrative Rules:

Section 9050.0040 Definitions

Subp. 90.

“Personal Fund Account” means the account maintained at a facility by a resident that is solely for the use of that resident and managed according to parts 4655.4100 to 4655.4170.

Section 9050.1070 Resident Rights & Responsibilities

* * *

Resident fund accounts at the facility are solely for the resident's use, and the facility cashier shall retain sufficient liquid funds to satisfy normal demand withdrawal request of residents...

* * *

...The cashier at the facility shall give a receipt to persons depositing funds and ensure that withdrawal forms are signed when funds are withdrawn.

From the State Code of Conduct Certification (signed by Grievant):

I certify that to the best of my knowledge and belief:

1. I have read, understand, and agree to abide by the code of conduct for employees with accounting, auditing, financial reporting or tax filing duties.

2. I will make a good faith effort to carry out my duties honestly and ethically.

3. In preparing or reviewing financial information or reports, tax filings, or other related financial disclosures, I will, to the best of my ability, provide full, fair, accurate, timely, and understandable data.

4. I will comply with all pertinent policies and procedures, laws, rules, and regulations relating to my job duties.

Positions of the Parties-

The **EMPLOYER** takes the position that their proposed termination of Mr. Vickman's employment in December of last year was entirely proper and reasonable under the circumstances. In support of their claim, the Veterans Home maintains that the Grievant had a number of ongoing performance issues, over the past four-plus years, that constituted both misconduct and demonstrable incompetence in the performance of his assigned duties. In an effort to correct these deficiencies, the Agency claims they administered progressive discipline which included written warnings, and suspensions as well as cautionary admonitions that his continued failure to meet job expectations could result in his termination. Yet in spite of these warnings, Mr. Vickman engaged in highly improper conduct as a cashier when he failed to properly deposit or timely credit cash funds received from residents or their family members over a period of fifty-one days between January 1, 2010, and June 30, 2011. In all, the amount of the monies missing totaled

more than \$4,287. The Administration contends the funds that have completely disappeared from the Cashier's Office, can be traced to Mr. Vickman alone as he signed off on each deposit received from a resident or his/her representative, and yet failed to make the necessary corresponding transfer to the bank at the end of the business day, as required. The Employer further notes his mismanagement of these funds were addressed in the local media leaving the Home with a "black eye." Finally, they argue that the employee presented no plausible alternative as to what might have happened to the missing funds; no extenuating circumstances which would warrant a modification of the disciplinary sanction that is being proposed. For all these reasons they ask that they be allowed to follow through with their intent to terminate his employment.

Conversely, the **GRIEVANT** takes the position in this matter that his proposed dismissal is unreasonable and unwarranted. In support, he asserts there is no direct evidence that he did anything wrong relative to the missing funds. The accuracy of the records are questionable at best according to Mr. Vickman. Further he claims that his former supervisor told him that it was not necessary to issue written receipts for all deposits from residents or their family members unless it was requested. Additionally the contention is made that there was no misconduct committed relative to the delayed deposit for

some of the funds, nor was there any published rules prohibiting same. He further suggests that other employees had access to the computers or the funds themselves and that he worked in a hectic environment where it was possible that the cash funds were not properly credited or deposited by someone else. In addition the employee argues that he is a long-term member of the staff at the Home with consistently favorable performance reviews which were not taken into consideration prior to management reaching their decision. For or all these reasons then he asks that he be retained in his position and made whole.

Findings of Fact-

Pursuant to the applicable terms of the Veteran's Preference Act, a public sector employer may discharge an employee, "for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing." Minn. Stat. § 197.46. The standard of proof in matters such as this have been equated by the courts to the "just cause" standard normally applied to disciplinary matters in the public sector. See: *Cass County v. L.E.L.S.* , 353 N.W.2nd 626 (1984); *Caldwell v. City of Mpls.*, 486 N.W. 2nd 151 (1992); *Ekstedt vs. the Village of New Hope*, 292 Minn. 152; 193 N.W.2nd 821.

The question to be considered here is whether or not the Employer acted reasonably in reaching their decision to terminate Mr. Vickman's employment. That is, whether they have demonstrated sufficient misconduct which has adversely affected the workplace and/or work environment. To that end, I find that the Veterans Home introduced a significant number of exhibits and corresponding testimony from its witnesses, demonstrating conclusively that the Grievant engaged, at minimum, in the mismanagement of cash funds entrusted to him by residents or worse, deliberately caused their disappearance.

The Grievant charges that the Agency has presented no direct evidence supporting their allegations. While the contention is accurate, it is not dispositive of this dispute.

Much of the Employer's case against Mr. Vickman depends upon the circumstantial evidence surrounding the two audits that were conducted as a result of the complaints brought to their attention in June and July of last year. Commenting on this form of proof, professors Marvin Hill, Jr. and Anthony Sinicropi, made the following observations on the subject in their treatise *Evidence in Arbitration*:

"It is important to stress that when circumstantial evidence is offered, the trier of fact must draw inferences from that evidence as it relates to the event or proposition that the employer is attempting to prove...It should not be concluded

however, that because circumstantial evidence depends upon such inferences that it is necessarily suspect, or that an arbitrator will not accord it great weight. To the contrary, numerous arbitrators, similar to courts of law, have fully credited circumstantial evidence" (Hill & Sinicropi, BNA Books, at p. 5).

I would agree with Mr. Vickman that the circumstantial evidence in the record needs to demonstrate more than a mere reasonable alternative to what occurred. Rather, in matters of termination particularly, there must be clear evidence establishing a pattern surrounding the event in question which allows the trier of fact to reconstruct it with enough certainty to conclude that it is the most logical, and therefore the most reasonable, scenario.

In this instance the definitive weight of the evidence is convincing. It demonstrates that the most logical – most reasonable conclusion to be drawn from the record is that the Grievant knew what his responsibilities were *vis-à-vis* the cash and checks he routinely received as the Head Cashier at the facility; that he was the only employee who signed all the receipts in question given to the residents or their family members in return for money submitted for deposit; that he was the only one who had access to the Cashier's Office who was present in the office on each of the days in which the suspicious transactions took place, and; most

significantly, that he did not properly deposit and/or record those funds – either delaying the deposits for up to six weeks, or failing to credit or account for the money altogether. Moreover, the evidence demonstrates that during the period of time when Mr. Vickman was out on FMLA (from April to July, 2011) and after he was placed on investigatory suspension, no such similar discrepancies occurred in the Cashier's Office.

In no small measure, I have been influenced in my decision by the testimony and accompanying documentation offered by the Home through the Agency's Internal Auditor, David Salchow. The extensive and detailed evidence presented by this witness established an air-tight paper trail commencing with each of the deposit receipts signed by the Grievant, from a period beginning January 1, 2010 through June 30, 2011, and moving through the Cashier's Daily Counter Sheet, endorsements of checks routinely placed in the Cashier's Drawer, and ultimately the deposit of all checks and cash received into the Home's bank account (Employer's Books 3 & 4). In all, there were some fifty-one days during the time frame being examined, in which Mr. Vickman was present in the Cashier's Office, where seventeen residents experienced discrepancies in their respective accounts, when only portions of the amount receipted

were credited on the day of receipt, or not credited at all. Significantly, the latter divergences involved cash transactions almost exclusively. The veracity of this evidence went into the record essentially uncontested by the Grievant.

Further, I can find no extenuating circumstances present here which might otherwise warrant any modification of the Agency's proposal. Beyond his contention that he did not act inappropriately in connection with the responsibilities of his position, Mr. Vickman could offer no plausible rationale for the shortfall. Some of the theories for the missing funds included his assertion that the monies had been deposited earlier in the day and then withdrawn later that same day; that he may have been "distracted" and forgot to record the transactions in a timely manner; that the money slipped below the box in the filing cabinet and he did not see it that day; that others had access to the office and could have altered the records or taken the cash from the drawer, or; that it was the result of a system error (Employer's Book 2, Tab 1; Book 3, Tab 17; Mr. Vickman's testimony). There was, however, little if anything placed into the record to support these assertions.

One of the primary defenses offered by the accused at the hearing was that he was told by one of his former supervisors that it was not necessary to record each transaction as they were received. The assertion

however not only runs afoul of basic sound accounting practices, it is in opposition to the State's rules and policy provisions, the Code of Conduct, and the Veteran Home's own published procedures, *supra*, to which Mr. Vickman ascribed. Moreover, the former supervisor to whom the instruction was attributed was not present to give verifying testimony in support of this claim.

In August of 2011, the OLA, in the course of their own investigation, interviewed Mr. Vickman regarding the charges being leveled against him, with a court reporter present. His recorded responses to repeated questioning concerning his theory behind the numerous accounting discrepancies is best illustrated by the following exchange between the State's Deputy Legislative Auditor, Cecile Ferkul, and the Grievant:

OLA: "So what do you think happened here? We're trying to make this make sense to us, and we're having trouble with that. So, I mean, you fill this stuff out every day. What do you think happened here?"

Vickman: I don't know....I don't have an explanation myself, and I don't know what to tell you, because I know what it looks like.... It looks like I put money in my pocket....and....I don't have an explanation for it" (Agency's Book 1; Tab 17, pp 125, 140).

Finally, I have taken into consideration Mr. Vickman's relatively long career with the Agency as well as his favorable overall performance reviews spanning some twenty-five years (Employee's Ex. 1). While admirable in and

of themselves, they nevertheless do not constitute a vaccination against discipline. This is particularly so in light of the most egregious charges being brought against the Grievant here, and taking into consideration as well the five separate disciplinary actions administered to him, which included both warnings and suspensions for failure to follow proper accounting practices imperative to the performance of his job – the majority of which took place in 2008 and 2009 (Book 1; Tabs 24-28).

Conclusions of Law-

Based upon the foregoing, I find that the Agency has met their evidentiary obligations demonstrating that their proposal to discharge Mr. Vickman is most reasonable under the circumstances, and that he was afforded all of his rights and processes as required by the Act. Accordingly, their decision is affirmed.

Respectfully submitted this 23rd day of July, 2012.

Jay C. Fogelberg, Arbitrator