

IN THE MATTER OF THE ARBITRATION BETWEEN:

HENNEPIN COUNTY

-and-

**ARBITRATION OPINION
AND AWARD**

AFSCME Local 34

BMS Case No. 13-PA-0575

Arbitrator

Richard A. Beens

Appearances

For the County:

**Karen Wallin, Esq.
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A-400 Hennepin County Government Center
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For the Union:

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Date of Award

April 2, 2013

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between Hennepin County (“Employer” or “County”) and the American Federation of State, County and Municipal Employees, Local 34 (“Union”). Karon McSween-Sanigular (“Grievant”) was employed by the County and a member of the Union.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render an arbitration award. The hearing was held on March 11 and 13, 2013 in Minneapolis, Minnesota. The parties stipulate there are no procedural issues in dispute.² Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written final arguments were submitted simultaneously on March 25, 2013. The record was then closed and the matter deemed submitted.

ISSUES

The parties agree that the following issues are properly before the arbitrator for resolution:

- 1. Did the Employer have just cause to suspend the Grievant and, if not, what shall be the proper remedy?*
- 2. Did the Employer have just cause to terminate the Grievant and, if not, what shall be the proper remedy?*

FACTUAL BACKGROUND

The Hennepin County Human Services and Public Health Department (“HSHPD”) administers a broad range of programs designed to render social, financial,

¹ Joint Exhibit 2.

² Joint Exhibit 1.

and public health services to eligible county residents. In 2010 alone, they provided nearly \$2.7 billion in program benefits.³ Most of the department's programs are funded and heavily regulated by the state and federal government.

Recipient eligibility is first considered by a County HSPHD subdivision, Initial Contact and Assessment ("ICA"). Most relevant to this arbitration is a subdivision of ICA which screens applicants for Medicaid Waivers, a series of programs offering funding for home and community based services to clients who would otherwise require more expensive institutional care.⁴ Rita Chamberlin has been the county program manager of this group since 2002.

Following an initial call or referral to the department, clients go through an extensive eligibility screening process. A social worker is assigned to interview the applicant and assesses their eligibility for the requested services. In doing so, the social worker uses the LTC Screening Document,⁵ a form designed by the Minnesota Department of Human Services and used statewide. A highly detailed, five-page document, it is completed by the social worker and later uploaded by computer into the Minnesota Medicaid Information System ("MMIS"), a statewide database of those seeking or receiving public assistance.

It is essential that the screening document be accurately filled out and uploaded in

³ See the Hennepin County website at www.hennepin.us/hspgd.

⁴ Employer Exhibit 27. Examples Medicaid Waiver programs include Community Alternative Care (CAC), which provides home and community based care for chronically ill children and adults who would otherwise require a level of care provided by hospitals, Community Alternatives for Disabled Individuals (CADI), which provides home and community based care for disabled children and adults who would otherwise require the level of care provided in a nursing facility, and Developmental Disability Waiver (DD), which provides funding for home and community based services for children and adults with mental retardation or related conditions. For additional examples, see www.hennepin.us/hspgd.

⁵Employer Exhibit 46.

a timely manner. By their very nature, applicants are among the most vulnerable members of society. They may suffer from mental and/or physical disabilities rendering them in need of some form of public assistance. A HSPHD committee meets weekly to review uploaded screening documents and clients' qualifications for Medicaid waivers. If deemed eligible and accepted, clients may receive a variety of in-home services designed to help them function in the community and out of institutions. However, only a finite amount of public funding is available. Consequently, some otherwise eligible clients are placed on a waiting list for "slots" of public assistance. Inordinate delays or inaccuracies in the initial assessment can result in further delaying assistance to the most in need. On occasion, it can literally become a life or death matter. Grievant's job performance as a Senior Social Worker and ICA screener over the last six years lies at the heart of this grievance.

Grievant received a Bachelor's degree in marketing and communication from the University of Minnesota in 1984. She was first employed by Hennepin County in an entry-level social services position in July, 1992. She received plaudits for her work in that position.⁶ Through a combination of practical experience and college coursework, she was promoted to a social worker position in 2003. Subsequent to obtaining a Master's degree in social work from the University of Minnesota, Grievant was promoted to a Senior Social Worker position in February, 2006.

All agree that Grievant was a caring and compassionate advocate for her clients throughout her 20-year career with the County. However, since the 2006 promotion to

⁶ Union Exhibits A and B.

Senior Social worker, the County asserts her job performance has been increasingly deficient. Grievant, on the other hand, ascribes any performance deficiencies to a number of factors outside her control including, computer problems, lack of mentors, lack of supervisory support, complex and constantly changing regulations, and bias.

Grievant's first performance review as a Senior Social Worker was conducted by her then unit supervisor, Bruce Kerber, on September 17, 2006, following her completion of a six-month probationary period. At that point, Grievant was rated "Fully Capable."⁷

For a period of approximately three months, late May to August, 2007, Grievant was on partial FMLA leave and only worked part time. In mid-summer of that year, Tom Fuller replaced Bruce Kerber as her direct supervisor.⁸ Fuller reviewed Grievant on August 8, 2007, but cautioned, "*Because of the short time I have worked with Ms. McSween, I am requesting a review in 6 months.*" While Grievant was again rated "Fully Capable," Fuller raised one red flag in a comment to the Quality and Accuracy category:

*"In discussions with Ms. Walker and Mr. Kerber (Grievant's prior supervisors), there had been some concerns in the past concerning the accuracy and completeness of documentation (screening documents and case notes). I have not observed any difficulties in the area, and the next review will give the opportunity to better observe and evaluate this area."*⁹

Despite this comment, Fuller recommended a one-step pay increase for Grievant.

In March, 2008, Grievant was asked by Program Manager Chamberlin to

⁷ Joint Exhibit 4. Reviewing supervisors grade employees in eight different categories: Customer Focus, Integrity and Trust, Support Vision and Purpose, Building Relationships, Resiliency, Technical Knowledge, Quality and Accuracy and Time Management. Employees are given one of five grades, Outstanding, Highly Commendable, Fully Capable, Needs Improvement, or Unsatisfactory in each of various category subheadings, an overall rating for each category and, finally, for the review as a whole.

⁸ Employer Exhibit 47.

⁹ Joint Exhibit 5.

comment on Fuller in preparation for his annual performance review. She responded with a glowing review capped off by saying, *“In all honesty, Tom (Fuller) and Bruce Kerber are the only supervisors in ADS that I had, that make my job with Hennepin County enjoyable!”*¹⁰

Grievant’s next Performance Review was held on November 21, 2008.¹¹ At this point, Fuller had supervised Grievant for over a year. He now found performance deficiencies in parts of all eight rating categories and gave her an overall “Needs Improvement” rating. Grievant twice refused to sign the review (11-21-08 and 11-25-08)¹² and wrote a nine page, single-spaced response to his criticisms.¹³ Selected excerpts from the review and Grievant’s response will give a flavor of their exchange.¹⁴

Category -- Customer Focus

- b. Understands the unique concerns and challenges seniors and persons with disabilities face and access or make available the services that can best meet their needs.

Fuller’s rating: Needs Improvement

Fuller’s comments: *During this review period, this writer accompanied Ms McSween on one field visit (9-4-2008). During that visit her interactions with the client were very professional and appropriate. During supervision, she has expressed professional concern for her clients and an interest in addressing their needs. However, her work performance has been inconsistent, resulting in some clients not receiving timely responses. There has been some delay in completing assessments or closing cases because of lack of timely follow up with the clients from Ms McSween. She has described situations in which she has requested documentation from clients but has not followed up with this if there was a delay in the clients returning material to Ms McSween. This affects customer service because often times client’s lack of follow thru is a result of their declining functional capacity and evidence of their need for increased assistance and/or consultation.*

¹⁰ Employer Exhibit 34.

¹¹ Joint Exhibit 6.

¹² Joint Exhibit 6.

¹³ Joint Exhibit 7.

¹⁴ **The spelling, grammar and punctuation of the original writers are retained in all quotes.**

Grievant's response: *Mr. Fuller has been informed that the delays have been a result of not having the necessary document from the client's. Seniors do not always have the necessary documentation at hand and need further assistance. What I have done to assist in this process is prior to leaving 1. I give the client a check list of necessary documents that will be needed. 2. I have contacted family members to assist there elderly family member with the necessary documentation. 3. I have requested assistance from a Community Health Worker (as this is their job duty) 4. I have gone to the bank with the client's consent and assisted the client as needed. 5. I have made telephone calls to insurance companies for policies. 6. I have gone back to actually assist the client's in sorting through boxes to assist the client's and finding forms. Sometimes when this is done the 60 day time period runs out and the client has to reapply. This is a problem for not ONLY me, but other co-workers that have run into the same problem. This has bee a matter that continues to be discussed in regional meeting and team consults and should not be unfamiliar to Mr. Fuller.*

In addition, there continue to be a systematic problem in the department. There is a form that is used in our department- form 5181/3543. This form needs approval, prior to the client receiving services. Without the approval of this form everything stops for client. This continues to be a problem. It was a matter that was discussed in a regional meeting as recent as January 5, 2009. One worker at the meeting reported that she still has a case waiting on her desk that has been there for 4 months. I agree with Mr. Fuller this is a problem and affects customer service.

Category -- Building Relationships

- d. Works effectively with others, communicating with coworkers/partners by listening and, when necessary, checking for understanding, giving others a chance to provide their perspective. Engages others, presenting ideas in a positive, non-threatening manner.

Fuller's rating: Unsatisfactory

Fuller's comment: *Ms McSween is respectful in her interactions in meetings and during supervision. A concern in this area is that Ms McSween has not consistently initiated problem solving on a timely basis when she has encounter difficult or complex situations when conducting assessment. Rather than explore solutions, she has appeared to present the problem and ask that the solution be given. An expectation will be for Ms McSween to present a question or problem, but at the same time describe the attempts at resolution she has made and the proposed solutions she suggests.*

Grievant's response: *Comments -- Ms. McSween is respectful and then his evaluation is a "U". This is a contradictory statement and is very misleading. In regard to "appearing" to present a problem, and then ask for a solution is given, is speculation on Mr. Fuller's evaluation of me. But based on my performance of his speculations of me, I am given a "U." Is this fair??? AS I reported earlier, in this position there are so many*

questions that are new that we use co-workers as resources to assist each other. Co-workers come to me for advice as well. This is not only done in Team Consult, Regional meeting, but questions are asked through emails as well. This is another misrepresentation that is very speculative on Mr. Fuller's behalf. On some instance I have asked Mr. Fuller as he is my supervisor. He can not answer the question and has to go to the next office and ask, supervisor, Patti K. Is this a double standard???

Category -- Technical Knowledge

- a- Keeps current with program and system changes and has a clear understanding of the impact of programs and policies on service delivery.

Fuller's rating: Needs Improvement

Fuller's comment: *As stated above, Ms McSween has struggled to remain current in an ever changing environment. She has had difficulty assessing the AC (Alternative Care) clients, and thus is not currently being assigned AC assessments. Although she has attended one day long AC training, and worked with several knowledgeable AC consult staff, she continues to be confused by the complexity of that program. Ms McSween recently attended an additional AC Training on 10-23-2008. She will be assigned a mentor and be required to attend further training before receiving AC assignments. In addition, some procedural details have been missed or confused. When entering LTCC documents, Ms McSween has on at least one instance not checked the "send to state" radio button which in effect stalls the entry of an LTCC in the state MMIS system. Although Ms McSween has worked in the LTC area for just under 6 years, she has acknowledged that she does not have a good grasp of developing a temporary service agreement. I have supported her request to get individual mentoring in this process. I have had discussions with Ms. McSween regarding the content of her time reporting. She has at time stated goals that do not comply with case note standards which were developed to be in compliance with federal regulations. She has also, at times, entered material in time reporting which is not directly related to client services, (i.e. supervisors being on sick leave or unavailable). Ms McSween will be asked to review current time reporting training outlines and attend the training currently under development with deals with time reporting content, goal writing and standards.*

Grievant's response:

The History of AC as I have known it to be since I have in the ADS Department;

African -American Supervisor, Sharon S. was previously promoted to Supervisor and AC Lead. After several struggles with the program, Sharon left the county. Soon after African American, Supervisor, Tina C. was assigned from DD to Supervisor - Lead for AC. Tina left the county and became a Manger for Ramsey County.

After two African American females resigned from Hennepin County the ADS Department devised a group of about 6 or more workers that is now known what is called

the AC. Consult Group. This group works specifically on AC cases and they have an opportunity in their Team to discuss and become experts in this field. But, even as a group they continue to have struggles with AC cases. AC cases have a reputation for being extremely difficult for cases to handle by staff. As I reported earlier, some staff refuses to work with AC.

One case that I attempted with AC and referred to the AC Consult Group was in regard to a case as the client was selling her home to "We Buy Ugly Homes." The AC Consult Team could not get back to me with an answer as they had to consult with a County Attorney. This is an example of the complexity of these cases. Sometimes even with a group the answer is not available.

If two African- American, Supervisor, left the county and an AC. Consult Group had to be developed in their absence, is it fair to day that a one day long AC training program is sufficient based on the natures of these cases? Apparently, Mr. Fuller does not understand the full complexity of AC cases to write such a report in my review.

Mr. Fuller reports that I do not have a grasp of developing a Temporary Service Authorization -- This is a misconception. In regard to the TSA, the Senior Community Health Worker that I worked with for the past year from the North Least Team was assigned to another Team on the North Region as another Co-worker from the North Region was having problems and needed the assistance of the Senior Community Health Worker from the North East Region. This change was without notice and as a result, I began to work with another SCHW that was not as knowledgeable (I was not aware of this until later) As a result, several TSA were incomplete, with the wrong provider codes, services not ordered, services order, but not in the proper location and client called reporting they could not get services. To make the matter worse, the SCHW was no longer with the county and we (the staff) were not informed and there was not sufficient notice or warning. I received a call as recent as yesterday, still calling me as they are looking for the worker. In my post positions, I worked with the SCHW that I initially talked about and was very aware of here work. She is very good at what she does and continues to work with not only me, but other workers in the ADS department. Prior to my knowledge of about the errors that were created from the past SCHW, I asked the initial worker to assist in refreshing me to be more proactive in my work as I had not worked on TSA's in over a year. As a result, I initiated the meeting. Tom's statement in my review is very misleading.

Tom has reported "Entering materials in time reporting that is not directly related and do comply with case note standards, which develop to be in compliance with federal regulations in guidelines.

As example of this is Mr. Fuller pointed out a case to me that I did not write the compliance with the federal regulations in guidelines: "To maintain an optimal level of independence in the community." I informed Mr. Fuller that I did write the guideline to maintain... because the client died and that he no longer lives in the community I was

told that in the future when this happens that I am to write that the client still lives in the community even though he died to comply with the federal regulations and guidelines.

Exchanges similar in content and tone occur in each of the eight rating categories.

On the same day Grievant filed her response to Fuller's review, she also requested a transfer out of the ADS department.¹⁵ This request was later denied.

In final comments to Grievant's review, Fuller stated:

This has been a difficult year for staff in ADS with shrinking budgets, increases in the complexity of work, and frequent changes in work flow processes. Despite these pressures, accountability and follow-through of the work in ADS must continue. The purpose of this documentation is to assist ms McSween in achieving acceptable standards and further developing her skill set to meet the challenges faced by ADS and to develop her potential as a member of ADS.¹⁶

Following Grievant's review, Fuller imposed a 6-month Performance Improvement Plan (PIP).¹⁷ It was designed to cover the period from 11/21/08 to 5/21/09 and provided:

Ms. McSween will be expected to:

- 1. When questions arise during the course of an assessment, it is expected that you will attempt to resolve any questions within one (1) week by consulting the following resources (listed in priority order): a) ADS Operations Manual, b) seek assistance from the appropriate Program Consultation Group (CADI, EW, TBI, etc.), c) Region Case Consultation Group, or d) your supervisor. It is expected that you will document the progress you make toward obtaining an answer in HSIS Time Reporting 100% of the time. This will support the vision and purpose of ADS by insuring that clients will be provided services and/or consultation and referral on a time basis. It is expected that in any urgent or emergent situations, you should come directly to your supervisor for guidance.*
- 2. Time reporting will be consistent 100% of the time with HSPHD case note standards for content and ADS standards for productivity: a minimum of 75% of hours worked reported in direct client contact.*
- 3. It is expected that all cases presented for transfer or closing will have all details finalized. For cases presented for transfer, Service Agreements will be approved in MMIS, LTCC's will be approved in MMIS, and MA will be open 100% of the*

¹⁵ Employer Exhibit 35.

¹⁶ Joint Exhibit 7, p. 7.

¹⁷ Joint Exhibit 9.

- time. It is understood that there may be changes in the status of clients eligibility or program participation that can occur without the knowledge of the assess, and this will be taken in consideration.*
- 4. It is expected that you will obtain consultation regarding the preparation of Temporary Service Authorizations (scheduled for 11-20-2008) and that you will accurately complete all TSA's on assessments you conduct 100% of the time.*
 - 5. You will be expected to keep an up-to-date training log of issues and their resolutions as you given assistance/coaching by you supervisor or co-workers. You will be expected to reference this log as same/similar issues arise in the future so you can find the answers on your own. This log will be reviewed periodically during coaching sessions throughout the duration of your performance improvement plan.*

Fuller further stipulated that he would meet weekly with Grievant one-on-one for coaching sessions during the duration of the PIP. In response, Grievant requested that she be allowed to tape record meetings with her supervisor or have a witness present. Consequently, Patrice Hughes Alfred was added to the meetings on 2/26/2009 as a third party observer.¹⁸

Grievant only worked part-time or was out on FMLA leave from early March, 2009 to late August, 2009. While working part-time, she was to attend a scheduled supervision meeting with Fuller and Alford on April, 17, 2009. When her request to tape record the meeting was denied, she walked out. She also refused to respond to Fuller's request for client updates. These events led to her receipt of a Written Reprimand Letter on May 6, 2009.¹⁹ The reprimand was not grieved.

Grievant's medical problems resulted in extended periods of FMLA leave, medical leaves of absence, and medical layoff between March, 2009 and March, 2011. She ascribed her absences to irritable bowel syndrome caused by work related stress. In

¹⁸ Employer Exhibit 36

¹⁹ Joint Exhibit 13.

fact, Grievant subsequently filed a Worker's Compensation claim demanding temporary total disability for the periods of 3-9-09 to 4-6-09, 8-28-09 to 3-11-10, and 7-30-10 to 2-14-11 in the sum of \$50,679.40 and temporary partial disability from 4-6-09 to 8-1-09 in the sum of \$6,528.63. She also claimed medical expenses of \$19,472.76. The entire Worker's Compensation claim was voluntarily settled by Grievant in December, 2011 for \$4,870, the majority of which was apportioned to medical providers.²⁰

Due to her absences during the spring and summer of 2009, the six-month term of Grievant's original PIP was extended to 8-27-09. She went on a medical leave of absence again on 8-28-09, the day after the extended PIP ended. This time, Grievant remained out until March 11, 2010. During the leave, Grievant requested Reasonable Accommodation under the provisions of the American's With Disabilities Act. This was denied as "premature" since she had not yet returned to work. Her prior request for a new supervisor and department transfer was also denied as "unreasonable."²¹

Upon her return, Grievant experienced problems catching up with ADS regulatory and procedural changes.²² However, she was given assistance in MMIS computer procedures and again assigned an impartial observer to her supervision sessions with Fuller.²³

A Special Performance Review was scheduled for April 19, 2010, about 5 weeks after her return to work. It looked at her progress toward completion of the PIP

²⁰ Union Exhibit C.

²¹ Employer Exhibit 26.

²² Union Exhibit E.

²³ Union Exhibit D. Also Joint Exhibit 25, pp.1-10.

requirements given to her eighteen months earlier.²⁴ If anything, her performance had deteriorated. Fuller now rated her “Needs Improvement” in all eight categories. Sample comments were:

- *There were consistent delays from the time clients were assigned until face to face appointments were completed, documentation was entered into the system, service authorizations were completed and services begun.*²⁵
- *Ms McSween-Sanigular has not accepted ownership of the difficulties she has had in completing her work at a fully capable level. She has tended to put blame on the technical systems with which ADS operates, lack of clear direction from this supervisor, the lack of training notwithstanding that she has performed same or similar tasks since becoming a Senior Social Worker.*²⁶
- *In response to coaching and feedback, her response has been primarily to blame other people and systems for her lack of follow-through rather than accept responsibility for her actions and engage in problem solving.*²⁷
- *During this review period, productivity reports indicate that Ms McSween-Sanigular averaged 46.25% of time worked reported as client contact. The ADS standard is 75%.*²⁸

As a result of her failure to meet performance standards, Grievant was given a five day suspension.²⁹ Although the County indicates this suspension was grieved, it was never taken to arbitration.³⁰ Ms. McSween-Sanigular testified that she had not resisted the discipline.³¹ Once again, Grievant was placed on a PIP which was to extend from 7-22-10 through 9-22-10. After less than two weeks on the new plan, Grievant once again went on an extended medical leave of absence.

²⁴ Joint Exhibit 8.

²⁵ Joint Exhibit 8, p. 4.

²⁶ Joint Exhibit 8, p. 5.

²⁷ Joint Exhibit 8, p. 6.

²⁸ Joint Exhibit 8, p. 8.

²⁹ Joint Exhibit 14.

³⁰ Employer Exhibit 26.

³¹ Under either circumstance, the discipline is deemed final and may be considered by the arbitrator in the appropriate context.

Upon her return to work in February, 2011, Grievant and her union representative, Penny Wile, met with supervisor Fuller and Program Manager Chamberlin to review her work prior to going on medical leave in August, 2010. Chamberlin raised four areas of concern:³²

1. *Discrepancy between case notes and time reporting: excessive time reported for activities reported in case notes.*
2. *Confusing references or discrepancies in case notes including critical error in assessment of dementia.*
3. *Failure to respond timely (within 3 day standard) to referral June 2012 (no action until advocate complained one month later). And*
4. *Failure to respond to direct request from supervisor (2x).*

Again, Grievant placed blame for these deficiencies on Mr. Fuller.³³ Nevertheless, Chamberlin had decided to give Grievant a “fresh start” by assigning her to a new supervisor, Louella Kaufer.³⁴ However, Chamberlin also admonished Grievant:

*Regarding the concerns identified above, I have decided to take no action at this time. Instead, I have chosen to see how you perform your duties in your new work unit under the direction of your new supervisor. It is my hope that this move will result in improved performance. However, you should know that in your new assignment, you will be held to the same standards required of other employees in your job class and work unit. This memo is not considered discipline, but rather a coaching session.*³⁵

There are no documented difficulties with Grievant’s performance for the ensuing fourteen months. Grievant testified that she believed Kaufer to be a “wonderful and supportive” manager. Although requested to do so by Chamberlin, Kaufer had not reviewed Grievant’s performance as of March, 2012 when a departmental reorganization

³² Joint Exhibit 12.

³³ Employer Exhibit 36.

³⁴ Employer Exhibit 45.

³⁵ Joint Exhibit 12.

again shuffled managers.³⁶ Kaufer was successively replaced by two temporary managers during March, April, and part of May, 2012.

Grievant's last unit manager, Marquita Ryan, was appointed in May, 2012. She has a Master's Degree in marriage and family therapy and had worked for the previous six and a half years in the HSPHD child protection division. In an attempt to learn about each of her new supervisees, Ryan set up casual, one-on-one meetings. She and Grievant first met in late May. They have widely differing recollections of their first encounter.

Grievant contends Ryan immediately asked her to retire from HSPHD because the County wanted to hire younger workers.³⁷ Further, Grievant claims Ryan said that if Grievant didn't retire, Ryan would make her job so miserable that she would be fired.³⁸

Ryan testified that Grievant brought up the subject of possible retirement in the course of a casual, friendly conversation. Ryan responded that, given her relative youth, many years would pass before she could even think of the subject. Ryan strenuously denied making the other alleged statements.

The retirement issue was only the first of several incidents leading to Grievant's termination on September 6, 2012.

Ryan had a practice of going through each staff member's case list on a monthly basis at regularly scheduled supervision meetings. Ryan kept extensive handwritten notes for meetings with her staff.³⁹ The average caseload for an ICA Assessor is 15 to 20 cases. While most assessors are assigned about two new cases per week, others are being closed

³⁶ Employer Exhibit 37.

³⁷ Union Exhibit R.

³⁸ Union Exhibit H.

³⁹ Employer Exhibit 40

out. At some point, Ryan discovered that Grievant had 45 open cases.⁴⁰ When asked, Grievant was unable to report the status of individual cases. Following supervisions on 7/9/12 and 7/20/12, Ryan emailed Grievant a case by case analysis of what had been discussed along with directions for further actions.⁴¹

Ryan's supervision meetings also revealed Grievant had difficulty uploading completed assessments into the MMIS database. Consequently, Ryan enrolled Grievant in a computer uploading training course (EFC 102) scheduled for attendance by everyone in Ryan's unit. She was enrolled on 6/11/12 for a course to be held on 7/11/12 and notified of the date via a personal email from Ryan and via Lotus Notes, a time scheduling computer program used by the entire department.⁴² Nevertheless, Grievant failed to attend. She claimed the meeting was not on her "paper calendar" so she had scheduled two client assessments instead. When asked for the names of the clients, Grievant did not respond.⁴³

Two later incidents precipitated Grievant's termination. The first began with an in-home assessment that Ryan attended with Grievant on May 28, 2012. Ryan arrived about 15 minutes after Grievant had started the assessment. After filling out the Waiver Start Consult form, Grievant submitted it to Ryan for review.⁴⁴ On 6/19/12, Ryan sent Grievant a responsive email suggesting corrections and/or additions to the information reported. Grievant revised the form and returned it to Ryan the same day.⁴⁵ Ryan

⁴⁰Employer Exhibits 38 and 25, p. 39.

⁴¹ Joint Exhibit 25, pp. 47-50 and 54-56.

⁴² Employer Exhibit 40.

⁴³ Employer Exhibit 40.

⁴⁴ Joint Exhibit 25, pp. 15-16.

⁴⁵ Joint Exhibit 25, pp. 19-21.

responded a day later, again suggesting a number of corrections and/or additions to the form.⁴⁶ In the third iteration, Grievant, for the first time, added the following statement:

“Due to the mental abuse she receives from her husband daily, she is not interested in having him as her pca.” (Personal Care Attendant)

Under Minnesota law relating to maltreatment of vulnerable adults, Grievant has a mandatory duty to immediately report abuse allegations to appropriate authorities.⁴⁷ She had not done so. In this case, the appropriate authority would be the Hennepin County Common Entry Point.⁴⁸ When Ryan observed that she hadn’t heard any evidence of mental abuse, Grievant said the client mentioned it during the first part of the interview prior to Ryan arrival. Even though a month had passed, Ryan instructed Grievant to report the incident. Hennepin County Adult Protection referred the matter to local police who investigated and concluded no abuse had occurred. The case was then closed. At a later investigative interview, Grievant gave conflicting and confusing accounts of what the client had said and when she had reported the alleged abuse.⁴⁹

The second incident leading to discipline occurred on 8/14/12. A supervision meeting between Ryan and Grievant was set for 9:00 AM that morning. Grievant had been notified of the meeting two months earlier via Lotus Notes. At 8:29 AM on August 14, Grievant emailed Ryan insisting that she had to reschedule the meeting because she, *“was swamped.”*⁵⁰ A series of emails back and forth culminated in Ryan ordering

⁴⁶ Joint Exhibit 25, pp. 22-23.

⁴⁷ Employer Exhibits 28 and 29. M.S.A. §§ 626.5572 and 626.557.

⁴⁸ Employer Exhibit 30.

⁴⁹ Joint Exhibit 25, pp. 92-96.

⁵⁰ Joint Exhibit 25, p. 74.

Grievant to be in her office at 11:00 AM for a supervision meeting.⁵¹ Grievant responded at 11:02 AM indicating that, *“As I have working and have informed you that I am swamped and just received your email at 10:59 and I am working from home, there is no way I can meet with you at 11:00.”*⁵² Despite *“being swamped,”* Grievant was simultaneously engage in an email exchange with her Union representative claiming that, *“Rita and her group look at every file I have and try to scrutinize my work and fine something that sticks.”*⁵³ In addition, she emailed Ryan at 11:21 AM requesting help on a case.⁵⁴

As a result of her failure to attend the 8/14/12 supervision meeting, Grievant was given a one-day suspension.⁵⁵ That suspension was grieved and is one of the issues in this arbitration.⁵⁶

A final investigatory meeting regarding Grievant’s work performance and the “mental abuse” issue was held on 8/21/12.⁵⁷ Ryan and a second supervisor represented the County. A Union representative accompanied Grievant. In the course of the interview, Grievant gave conflicting and confusing answers regarding the “mental abuse” issue. Further, despite having been asked for a list of her closed cases on three occasions starting in early July, Grievant still failed to respond. She attributed her performance deficiencies to a variety of factors: *“I did not attend the training..because ...you told me to retire.;* *“My computer was not working...”; “I need help and I am not getting it from*

⁵¹ Ibid.

⁵² Joint Exhibit 25, p. 25.

⁵³ Joint Exhibit 25, p. 72.

⁵⁴ Ibid. p. 76.

⁵⁵ Joint Exhibit 15.

⁵⁶ Joint Exhibit 21.

⁵⁷ Joint Exhibit 25, pp.92-96.

you.”; “I don’t work on Fridays.”; “Because I do not have the training to do my work.”⁵⁸

ICA management and County Human Resources conferred after the August 21 investigatory meeting and decided to terminate Grievant. She was given a Notice of Intent to Dismiss on 8/23/12 by Ryan.⁵⁹ In the course of cleaning out her desk and leaving the office, Grievant directed racial slurs at Ryan.⁶⁰ The termination was effective 9/6/12 and immediately grieved.⁶¹

APPLICABLE CONTRACT PROVISION⁶²

ARTICLE 32 -- DISCIPLINE

Section 1. The EMPLOYER will discipline employees in the classified service only for just case.

JOB DESCRIPTION⁶³

CLASS TITLE: Social Worker, Senior

DEFINITION:

*Under limited supervision, perform work involving provision of intensive social work services on case involving *complex problems*, and social treatment plans. (Emphasis added.)*

⁵⁸ Ibid.

⁵⁹ Joint Exhibit 16.

⁶⁰ Employer Exhibit 48. Grievant and Ryan are both African-American. Grievant picked a star from her bulletin board, gave it to Ryan, and said, “...I want you to have this star this is what they give Black folks when the let other black folks go. You deserve it. You know (Uncle) Tom got a star too, he deserved it too...” As she was leaving the building, Grievant waived at Ryan and said sarcastically, “Been nice working for you -- Goodbye, Miss Ann!” (“Miss Ann” is a derogatory termed used in the African-American community to connote a woman (black or white) who is arrogant and condescending. See Wikipedia.org.)

⁶¹ Joint Exhibit 22.

⁶² Joint Exhibit 2.

⁶³ Joint Exhibit 3. Only those portions of the Job Description deemed applicable to the present case are include.

JOB FUNCTIONS (DUTIES/RESPONSIBILITIES):⁶⁴

1. Carry a selected caseload where there is a need for specialized continuing service/treatment.
2. Interview clients and perform case evaluations to determine problems and a appropriate types and methods of service/treatment.
3. Design and follow through on intensive long or short-term service/treatment.
4. Provide counseling to families and individuals.
-
6. Interpret and explain policies, regulations, and programs to clients and the public.
7. Refer clients to appropriate community services and interpret social and emotional factors to others involved in treatment of clients.
8. Make field visits to client's homes.
9. Prepare social histories with emphasis on psychosocial factors, adoption, or foster home placements.
10. *Prepare and maintain case records, case findings, correspondence and reports.*
(Emphasis added)

Knowledge, Skills, and Abilities:

....

Ability to: *prepare case records and reports' utilize supervision, consultation, and in-service training in achieving an increasing level of competence; read, interpret, and apply policies, regulations, and procedures; communicate using verbal and written methods.* (Emphasis added)

⁶⁴ Only essential functions are included.

OPINION AND AWARD

It is well established in labor arbitration that, where an employer's right to discharge or suspend an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a "preponderance of the evidence" standard. That standard will be applied here.

In determining the question of whether the employer acted with "just cause," the arbitrator is called upon to interpret the phrase as a term of art which is unique to collective bargaining agreements. While the arbitrator may refer to sources other than the contract for guidance as to the meaning of just cause, his essential role is to interpret the contract in determining whether a given action was proper.

A "just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined or discharge. Other elements include a requirement that an employee know or could be reasonably expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge. Last, there must be a reasonable relationship between the employee's misconduct and the punishment imposed.

The assumption that an employee is expected to adequately perform his or her assigned tasks is so elementary and universal that it is rarely mentioned in labor law literature. However, termination cases based on job performance can present a challenging problem for the arbitrator. There is no single incident to consider as in the

usual workplace fighting or theft case. The facts are often spread over several years and are supported by varying degrees of documentation. More problematic, the employer and grievant usually give diametrically opposed interpretations of common facts. In the final analysis, witness credibility factors large.

In reviewing the evidence presented, I am mindful that the work of Senior Social Workers is an increasingly complex job. A bureaucratic sea of ever-changing governmental rules and regulations must be mastered and constantly updated. Programs come and go. The HSPHD seems to be in a permanent state of re-organization. Their clients, often physically and/or mentally impaired, represent needs that can never be fully met with precious public dollars. Difficult judgments are a part of the Social Worker's daily fare. Their job description specifically calls for handling complex cases under limited supervision. Most Senior Social Workers are up to the task. The same cannot be said for Grievant.

The evidence of Grievant's substandard job performance during the last six years is overwhelming. While all agree she is a caring, compassionate advocate for her clients, concerns over the accuracy and completeness of her work begin appearing in 2007, shortly after becoming a Senior Social Worker.⁶⁵ They continue, almost unabated, up to the week of her termination.⁶⁶ There was a consistent failure to accurately complete, upload, and close assessment files in a timely manner. Forty-five open files and Grievant's inability to explain the status of each is unacceptable.

Although she points to work related stress as the basis as the basis for her medical

⁶⁵ Joint Exhibit 5, p.5.

⁶⁶ The only purported exception is Union Exhibit G, an incomplete, unsigned Performance Review template that was never placed in Grievant's personnel file.

issues, her Worker's Compensation claim was, as a practical matter, unsuccessful. A \$75,000+ claim that is resolved for \$4870 reflects a settlement based on nuisance rather than merits.

Equally disturbing is Grievant's failure to take responsibility for her actions, or, more accurately, inactions. Supervisors' animus, lack of training, computer malfunction, lack of mentors and racial bias all appear at one time or another in her litany of excuses. One or another might explain a single incident, but the same excuses used repeatedly for over six years strains credulity. Most importantly, Grievant failed to present any concrete, credible evidence to support her claims. If anything, the record demonstrates herculean efforts by supervisors to train and assist her.

The two incidents in August, 2012, failure to attend a supervision meeting and the inappropriate allegation of client "abuse" were the final straws for HSPHD. Grievant had known about the August 14 supervision meeting with Ryan for two months. Emailing her supervisor a half hour in advance with the "swamped" excuse, smacks of avoidance. Grievant already knew about the investigatory meeting scheduled a week later and found time to discuss it with her Union representative despite being "swamped." She also had time to email a file question to Ryan during the time she should have been meeting with her to discuss files! The fact that a supervisory meeting was finally held a day later is irrelevant. She was directly ordered to meet with Ryan at 11:00 AM on August 14 and failed to comply. Grievant's long history of passive-aggressive avoidance negates what might otherwise be a tendency to give her the benefit of the doubt. She cannot both ask for help and then avoid the sessions designed to give it. Undoubtedly, supervision meetings had long ago become unpleasant exercises for Grievant. Even so, failure to

attend a scheduled and directly ordered supervision meeting under these circumstances is insubordinate and deserving of discipline.

Ryan's report of the August 21, 2012 investigatory meeting capsules the Employer's case.⁶⁷ Grievant gives contradictory and confusing explanations for her mishandling a purported adult "abuse" case. Later, she asserts she did not go to training because Ryan told her to retire. When Grievant finally attended the requisite training, her "...computer was not working." She further alleged she didn't have the training to do her work and wasn't getting supervisory help. Last, despite having been repeatedly requested to explain why seven of the 45 files should not be on her caseload, Grievant responded, "*Can you give me the cases.. I don't know off the top of my head.*" This list of excuses was an exercise in *déjà vu* for the County. Similar recitations reoccur throughout the County's documentation. At some point, the Employer, and, more importantly, the clients deserve better. In the final analysis, Marquita Ryan's version of the final meeting was far more credible than Grievant's. Was termination the appropriate response?

While an arbitrator has the power to determine whether a employee's conduct warrants discipline, his discretion to substitute his own judgment regarding the appropriate penalty for management's is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he must

⁶⁷ Joint Exhibit 25, pp. 92-96.

conclude the employer exceeded its managerial prerogatives and impose a lesser penalty. In reviewing the discipline imposed on an employee, the arbitrator must consider and weigh all the relevant factors including employee's length of service, his work record, and the seriousness of the misconduct.

Grievant's 20 years with the County would ordinarily weigh heavily in her favor. While the first 15 years appear unblemished, Grievant's performance as a Senior Social Worker since 2006 paints a markedly different picture. Prior to termination, Grievant had received a written reprimand, a five-day suspension and a one-day suspension. Each time she was warned that further problems could lead to termination. The evidence of her substandard job performance over the last five years is overwhelming. The "final straw" incidents, standing alone, would normally be relatively minor. Last minute schedule changes happen. Erroneous judgments about perceiving and reporting abuse can happen. However, in this instance they are only the latest indicators of Grievant's ongoing problems and unacceptable job performance.

No one relishes firing a long-term employee. However, the County's higher duty is to the citizens it serves. They have the right to expect competent execution of public welfare programs. While Grievant is undoubtedly a compassionate, well-intended person, she was not performing at the required level. Under the facts before me, I see no reason to overturn either her one-day suspension or her termination.

AWARD

The grievances are DENIED.

Dated: 3/2/13

Richard A. Beens, Arbitrator