

IN THE MATTER OF ARBITRATION

BETWEEN

**Allina Health d/b/a St. Francis
Regional Medical Center,**

Employer

**FMCS Case No.: 130128-52855-3
(Discharge of Meredith Theis)**

and

OPINION AND AWARD

SEIU Healthcare Minnesota,

Union

**A. Ray McCoy
Arbitrator**

Appearances:

For the Employer

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JURISDICTION

SEIU Healthcare Minnesota, (hereinafter "SEIU Healthcare" or "Union" filed a grievance challenging Allina Health d/b/a St. Francis Regional Medical Center's (hereinafter "Allina" or "Employer") termination of the grievant, Ms. Meredith Theis (hereinafter "Grievant"). Allina terminated Ms. Theis on November 2, 2012 for possession, use and disclosure of protected patient information without a permitted business reason or patient care need. The Union filed a timely grievance on November 2, 2012. The Parties processed the grievance through the various steps outlined in their collective bargaining agreement. The Union requested arbitration. The Parties notified the undersigned arbitrator of his selection to hear this matter on February 27, 2013. The Parties selected July 15, 2013 for the hearing. The hearing was held on that date at the offices of the Federal Mediation and Conciliation Services, Suite 200, Minneapolis, MN.

Both sides had a full and fair opportunity to present testimony, examine witnesses and present supporting documentary evidence. At the close of the hearing the Parties elected to exchange briefs rather than provide oral closing arguments. Briefs were exchanged as agreed on August 7th. The arbitrator closed the record on that date. The Parties agreed the matter is properly before the arbitrator for resolution. With the exception of exhibits returned to the Employer as a result of stipulation of the parties and the rejection of evidence offered by the Union regarding decisions in related proceedings, all of the evidence provided to the arbitrator as well as the post-hearing briefs have been fully considered as expressed in the opinion below.

RELEVANT CONTRACT AND POLICY PROVISIONS

ARTICLE 1: RECOGNITION

(C) **No Discrimination:** There shall be no discrimination by the Union or the Employers against any employee because of membership or non-membership in the Union or because of the assertion of rights afforded by this Agreement.

ARTICLE 3: MANAGEMENT RIGHTS

Except as specifically limited by express provisions of this Agreement, the management of the Hospital, including but not limited to, the right to hire, lay off, promote, transfer, discharge or discipline regulations, direct the working forces and to determine the materials, means and the type of service provided, shall be deemed the sole and exclusive functions of management.

ARTICLE 6: CORRECTIVE ACTION AND DISCHARGE

(A) **Just cause:** The Employer shall not initiate corrective action, discharge or suspend an employee without just cause.

ISSUE

Did the Employer have just cause to discharge the Grievant and if not what is the appropriate remedy?

POSITIONS OF THE PARTIES

The following is a summary of the Parties' respective positions as largely reflected in their post-hearing briefs.

Employer's Position

Allina Health has more than met its burden that the Grievant was terminated for cause after she engaged in the intentional use and disclosure of patient records containing confidential and protected health information without a permitted business reason in violation of both hospital policy and federal law. Allina had no choice but to

comply with its established, written procedures regarding breaches of patient confidentiality and discharge the Grievant. Not terminating the Grievant would undermine the Hospital's cardinal ethical and legal obligations relating to patient privacy. Casual disregard for patient confidentiality will not be tolerated, and employees should and must expect to lose their employment for such violations.

The rules regarding patient information must be strictly and rigorously enforced. Arbitrators uniformly agree that a breach of patient confidentiality is a serious offense warranting discharge.

The Hospital's confidentiality policy is reasonable. The Hospital places the highest priority on maintaining patient confidentiality. The policies uphold patient trust and ensure compliance with state and federal law. Patients share highly personal and sensitive information with health care providers and those providers are reasonably expected to hold this information in confidence, and to use it only for the purpose of administering care.

The Grievant had notice of Allina's expectations regarding her limited right to use or share patient health information. Grievant signed a confidentiality agreement when hired. Grievant completed annual training on patient privacy and did not lack an understanding of the consequences if she violated the policy. Allina continuously communicated its requirements through instructions for accessing policies online, annual training, department training, and specific department meetings.

Whether the Grievant had training on a de-identification policy is irrelevant. While it is true the Grievant was not trained on de-identification in a specific, stand-alone program, such training was not necessary for her job duties. Whether or not the Grievant has training on union complaints as legitimate business purposes is irrelevant. The Grievant said she was never trained that reporting a potential contract violation to a union steward was an illegitimate business purpose. The Confidentiality Policy is controlling. The policy states that a legitimate business need does not apply if your role in the treatment of the individual has ended. While the Grievant came upon the documents in her normal workflow, after she scanned them into the electronic record, her business purpose ended.

The Grievant's conduct violated the Confidentiality Policy. The Grievant partially redacted numerous patient medical records, made copies, kept the records in her possession, and submitted the medical records to another individual. A level 3 breach of the policy requires intentional conduct, without permission and without a permitted business reason. The Grievant's intentionally used and disclosed patient medical records and any such disclosure will result in discipline. Even a good faith intentional disclosure of patient medical information without a permitted business reason is a violation of the policy.

The Grievant did not have a legitimate business purpose for disclosing the medical records. Once the Grievant's use of the medical records was complete her legitimate business purpose ended. Making a complaint regarding a breach of contract to a union steward is not a legitimate business purpose warranting the use of the patient's medical record. Neither Allina's System-Wide Policy or HIPPA support the Grievant's use of patient medical records in this case. Allina's System-Wide Policy allows the facility to use patient medical records in the resolution of grievances but not the Grievant. The Grievant is not considered the "facility" and was not acting on behalf of "the facility." An exception included in the HIPPA law permits covered entities to use in health care operations which includes the resolution of grievances. The Grievant is not a covered entity. Allina may use and disclose PHI for the resolution of grievances HIPPA does not afford a union or an individual engaging in union activity, unfettered access to a patient's PHI absent a hospital's disclosure. While the Grievant had a right to raise a potential contract concern with her steward, doing so is not a legitimate business purpose warranting the use of unauthorized medical records. The Grievant could have raised the same concern without using patient medical records.

Allina fairly and objectively investigated whether the Grievant had used and disclosed the patient's medical records without a legitimate business purpose before administering discipline. The hospital took numerous steps in the investigation process to thoughtfully consider whether or not the Grievant's conduct constituted a legitimate business purpose. The Hospital then went to additional lengths to ensure the discipline it imposed was consistent. The investigation included numerous meetings including

ones with the Grievant and the Grievant's union representation. The investigative committee held numerous meetings to make sure they followed proper steps for each decision. Even after concluding that the Grievant's conduct was inappropriate, the Investigative Committee resolved to thoroughly review training materials and prior Level 3 violations to ensure the discipline imposed would be consistent with other Level 3 breaches of patient privacy. Only after determining that all similar violations had resulted in termination did the Investigation Committee make the decision to terminate the Grievant. The Investigation Committee discussed and considered the Grievant's work history, disciplinary record as well as her understanding of the confidentiality policy. The Committee decided that Grievant's conduct could not be mitigated.

The Hospital applies discipline for breaches of confidentiality consistently and did not treat the Grievant differently or discriminate against her. The Grievant's conduct was not a Level 1 violation because it was purposeful and it was not a Level 2 violation because the Grievant did not have a legitimate business purpose for accessing the records. The Hospital has consistently terminated employees, even long-term employees on a first offense for Level 3 violations.

The Grievant's conduct was serious and warranted termination. It is not the role of the arbitrator to second-guess management decisions concerning the level of discipline imposed upon an employee, even in cases involving discharge. As in other Allina cases a Level 3 breach of patient confidentiality should result in termination even if the employee has an otherwise satisfactory service record. Any reinstatement would send the worst possible message to the rest of the hospital staff. The hospital must send a strong, consistent message to its workforce that it will not tolerate violating patient confidentiality. To sustain the grievance in any way would do unwarranted violence to the organizations consistent disciplinary processes. The Grievant held a position of trust and violated that trust and responsibility. The best-intentioned serious breach of privacy is still a serious breach. The Hospital repeatedly trained the Grievant on what not to do but she did it anyway. She has only herself to blame for the resulting consequences.

Union's Position

The Employer discharged the Grievant for making a complaint to her Union steward about a potential contract violation supported by redacted medical records she came across in her ordinary workflow. The Grievant used the records for a legitimate business purpose of union grievance investigation. She made sure the records were redacted to remove patient identifying information before providing them to her union steward. The Grievant was plainly engaged in activity protected by the contract and federal labor law. The Employer's decision to discharge her under these circumstances is without just cause. The discharge was for asserting contract rights in violation of the non-discrimination clause of the Agreement. The Employer failed to apply discipline in an even-handed and non-discriminatory manner because it imposed lighter discipline on other employees who committed substantially more serious patient confidentiality infractions and who had significantly worse disciplinary records. The Employer's purported policy regarding use of medical records in connection with union grievance investigations either did not exist or was not clearly disseminated. The Employer was substantially at fault for the alleged infraction because it routinely used unredacted medical records for purposes of union grievance investigations. The Employer did not adequately investigate the alleged violation and denied due process to the Grievant because the investigatory interview focused on alleged violation of a De-Identification policy. The Employer failed to follow progressive discipline and admittedly failed to give any weight to relevant mitigating factors. The Employer admits it would have terminated the Grievant even if the medical records she provided to her union steward would have been fully de-identified and properly redacted. This is tantamount to an admission that the Employer's motivation underlying the discharge decision was not to protect patient confidentiality but rather to prevent medical records from being used for a union related purpose. The protections of federal labor law are highly relevant to the analysis of whether the Employer had just cause to terminate the Grievant. A discriminatory termination in violation of applicable law is without just cause,

particularly where the contract incorporates the anti-discrimination protections of applicable law. The Grievant should be reinstated and made whole in every respect.

Article 1(C) of the Agreement prohibits discrimination on the basis of Union membership or the assertion of rights protected by the Agreement. The Employer acknowledged that the sole reason the Grievant gave the documents to her union steward was to complain about a potential contract violation. Article 7(B) affords the right to pursue a pre-grievance including a dispute over the preservation of bargaining unit work. Article 4 recognizes the right of union stewards to handle union business during their routine at the Hospital. Article 4(B) allows union stewards to be paid by the Employer for time spent performing union business. The Grievant was asserting her rights to pursue a pre-grievance and complain to her Steward about a potential contract violation of management doing bargaining unit work in providing the redacted documents to her steward. It is undisputed that she was terminated for her conduct in asserting these protected rights.

The non-discrimination clause of the Agreement should be interpreted in light of the protections of the National Labor Relations Act and precedents under the Act. Arbitrators have an obligation to examine the evidence with special care where anti-union animus may be involved. In this case the Agreement's non-discrimination clause is precisely parallel to the substantive provisions of the NLRA, specifically Sections 7, 8(a)(1), 8(a)(3). Those provisions prohibit discrimination against employees for Union membership or activity or for the exercise of federal labor law rights including the right to complain to union stewards and to assert rights through the grievance process. The U.S. Supreme Court and the NLRB have held that an employer unlawfully discriminates if it imposes discipline on an employee for asserting rights contained in the collective bargaining agreement. The Employer discriminated against the Grievant by terminating her for complaining to her union steward about a potential contract violation.

A union grievance investigation is a legitimate business reason for use and disclosure of medical records under the Employer's written policies and federal labor law and the grievant had no reasonable basis to conclude that she was violating Employer policies in using and disclosing the redacted records for that purpose. Allina permits the

access, use or disclosure of protected health information only for a legitimate business reason. The grievant's legitimate business reason was to assert rights under the Agreement. The policy does not say that resolution of grievances is not a legitimate business purpose. In fact, the Employer's minimum necessary policy cites internal investigations as an example of a legitimate purpose. The Employer's treatment, payment and operations system policy also lists resolution of grievances as an example of health care operations. The training documents the Employer submitted into evidence do not say that using patient information to enforce the Agreement is not a legitimate business reason.

OPINION AND AWARD

The Employer has a lengthy record of having disciplined employees for the intentional use and disclosure of patient records containing confidential and protected health information. Without question the Employer has taken significant steps to establish an understanding among all of its employees that the protection of patient health data is among the highest priorities of Allina Health. The Employer has disciplined and terminated numerous employees over the years for failure to adhere to its Confidentiality of Patient Information Policy. (Er. Ex. 31) Arbitrators have upheld the discipline imposed upon Allina employees for violating the policy and affirmed the reasonableness of that policy.

Those arbitration awards involved some employees who had otherwise stellar work records and in some cases lengthy unblemished work records.¹ In none of those cases, however, was the arbitrator confronted with the situation presented in this case.

¹ The Employer's submission of prior arbitration awards included among others an award by Arbitrator Cooper upholding the termination of an employee who accessed her father's medical records, Allina Hospitals and Minnesota Nurses Association (Kesler) (Cooper, 2010); an award by Arbitrator Fogelberg upholding termination of an employee with no prior discipline and a good work record, SEIU and Allina Hospitals, FMCS Case No. 1257492 (Fogelberg, 2013); an award by Arbitrator Vernon upholding the termination of an employee of more than 30 years with an extraordinary work record, Unity Hospital and Minnesota Nurses Association (Thole) (Vernon, 2012) and an award by Arbitrator Remington upholding the discharge of an employee with an 11 year excellent work record. Arbitrator Remington noted that 32 other employees were terminated as well for accessing the record of a high profile patient. Allina Hospitals/Unity Hospital and SEIU Healthcare Minnesota, (Remington, 2011)

In this case, the arbitrator is confronted with the fact that the conduct giving rise to the Employer's discipline of the Grievant was also protected union activity.

Both sides agree on the fundamental facts at the heart of this dispute. The Grievant, in the normal course of her duties, saw initials on at least four patient records suggesting that a non-bargaining unit employee might be engaged in bargaining unit work in breach of the Agreement. In an attempt to figure out whether the Employer was in violation of the Agreement, the Grievant copied, redacted and stored the four patient medical records for a time before turning them over to her Union steward. The Employer does not dispute that the Grievant's purpose was to pursue a grievance as permitted by the plain language of the Parties' Agreement. As expressed in its opening statement, the Employer said the fact that the Grievant was seeking to advance a grievance or potential grievance "was neither here nor there."

The arbitrator disagrees. The Employer must comply with state and federal laws regarding the protection of confidential patient health information and it must comply with relevant laws and its' collectively bargained agreement. The Employer cannot decide to comply with some laws/agreements but not others or to do so sometimes but not always. Consideration must be given to the fact that the Grievant was engaged in protected union activity in evaluating whether just cause to discharge exists. An analysis of whether the Grievant violated the Confidentiality of Patient Information Policy is insufficient by itself to resolve this case. Anyone conducting a simple and straight forward analysis must concede that the Grievant accessed confidential patient health information in the course of her duties, copied and disclosed that information and that her duties with respect to the handling of those patient records (scanning the documents into the system) had ended. Taking nothing more into consideration than those facts one could reasonably conclude that the Grievant violated the policy.

This sanitized approach used by the Employer does not, however, include consideration of its obligations described in the Parties' Agreement. In that Agreement, the Employer's managerial rights as exercised in this case are limited by other express provisions of the Agreement. To ignore that fact would permit the Employer to ignore its' obligation pursuant to Article 1 (C) of the Agreement. While the Employer has the

right to discharge that right is limited by the non-discrimination clause of the Agreement. Article 1(C) prohibits the Employer from taking actions that interfere with a bargaining unit member's assertion of rights guaranteed by the Agreement.

What the Employer did in this case was to ignore the fact that the conduct it identifies as grounds for punishing the Grievant was also grounded in a right protected by the Agreement, namely the right to pursue a grievance and to act in concert with her exclusive representative in doing so. Article 7 of the Agreement states: "**Any** claim of an employee arising out of the interpretation, application, or adherence to the terms or provisions of this Agreement...shall be subject to the Grievance and Arbitration procedure." (Agreement at p. 9; emphasis added) Furthermore, the Agreement requires the Employer to recognize the Union's selection of stewards and the role they play in representing bargaining unit members and enforcing the Agreement. (Id at p. 6) To sterilize the Grievant's conduct and ignore or deem irrelevant the fact that she was pursuing a right and process called for by the collectively bargained agreement is to taint the investigatory process as well as the deliberative process associated with the determination of wrong doing and the level of discipline to be applied.

That taint cannot be overcome by simply standing behind the legal requirement of protecting patient confidential health information. Respecting the Grievant's right to rely upon the protections of the labor agreement must be given the same high priority. Doing so recognizes that the Agreement imposes as much of a legal requirement upon the Employer as does state and federal laws designed to protect patient health information. In disciplining this Grievant, the Employer brushed aside obligations imposed upon it by the Agreement and in doing so punished the Grievant for the pursuit of rights outlined therein.

The Employer failed to demonstrate that it gave due consideration to the fact that the Grievant's sole purpose was to exercise rights guaranteed her by the labor agreement. By acting as if those rights could be set aside, the Employer launched into an investigative process that by its very nature had a chilling effect on the Grievant, the Union steward and I would hazard to guess the rest of the bargaining unit members

with regard to bringing forth grievances based on alleged contract violations that might be proved up by resort to confidential patient health records.

The Employer's pursuit of the enforcement of its Confidentiality of Patient Information policy must be carried out in accordance with or respect for other laws and rights with which it must comply in this unionized setting and cannot be sterilized to the point of eviscerating those rights. The Agreement gives employees the right to not only advance grievances but to explore whether or not a formal grievance should be filed. That is exactly the process the Grievant initiated here by redacting and copying the records containing confidential patient health information. Few actions on the part of an employer can strike fear in the hearts of bargaining unit members more than to know they and their union representatives can be tossed from the workplace simply for relying upon the plain language of the collective bargaining agreement.

The taint imposed upon the Employer's investigative and deliberative process in this case was revealed in a number of ways. Consider that on September 26, 2012, the union steward, consistent with the language and intent of Article 7(B) emailed one of the records the Grievant provided her to management requesting additional information as a means of deciding whether a formal grievance should be filed. The subject line of the Union Steward's email to management was "FW: Information Request/Pre-Grievance." (Er. Ex. 6)

On that very same day, the Employer alerted its' Compliance department to consider whether an investigation should be launched. The swiftness and intensity with which this investigation was launched is evidenced by the series of emails between Compliance, Human Resources and others involved with the investigatory process regarding breaches of patient confidential health information. (Er. Exs. 9, 10, 11) Testimony revealed that the Employer initiated a pre-investigation telephone conference with several human resources representatives, compliance as well as a representative of its labor relations staff. During that pre-investigation phone conference, the Employer decided to treat the matter as it normally would any other breach of confidential patient health information. In other words, it made a conscious decision to ignore the fact that the Grievant was engaged in protected union activity. Having taken that important fact

out of the equation before the official investigation was even launched biased the investigation and every aspect of the process that followed was similarly biased.

Just days later on October 8, 2012, the Employer convened a meeting with the union steward who had initiated the pre-grievance process and insisted that she reveal the source of the document. According to testimony the meeting was "fairly tense" and "animated." Testimony revealed that tensions were "escalated" and as a result it was necessary to take several breaks in order to carry on the meeting. During this meeting, the Employer threatened the steward with discipline for failing to reveal the source and applied significant pressure on the Union to comply. The Employer, in other words, marshaled all of its resources in an effort to uncover the source of the documents and to pursue its usual course of action undertaken when a breach of confidential patient medical information is suspected.

By October 26, 2012, the Employer had concluded that the Grievant had committed a Level 3 violation of the Confidentiality of Patient Information Policy and began deliberating the appropriate level of discipline. Having removed a very real fact from its investigative approach and deliberative process, namely that the Grievant was engaged in union activity, the Employer easily concluded that the Grievant should be terminated.

As testimony revealed, even given additional time and attention to ensuring consistency with regard to discipline for Level 3 violations as well as mitigating factors, The Employer concluded that the fact that the Grievant was engaging in proper union activity was both irrelevant and wholly insufficient to alter its decision. In fact, the Employer's went so far as to say through testimony that it would have terminated the Grievant had all of the patient health information been removed from the record. In short, the Employer made clear that its punishment had to do with the use of the record to pursue the grievance whether or not patient health information was disclosed.

That admission cast an even darker cloud over the Employer's investigation and deliberations in this case. It does so because it reduces the true conduct about which the Employer was concerned to the use of the record to pursue a legitimate step in the grievance process. The Employer's concern about the use of the document to pursue a

grievance, even a completely de-identified patient record, is even more confusing given its own conduct in this regard. Specifically, the Union demonstrated that the Employer on more than a few occasions turned over completely un-redacted and non de-identified patient records to the Union in the course of processing grievances or responding to pre-grievance union information requests. (Union Ex. 12) This is true even though the Employer presented testimony that before it turns over documents containing patient health information to the Union it has a team of experts review the records to make sure disclosure is appropriate.

When these facts are coupled with the Employer's admission that the Grievant would have been punished even had she disclosed a patient record devoid of any patient health information, the arbitrator must conclude that the Employer's actions were designed to strike a forceful blow at this Grievant for engaging in protected union activity.

Other facts brought out during the hearing of this matter further reveal the lack of just cause in the process imposed upon the Grievant. For example, testimony revealed that none of the training provided to the Grievant and referenced by the Employer with regard to the protection of patient health information addressed the use of that information in grievance processing. It is not enough to say that the Grievant was trained and retrained on the protection of patient confidential information if the Employer has not addressed during such trainings the manner in which a bargaining unit member should approach the situation the Grievant faced in this case.

It is incumbent upon the Employer to address that weakness in its training protocol because to do nothing would suggest that any bargaining unit member who comes across a real or potential contract violation as a result of handling patient health information records in the normal course of their duties must ignore that information or risk termination. The Grievant here tried to manage the conflict between the patient privacy rules and her right to pursue a grievance as best she could. The Grievant testified that it was her first time raising a contract issue with her Union and she had no indication from any of the training programs that she could not use patient records to do so. Significantly, the Grievant testified that she redacted information from the record

that she felt would identify the patient before disclosing the record to her Union steward. While the Employer questioned the Grievant during its investigation about her knowledge of a "de-identification" policy, it acknowledged that the Grievant had not been trained on such a policy but dismissed that fact as irrelevant.

The Employer has policies and procedures that allow it to use patient health information in the processing of grievances. For example, Allina's Treatment, Payment & Operations System Policy defines how patient health information will be used in its health care operations among other areas. One aspect of that definition specifically includes "resolutions of grievances." (Er. Ex. 22, at p. 4) The Employer argued that while it has a legitimate business reason for using patient health information in the processing of grievances the Grievant and the Union steward enjoyed no such right. However, the Employer failed to make this distinction clear in any of its trainings. In short, the Employer enjoys a legitimate business reason to use even un-redacted patient health information in the processing of grievances and the right to deem employee use of redacted patient health records in that same process illegitimate.

The Employer's treatment of this Grievant as if she behaved no differently than others terminated for examining the records of a celebrity, other high profile patients or even family members was a fatal flaw.² It is also a decision that it could not carry out in practice. This is clearly demonstrated by the Employer's difficulty in both adhering to its decision to ignore the Grievant's union activity and its characterization of that activity in its tracking process.

The Employer's 360 Compliance/tracking form indicates that both the Grievant and the Union Steward were terminated for sharing patient confidential health information for "gain." (Union Ex. 8) While, the witness who completed the 360 form testified that describing the Grievant's conduct as sharing confidential patient health information for gain was a typo, the accompanying email paints a different picture. In that email, she states: "I want to make sure it's appropriate that I've marked the

² The Employer witness testifying as to the Grievant's conduct that violated the protection of patient health information policy described her disclosure of the records saying she "handed them over to another employee." In other words, the witness even while testifying refused to acknowledge that that other employee was the Grievant's Union steward.

Termination reason as "Sharing for Gain" and I have also marked "Other" with a reference to see rationale." (Id at p. 1) In other words, the witness made clear that her intent as of the date of her email and prior to submission of the 360 Forms to the Union was to make sure that her conclusion regarding the reason for termination of both the Grievant and the Union steward was because they shared patient health information for gain. Her testimony that she simply committed a typo in leaving the box checked on the Grievant's 360 form is not credible. Having sent the form with the alleged typo to others for review prior to issuing it to the Union pursuant to an information request indicates that none of those reviewing the two forms recommended a change in that characterization.

In other words, the Employer's attempt to sterilize its deliberative process and remove any indication that it considered the Grievant's union activity in determining whether or not to discipline and the level of discipline failed. The sharing for gain can refer to nothing else but the use of the information to process a grievance. The Employer's 360 Form prepared for the Union steward does not describe any reason why her termination was considered sharing for gain. This evidence is sufficient to demonstrate that the Employer carried out the investigatory and deliberative process in this case in such a manner as to close off the Grievant's rights protected by the Agreement and relevant state/federal labor laws even while stressing the extraordinary efforts it took to be fair and consistent.³

The testimony however made plain the Employer's true posture. When asked whether the fact that the Grievant was engaged in union activity was discussed, the Employer witness responded: "It was in passing. It was a well known fact that union activity was not a legitimate business reason..." When asked whether the fact that the

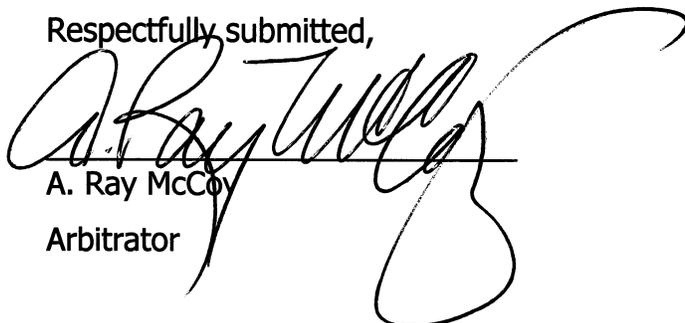
³ The Senior Human Resource Generalist providing testimony regarding the investigation and deliberative process emphasized over and over how many extra steps were taken by the Employer to be fair and careful in making sure it was evaluating the Grievant's case properly. However, those extra steps did not give any apparent consideration to the fact that the Grievant was engaged in union activity. It is clear from exhibits that Compliance considered the case against the Grievant and that against the steward as a package. For example, Employer Exhibit 18 contains the following "...I am in the process of sending you a separate email re: your request to gather privacy policy language that relates to the business purpose piece in these two cases." The business purpose here for both the Grievant and the steward was given extra special consideration according to this exhibit with the result being the characterization of the use of the records for grievance processing as an illegitimate purpose.

Grievant's actions were protected by federal law was discussed, the witness answered: "It was discussed but the outcome did not change." Consequently, the arbitrator finds that the investigative and deliberative process were fatally flawed and did not comply with the just cause standard called for in the Agreement. Given the specific facts regarding the Grievant's conduct in this case, a proper balancing of the competing concerns, policies and rights should have led the Employer to conclude that the Grievant had a legitimate business purpose for sharing the four files with her Union steward. A fair investigatory and deliberative process would have at the very least produced a concrete rationale for finding that such a balancing would still have led to the Grievant's termination. Here the Employer's fails the just cause test because it specifically excluded a most critical fact even before undertaking its' investigation that both characterized and gave meaning to the Grievant's actions. It is only by stripping the very real fact that the Grievant's sole purpose was to pursue a right guaranteed her by the Agreement that one can conclude the Employer behaved properly. Doing so, however, would be in direct contravention of the Parties' Agreement.

AWARD

The grievance is sustained. The Grievant will immediately be returned to work, given total compensation lost as a result of the wrongful termination and her personnel file will have any reference to this discipline removed. In short, the Grievant shall be made whole in every respect. The arbitrator retains jurisdiction for the purpose of assisting the parties with implementation of this award and to enforce the Confidentiality Agreement signed by the Parties and the arbitrator at the hearing of this matter.

Respectfully submitted,



A. Ray McCoy
Arbitrator

October 4, 2013