

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 5**

and

UNIVERSITY OF MINNESOTA

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 14-PA-0147

JEFFREY W. JACOBS

ARBITRATOR

April 24, 2014

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

University of Minnesota.

DECISION AND AWARD OF ARBITRATOR
BMS Case # 14-PA-0147
May Vang Grievance matter

APPEARANCES:

FOR THE UNION:

Kurt Errickson, Business Representative
May Vang, grievant
Nan Vang, grievant's sister
Dr. Pader Vang, Professor of Sociology
Dia Vang, grievant's mother
Saysue Yang, grievant's uncle

FOR THE UNIVERSITY:

Shelley Carthen Watson, esq.
Shirley Kuehn, HR manager of Employee Benefits
Melissa Unruh, Benefits Services Supervisor
Kathryn Pouliot, Benefits Services Manager
Chara Blanch, former HR Consultant

PRELIMINARY STATEMENT

The hearing in the above matter was held on February 20, and March 5, 2014 at the Office of the General Counsel on the Minneapolis Campus of the University of Minnesota and at the Bureau of Mediation Services in St. Paul. The parties submitted briefs dated April 4, 2014 at which point the record was closed.

ISSUE PRESENTED

Did the University have just cause to terminate the grievant? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2013 through June 30, 2015. Article 21, section 3 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

RELEVANT CONTRACT PROVISIONS

Article 20 Insurance

Section 1. University of Minnesota Employee Insurance Plan (UPlan)

During the life of this Agreement, the Employer agrees to offer a Group Insurance Program that includes medical, dental, life with matching accidental death and dismemberment, and disability coverages.

The UPlan will make a UPlan Summary describing these coverages available to all insurance eligible employees. The UPlan Summary shall be provided no less than biennially and prior to the beginning of the insurance year. New insurance eligible employees shall receive a UPlan Summary within thirty (30) days of their enrollment in the plan.

Section 2. Eligibility for Group Participation

This section describes eligibility to participate in the Group Insurance Program.

A. Employees - Basic Eligibility.

Employees may participate in the University of Minnesota Employee Insurance Plan if they are scheduled to work at the University with an appointment of at least fifty percent (50%) time and lasting at least three (3) months in duration.

C. Dependents

Eligible dependents for the purposes of this Article are as follows:

1. Spouse.

The spouse of an eligible employee (if not legally separated). For the purposes of medical coverage, if that spouse works full time for an employer other than the University and elects to receive either credits or cash (1) in place of medical coverage; or (2) in addition to a medical plan with seven hundred fifty dollar (\$750) or greater deductible through his/her employing organization, s/he is not eligible to be a covered dependent under medical coverage for the purposes of this Article. If both spouses work for the University, one employee may elect family coverage and cover the other employee as a dependent.

2. Domestic Partner.

For purposes of medical, dental and optional coverages, to the extent possible the registered same-sex Domestic Partner of an eligible employee, who meets the criteria in the University's Domestic Partner Registration process, shall be offered the same coverage as an employee's Spouse.

Article 22 – Discipline

Section 1. Discipline for just cause Disciplinary action shall be taken only for just cause, however probationary employees may be discharged without just cause and shall have no right to grieve, discharge (see Article 7, Probationary Period). Disciplinary action, except discharge, shall have as its purpose the correction or elimination of incorrect work-related behavior by an employee.

Section 7. Discharge Any demand by the Employer for an employee's resignation shall be considered a discharge.

The Employer shall have the right to discharge an employee who:

1. Is judged by the Employer to be guilty of continuing non-correction of improper work-related behavior after suspension as specified in Section 6C above;

2. Endangers in a willful or careless manner, the safety of students, patients, the public, himself/herself or other employees;
3. Causes a liability for the Employer by willful or careless violation of University procedures or policies;
4. Is judged by the Employer to be guilty of serious violations of generally accepted standards of employee conduct such as, but not limited to, theft, fraud, willful or careless destruction of Employer property, gross insubordination or falsifying of documents;
5. Fails to pass probation except as provided under Article 7, Probationary Period;
6. Engages in behavior other than A-E above which in the Employer's judgment meets accepted just cause termination tests.

Should the Employer feel there is just cause for immediately discharging an employee who has passed probation, the employee may be placed on a paid leave during which the Union and the employee shall be notified immediately and be given an opportunity to hear and respond to the evidence supporting discharge.

Article 29 - Work Rules

The Employer may establish and enforce reasonable work rules which are not in conflict with the terms of this Agreement. Such rules may be established on an organizational unit basis such as a work location, Department, Coordinate Campus, Collegiate/Administrative Unit, or University-wide and shall be the same rules for all Unit 6 employees in an area, but may vary according to what is appropriate for the work assigned to employees, and shall be applied uniformly to all employees who are affected within these organizational units. The rules shall be posted and/or distributed to directly affected employees.

Article 32 - Management Rights

Except as expressly limited by this Agreement, the University reserves unto itself all rights, powers and privileges heretofore exercised or granted to it by law including but not limited to the following:

1. The right to manage and control the University's business. Adopt rules and regulations, determine financial and budgetary policies (including all accounting procedures) and all matters pertaining to public relations. Determine the size of the management organization, its functions, authority, amount of supervision and table or organization.

UNIVERSITY'S POSITION:

The University's position is that there was just cause to terminate the grievant for intentionally falsely listing a person as her husband on her health insurance who was not her legally married spouse.

In support of this position the University made the following contentions:

1. The University argued that the grievant intentionally falsified her health insurance forms and that her "husband" was never legally married to her under the laws of the State of Minnesota. This fraud cost the University \$1,818.31 for claims filed by Cha Xiong, the grievant's partner, (hereafter Cha) and \$15,164.72 for the University's contribution to the premiums for Cha.

2. The University noted throughout the proceeding that while the grievant may have been “married” under Hmong tradition, they were never married pursuant to State law. The University asserted that the documents given to the grievant and to all affected employees, clearly indicates that in order to be covered by health insurance the person must be legally married – pursuant to Minnesota law – not some form of common law, spiritual ceremony or cultural marriage ceremony.

3. The University also maintained throughout this proceeding that the grievant was well aware that she had to be legally married to include Cha on the UPlan. The Grievant received the UPlan Guides and Summary of Benefits on an annual basis which clearly define who are eligible dependents and the consequences of enrolling ineligible dependents to the UPlan. The University asserted that there is no question that these documents are clear and provide both that any person enrolled as a “spouse” must be legally married to the employee. Further that the consequences of submitting false or fraudulent forms is a serious offense subject to discipline up to and including termination.

4. The University rejected the claim that the grievant was unaware of these rules or that she did not know how to fill out the forms. She added children to her plan and was able to accurately make relevant and timely changes to her forms. In addition the grievant attended specific training on the forms and on her health insurance benefits. This training informed employees that their spouses must be legally married. The University asserted that assertions by the union that the grievant did not understand these rules should be flatly rejected as unsupported and not credible.

5. In addition, the University pointed to the UPlan Guide and Summary of Benefits in which these benefits and the requirements for eligibility are clearly covered. These provisions clearly state that the spouse “must be legally married.” The University claims that the grievant got these documents and that nothing could be clearer – legally married means just that.

6. The University also noted that in addition to the fraudulent claim for health insurance and premiums there are serious tax consequences to the grievant's actions. Her health contributions were taken from pre-tax dollars and her taxes were reduced as a result. The University alleged as well that this shows a serious flaw in the grievant's character. The University pointed out that the grievant filled out tax forms, claiming her children by Cha and those by a prior relationship as dependents in some years and not in others.

7. The University also pointed to provisions of the Guide that specifically exclude unmarried individual from coverage. Section 8 of University exhibit 10 provides that "unmarried opposite-sex domestic partners and common-law spouses are not eligible dependents." The grievant knew of these provisions and was given access to copies of this.

8. The University argued that the requirement that a person be legally married is both reasonable and nondiscriminatory. Since the premiums for married spouses are paid from pre-tax dollars, it would be illegal of the University to allow employees to enroll people who are not married to the employee. Further, there is nothing in the UPlan that treats Hmong individuals differently. The plan is entirely neutral in its impact.

9. The University also pointed to an audit done by the Mercer Company in 2012 that was done of health insurance plans and the mailings that were sent to affected individuals, including the grievant regarding the need to only claim legally married spouses. These mailings also made it clear what the consequences would be for false or fraudulent filings of claims or dependents. See University Exhibit 13. The grievant received these and was presumed to have read and understood them yet she continued to claim Cha as her legally married spouse even though it was obvious he was not legally married to her.

10. The University also asserted that it was clear that the grievant herself made the initial phone call in May 2013 to the employee benefits department seeking to have Cha removed from her health insurance. The claim that someone else made this call was, in the University's eyes, preposterous. The caller ID was to the grievant's cell phone and her claim that someone, unnamed and unidentified despite repeated questioning, made the call is not credible. The person on the phone clearly identified herself as the grievant and certainly knew enough about her personal situation to describe it accurately and in detail. See Ms. Unruh's testimony. Further, there was no hard evidence whatsoever that anyone else made this call nor any reason why they would.

11. The grievant acknowledged in this call that she and Cha were never married and expressed clear knowledge that she knew that and understood the difference between cultural marriage and a legal marriage under Minnesota law. This call, led to the investigation and the findings upon further review were according the University, troubling. The investigation was also quite telling in terms of the efforts the grievant made to hide her falsification of the health insurance forms and the length to which she will go to claim that she is single when doing so is advantageous and married when that is advantageous to her.

12. As further evidence of the grievant's intentional deceit and bad faith, the grievant filled out a form under the Medical Premium Relief Program. This program is available for employees below a certain income level that grants a rebate on health insurance premiums. When the grievant filled out these forms she represented her income had come from a federal tax return. When asked and would have provided a tax return. When asked to provide a tax return during the investigation of this matter she stated that she did not have to file a tax return. Clearly this was untrue.

13. She further repeatedly represented to the IRS on her tax forms that she was single, see University exhibits 37, 38 and 39. She further submitted a forged tax return to the employee benefits department. As noted, to qualify for premium relief, she must have filed a tax return. To qualify for that relief, she must have filed as married, due to the income requirements, or her application would have been rejected. The tax returns showed that she filed as single which means that she must have altered those forms in some way in order to get premium relief.

14. The University asserted that there have been three prior instances where employees have falsely placed individuals who were not their spouses on a health form and all have either been fired or have resigned in lieu of termination. One of these was from the same union and there was no grievance filed. The University asserted that it is well understood by University employees that deliberate falsification of health insurance or other official documents is a very serious offense that virtually always leads to termination. When this is coupled with the other efforts made by the grievant to obfuscate and obstruct the investigation, termination is the only appropriate course of action.

15. Cutting directly to the union's claim that the grievant easily believed that she was married, the University pointed to a number of statements and documents that it claimed undercut that entire story. When asked during the investigation about having Cha on her health insurance, the grievant acknowledged that the two were culturally married but "not legally" married. It was thus clear that she fully understands the difference and fully understood that she was not entitled to have him on her plan.

16. Moreover, the University asserted that several members of the grievant's own family have both culture Hmong marriages and legal marriages. Thus even among her own culture, which the grievant claims is her support system, there is a clear understanding that legal marriages are different from cultural ones.

17. Further, despite the union's claims that the grievant's parent grew up in the jungles of Laos, the grievant grew up in the jungles of St. Paul, Minnesota, was raised here, speaks English fluently as her primary language, graduated from Harding high school, successfully took classes at the University College of Biological Sciences and clearly understands enough of American culture and law that the union's claim that she was somehow confused by it all is specious at best. Even the union's so-called expert, Dr. Vang, acknowledged that a young woman born and raised in the US, educated here, who worked outside the home, had attended college and who had an obvious working knowledge of the Court system (since she on multiple occasions went to Court both for child support issues as well as to get an Order for Protection from Cha due to his abuse) would understand the difference between a cultural marriage and a legally recognized marriage. The University maintained most adamantly that the grievant fully understood this distinction yet continued the charade of asserting that she thought Cha was legally married to her and thus entitled to health insurance benefits.

18. The University adamantly disputed the assertion by the grievant and the union that she somehow thought her cultural marriage to Cha was the equivalent to a legal marriage under state law. She frequently used the term "legal" marriage as something different from her Hmong cultural or traditional marriage and it was clear from the testimony of the employer's witnesses that when they spoke to her, the grievant understood and appreciated the difference between the two. More importantly, she understood that her cultural marriage was not legally recognized by the State or by the University under the policies and guidelines set forth above.

19. Even in her interviews, the grievant acknowledged that she and Cha were not legally married; thus her assertion now that she believed her cultural marriage was "legal" is untrue. Further, even if the grievant was unaware of the legality, or lack of it, of her traditional marriage, her ignorance of that fact does not excuse her behavior in putting Cha on her health insurance as her legally married husband.

20. The University also noted that even the union's witnesses acknowledged and admitted that there is a difference between the two types of marriages and that they understand that cultural marriage is not legally recognized in Minnesota. They further acknowledge that their culture understands this as well and that many Hmong individuals do both in order to have their marriages legally recognized by the government and employers.

21. The grievant also made highly suspicious statements in the investigation regarding why she added Cha to her health insurance. She admitted to investigators that when she asked members of her family about doing this, she was told that many Hmong members go through only a cultural marriage but put their spouses on health insurance anyway. The University asserted that the mere fact that she acknowledged asking shows her understanding that there is a difference between the two types of marriages.

22. The University asserted that the grievant's actions were more than mere negligence or based on a lack of understanding of the rules. The University alleged that she engaged in a deliberate course of action to deceive and defraud the University over the course of several years – having added Cha to her insurance and then affirmatively stated that he was her legally married spouse on various official forms. The University pointed to the Mercer audit and noted that the grievant had to affirmatively state that Cha was her legally married husband yet the Mercer audit was done to specifically advise employees that only legally married persons were entitled to be added to the health insurance. The grievant presumably had to have read the material from Mercer since she filled out the forms and returned them.

23. Indeed, the University argued, the online information and questions from Mercer that the grievant went through shows that she was clearly told of the definition of a legally married spouse yet she consistently lied on that form by answering “yes” to questions about whether she was legally married to Cha. See University exhibits 15 and 21 – the screen shots of the online information the grievant filled out for the audit.

24. The University also pointed to several other instances of documents where the grievant listed herself as single. Her application for MSRS retirement shows her as single; she frequently changed her W-4 tax withholding documents and on each of those she checked the box marked “single” even though there is a box that allowed her to state that she was married but filing as a single person. Her life insurance plan does not list Cha as a beneficiary. Even though it would be usual and customary to do so if that person really was her legally married spouse.

25. The University also alleged that the grievant even submitted a knowingly falsified form during the investigation that was an obvious, albeit clumsy, attempt to mislead the investigators. The grievant filed for an Order for Protection, OFP, from the Ramsey County District Court due to the abuse she was enduring from Cha. The official certified document has a series of boxes representing the relationship between the grievant and the alleged abuser – here Cha. On the official form the box marked “spouse” is blank yet during the step meetings the grievant submitted a copy of that form where the box is checked in obvious handwritten form. No adequate explanation for why this form was altered was ever given to the investigators and the University alleged that this is about as obvious a case of fraud and deceit as one could imagine.

26. The University argued finally that termination is the only appropriate remedy here not only because of the clear fact that the grievant enrolled an ineligible person on her health insurance but also because of the length she went to both before and after this was discovered to hide and deceive the employer. While her work was not in question, the University argued that the grievant’s actions cannot be excused or condoned even if she was the subject of domestic abuse as alleged by the union. These facts do not excuse or even adequately explain the obvious fraud at play here.

Accordingly the University seeks an award of the arbitrator denying the grievance in its entirety and upholding the discharge.

UNION'S POSITION

The Union's position was that there was not just cause for the termination and that the University's action was too harsh under these circumstances. In support of this position the Union made the following contentions.

1. The Union argued that the grievant has been with the University since 2006 and that her work has been exemplary. She is well regarded and does an excellent job. The union argued that to punish her under these circumstances with termination would be a travesty of justice.

2. The union adamantly maintained that the grievant did not lie, deceive or cheat anyone and that her errors in enrolling her husband Cha were the result of her cultural upbringing in which she was taught from birth that marriage is a deeply cultural matter and that her marriage to Cha was fully legal. She never intended to defraud the employer nor to obstruct the investigation in any manner.

3. The union noted that the University bears the burden of proof on all matters in this case and that it failed to prove intent on the grievant's part. The very term fraud necessarily includes intentional or deliberate actions on the part of the person charged with that offense. Here there was no evidence of intent. Indeed, the union asserted, the grievant believed that her traditional marriage was recognized and that she could thus enroll her husband on her health insurance.

4. The union asserted that in Hmong culture the clans control the traditions of marriage and that the ceremony is sanctioned by a group of elders. The grievant was married to Cha in such a ceremony sanctioned by her culture and is for all intents and purposes a legally binding union of both the two individuals and the clans from which each comes. It is almost an iron clad union that can only be broken by consensus of the clans. There is considerable negotiation in terms of money that passes hands as well as any other details that need to be worked out. Divorce is handled in a similar way and only the clans can endorse the separation. The union pointed out that Cha's family does not want the two to be divorced.

5. The union also introduced witnesses and other evidence in support of the argument that females are supposed to be subservient to their male counterparts in Hmong culture. If Cha was in any way offended, such as by being dropped from his wife's health insurance, the grievant would be punished sometimes physically. The union asserted that Cha was indeed abusive and physically and emotionally abused her in many ways. He punched, kicked and threatened her with knives bats and other weapons. He once even put a gun to her head and pulled the trigger. Fortunately the gun was empty but the grievant did not know that. It was this sort of abuse that she suffered for the most trivial of "offenses" against Cha – imagine what would have happened if he found that she had cancelled his health insurance. The union argued that the grievant was terrified of Cha and knew that unless she kept him on her health insurance she would face horrible consequences.

6. When the grievant finally had the courage to go to the authorities to get an order for protection, she always referred to Cha as her "husband." She has always referred to him as that, both inside her own community as well as to those outside it.

7. The union countered the claim that the grievant's tax returns shows an evident intent to defraud by pointing out that she uses a Turbo tax program and simply fills in the blanks. She uses a 1040 short form. Further, the union asserted that her tax forms prove nothing other than that she filled out tax forms. Her statement that she "does not file taxes" was misunderstood by University personnel. What she meant was that she does not pay much in taxes – as one can imagine with a relatively low income and 6 children – 2 by a prior relationship and 4 by Cha. Further, since Cha was unemployed for much of the marriage it simply never occurred to the grievant to list him on her taxes.

8. The union further asserted that she did not have Cha as a beneficiary on her life insurance because of the abuse Cha has visited upon her. She simply does not want him to benefit from her death – especially if he caused it. Likewise, the union countered the University’s claim that her pension information did not list Cha and that the grievant therefore knew he was not her legal husband. The union posited a much different explanation and asserted that the grievant did not want him to benefit from her pension given his abuse towards her.

9. The union asserted that these types of arguments by the University demonstrates only assumptions made about her motivations that are neither based in fact and are explainable by other equally plausible and innocent reasons.

10. The union also asserted that the term, “legally married” as used in the multiple documents referred to by the University was never adequately defined and that the grievant believed she was in fact legally married. Further, if the University had truly wanted to assure that anyone covered as a dependent on its health insurance plan was in fact legally married all that would be required is a marriage certificate. This was never done and would have solved the problem not only for the grievant but for the hundreds of others who also apparently had ineligible people enrolled on their health insurance. Instead of assuring that they had a certificate the University simply assumes that all its employees have the requisite knowledge of the legal definition of the term “spouse” or “legally married.” The union asserted that this assumption is unreasonable on its face and on these facts since the grievant is from a culture where traditional marriage is considered binding and legal for all purposes.

11. The union also asserted that none of the others who had ineligible individuals enrolled on their health insurance were disciplined, much less discharged, and according to the University’s own records there were nearly 600 of them. Yet the University seeks to terminate an otherwise excellent employee for her good faith belief that Cha was her husband.

12. The union asserted that a mere piece of paper is not what the Hmong community recognizes as their form of marriage. Rather, it is the whole process by which the marriage and union is discussed and negotiated by the clans and the ceremony that community recognizes as legitimate and binding. Here there is no question that the grievant and Cha went through this process and there was no reason for her to believe she needed anything beyond that. As far as she was concerned, Cha was her legally married husband and no piece of paper made that any different.

13. The grievant asserted that during the tumultuous times when she went to the authorities for the order for protection, this was very disconcerting to Cha's family. They even asked her to pay his bail. It was at this same time that someone placed a call to the University to report that Cha was not the grievant's legal husband and to remove him for her health insurance. The grievant claimed that she did not make this call but that some unknown person may have since she may have left her cell phone at home and her mother in law or someone else must have entered her home and made this call.

14. The union asserted repeatedly that the circumstances of her culture and of the abuse she endured while she was with Cha are mitigating circumstances they should be taken not account here. The union asserted that the grievant felt obligated to put Cha on her health insurance and not to take him off until things got so bad that she could no longer stand his abuse. As noted, to have taken him off the insurance would have been seen as further disrespectful behavior on her part that would have at the very least subjected her to being ostracized even further by her community at least and possibly subjected to even more violent and dangerous actions by Cha.

15. The union denied that the grievant falsified the documents and asserted that if one reads them, it is apparent that she did notify the University that her husband was on the plan. The premium relief document lists her as single but later on in the document she also indicates clearly that she lists her "spouse and children." The University thus had the information and could have inquired further but failed to when these documents were submitted. The grievant had no way to know that the University would later terminate her for alleged errors on these forms.

16. The union also asserted that even if the arbitrator finds that the forms were filled out incorrectly termination is far too harsh a penalty in these unique circumstances. While other University employees were either fired or resigned after it was determined they had ineligible persons on their health insurance plans there was no evidence of the underlying facts of those and indeed the evidence was entirely anecdotal.

17. Further, the one case from this union was about a “spiritual marriage” which is a far different set of circumstances from this case, where the union alleged the grievant was clearly of the belief that her marriage was legal given her community. Nothing more than the University’s story about the spiritual marriage case was known.

18. Further, the policy does not require discharge and a far lesser form of discipline would be appropriate here even if the arbitrator determines that some discipline is warranted given these facts. The grievant is a very loyal and diligent employee whose work record is excellent. In none of the other nearly 600 cases of ineligible persons on health insurance were the employees questioned as to why nor was it shown that any were terminated or even disciplined. Nothing is known about whether those individuals had a good faith belief that they were doing anything incorrectly or inappropriate nor was there any evidence that any of these individuals had to repay the University for the premiums or claims made by these ineligible individuals.

19. The union asserted that if the grievant had been clearly told that she needed a marriage certificate – a mere piece of paper really – she would have gotten one. Had she done that simple step none of this would have occurred.

The Union seeks an award of the arbitrator sustaining the grievance, overturning the discharge and making the grievant whole for any lost time or accrued benefits.

DISCUSSION

FACTUAL BACKGROUND

The grievant is a Hmong woman who was born in the United States. Her parents both emigrated from Laos to the United States. The grievant graduated from Harding High School in St. Paul and attended some college level classes in the University's College of Biological Sciences. She is fluent in English.

She began working at the University as a student worker in 2001 and later was hired full time in 2006 working for the Dental School. By all accounts her work performance was not an issue and showed that her performance was at or above required standards

She has six children – two by a former relationship with a Mr. Vue and four by Cha Xiong, Cha. She was never married either legally or culturally to Mr. Vue but did go through the Hmong cultural marriage ceremony to Cha in 2004. There was considerable testimony that the Hmong community is tightly knit and adheres to many of the cultural traditions of their heritage. One of these is the traditional marriage ceremony. The evidence showed that the marriage is about both the uniting of two individuals but also of the joinder of two clans within the Hmong community. The marriage is essentially negotiated by representatives of the clans and many times a dowry is passed, money exchanges and various binding promises are made by and between the families. Divorce is frowned upon - much more so than in “American” culture, (if there is such a thing), and must also be negotiated between the families. It is difficult to divorce within the Hmong culture and community if one of the families does not want the divorce to occur.

There was no question that the marriage between the grievant and Cha was not one that was sanctioned by or legally recognized under the statutory or legal framework of the State of Minnesota – as a marriage performed by a recognized and certified clergy or other individual who was authorized to perform wedding ceremonies by the State.

There was evidence that some members of the Hmong community go through both sorts of ceremonies – i.e. one that is recognized by the Hmong community and one that is recognized under the laws of the State of Minnesota.

The grievant enrolled Cha on her health insurance after he lost his job in 2010. The evidence showed quite clearly that in numerous documents and electronic communications, the University made it abundantly clear that for a spouse to be eligible for health insurance, that person must be “legally married.”¹ She re-enrolled Cha again in 2011 for 2012.

The record also showed that in 2012, well prior to the call made to the UPlan representatives discussed below, that the University became aware that there were a number of employees who had ineligible individuals enrolled on their health insurance. The record showed too that the University did not require any actual documentary proof that a person claimed to be a “spouse,” as that term is used in the enrollment and other health insurance documents, was in fact “legally married” under the laws of the State of Minnesota. The employee had simply to list the person as their spouse.

The University then engaged the Mercer Company to conduct an audit of the health insurance and offered an “amnesty” of sorts to any employee who may have had an ineligible person(s) enrolled on their health insurance. See, Employer Exhibits 11 & 13. As a result of the audit, 590 ineligible dependents were removed from the UPlan: 182 voluntarily; 371 due to lack of documentation; and 37 due to inadequate documentation. See, Employer Exhibit 16. The “amnesty” program was adequately communicated to the grievant as well as all affected employees and each had the opportunity to correct the problem without any disciplinary consequences.

¹ The health plan also allows registered same sex couples to also be eligible for the health insurance. These documents though require registration for that to be the case. While there was very little evidence of how that might be accomplished the record revealed that a same sex partner of an eligible University employee who are not registered is not eligible for health insurance. While the same sex piece is not involved here, it was apparent that this is a similar requirement and is designed to allow only legally recognized partners to be eligible for the University’s health insurance.

Thus while the grievant may well have been confused about the term “legally married” until the Mercer audit, it was clear that she was given an adequate definition of that term through this program. The union asserted that the term legally married was a term of art that was both unclear and even confusing to the grievant. While that may apply to persons who were married in another country or who had a good faith belief that theirs was a legally recognized marriage under the statutory and legal laws of the jurisdiction in which they were married, those same arguments do not apply here. While it is clear that in Hmong culture, the traditional marriage ceremony is seen as necessary in order to be fully recognized by that community, the evidence showed that even within the Hmong community in the Twin Cities area, the term “legally married” is understood and that many couples do in fact get a marriage certificate issued by and recognized by the State of Minnesota and enter into the traditional Hmong marriage ceremony, which is recognized by that culture.

The University pointed to the Premium Relief documents, see Employer Exhibit 20, and asserted that these documents that showed that the grievant knew that Cha was not her “legally married” husband under State law, even though it was abundantly clear she fully believed him to be her husband under Hmong tradition.

Medical Premium Relief is a University Program available for employees below a certain income level that provides an employee with a rebate on health insurance premiums. The grievant completed these Medical Premium Relief forms on December 14, 2011 and indicated that she was legally married to Cha and had children. See Employer Exhibit 19.

On this record, those documents did not establish the sort of fraud or deceit the University asserted it did. While the form has a box checked for “single” it also clearly shows that the grievant indicated she was married and had children.

Further, the University asserted that the grievant must have submitted a false IRS tax form in order to get the premium relief. There was however no hard evidence of that. No documents were provided that established that and the sole evidence was the vague recollections of University witnesses who thought there may have been a tax form but were unable to recall any of the details of what was on it.

There was however the statement by the grievant that she “did not have to file taxes” in response to the question about the premium relief. See Employer Exhibits 15 and 21. The University asserted that this too was evidence of evident fraud by the grievant and was designed to mislead the University. There were however two plausible explanations for this statement. Clearly she did file taxes and likely would have had to submit a tax form in order to get the premium relief. (As noted above, there was inadequate evidence of fraud though given that the tax form that the University used to grant the premium relief was not introduced into evidence). What she could well have meant was that she did not have to pay taxes given her relatively low income and the fact that she had 6 children and her husband was out of work. While the response was indeed curious, it did not rise to the level of fraud as alleged by the University. Neither was it so incorrect that it showed an intent to deceive the University on this record.

The University also asserted that her life insurance forms show that she did not list Cha as the beneficiary. The University questioned why someone who was supposedly married would not list their spouse as the beneficiary. Here though, given the clear fact of the abuse and the violence by Cha toward the grievant, the fact that the life insurance does not list Cha is eminently reasonable. The evidence showed that he was terribly abusive to her and that she feared for her life. The union raised this as well as pointed out that if he contributed to her death in some way he might literally have been able to profit from it. Thus it made sense that she did not list him as a beneficiary. More to the point, this fact did not provide any sort of smoking gun that showed an intent to defraud the University

There was also the question of the tax forms that were submitted into evidence in this matter. These showed that the grievant listed herself as single or as head of household. It is the latter that was most troubling. The union asserted that there are many reasons someone might file as single even though they are married and that for complex tax purposes one might do so. At the same time though the union and the grievant asserted that she knows very little about taxes and uses Turbo Tax to file them. The evidence in this respect was troubling and undercut the claim that the grievant was using some obscure part of the Internal Revenue Code to file her taxes. On this record that assertion simply rang hollow. If she truly does not understand her taxes or the intricacies of the IRS code, as is very likely, why then would she use some artifice within it to file as “single?” What is far more likely is that the grievant falsely indicate that she was single on her taxes for whatever reason.²

Sometime in early May 2013 the University received a phone call from someone who identified herself as the grievant and on a phone identified as belonging to the grievant regarding the grievant’s health insurance. The evidence clearly showed that the person who made the call expressed a desire to take Cha off the grievant’s health insurance. The evidence showed that she was told that she would simply need to submit a divorce decree ending the marriage. At that point the person indicated that the grievant and Cha were never legally married. That phone call was the precipitating factor in the investigation that led to the grievant’s termination.

The grievant was interviewed on May 15, 2013 regarding the call. She declined union representation at that time but was offered the opportunity to have a union representative there. The grievant denied calling Employee Benefits, stating that although she had previously asked for the number, she had lost that phone number and did not call them.

² Obviously the question of the grievant’s taxes is not strictly at issue in this case and is a matter between her and the good people at the IRS. What is important here is the question of the grievant’s understanding of the difference between “single” versus “legally married.” These facts were important in that regard.

According to the grievant, some of Cha's family members work at the University and that they could have been involved in making the phone calls. The grievant stated that her sister-in-law works at the University medical school, but was not sure what her last name is. There was thus insufficient evidence to support the grievant's claim that she did not make the call. This record fully supports the claim that she did and, more to the point, that the substance of the call was that she understood that Cha was not "legally married" to her.

The claim that someone else made the call is not credible. First, it is not credible that Cha's family even knew about her health insurance. Neither was there adequate evidence that the family knew the details of it or who to call to discuss it. Second, there would have been no reason that they would have known of the University's rules regarding being "legally married." The grievant claimed she didn't know of them; why would someone not connected with the University know of them or make the quantum leap in logic to report this to get her fired? Third, it simply does not follow logically at all that someone from Cha's family would undertake to have him removed from health insurance since that would clearly be against his interest. Getting the grievant fired from her job would in no way benefit Cha even if one assumes that he or his family were nefarious enough to concoct this elaborate scheme to surreptitiously garner the grievant's cell phone, make a call to employee benefits using her information and admit that Cha was ineligible.³

³ Frankly, this entire argument was curious at best. It would have made far more sense logically for the grievant to have claimed that she indeed did make the call but continue to claim ignorance of the fact that Cha was ineligible – thus supporting an "innocent" request to take him off the insurance. The grievant maintained steadfastly however that she did not make the call but all the evidence pointed in the other direction. As always, arbitrators are required to render the decision based only on the evidence and the logical and most reasonable inferences to be drawn from those facts. We do not have the luxury of substituting the arguments made for what we think are better ones.

The one final fact that proved to be highly significant in this matter was the Order for Protection, OFP, submitted at the grievance step meeting to discuss the grievant's termination. The evidence showed that the grievant requested and got an Order for Protection from the Ramsey County District Court to stop the abuse. This was certainly understandable given the evidence of violence both verbally and physically. There was no evidence of Cha's response to this nor any evidence that he failed to comply with it or that he became even more violent or abusive toward the grievant.

Both parties were represented by attorneys and the Court issued the Order, See Employer Exhibits 33 and 40. Significantly there is a series of boxes to be checked for the nature of the relationship between the parties on the standard OFP form. One of these boxes is for "spouse" and others are for various types of other relationships between the parties to an OFP.

The certified copy from the Court shows that the box marked "spouse" is left blank. That copy also has other boxes that showed that the relationship was "lived together," "have children together" and "significant romantic or sexual relationship." The OFP form that was submitted on behalf of the grievant to University's investigators at the step 3 meeting has that same box checked in handwriting. It is obvious that the form was changed and then submitted to the University during the grievance process in a somewhat clumsy attempt to mislead the University into thinking that the Court somehow sanctioned the relationship by calling Cha and grievant "spouses." This was troubling and gave the arbitrator pause regarding the grievant's motives in submitting this information.

It is against this factual backdrop that the analysis of the case proceeds.

WAS THE GRIEVANT "LEGALLY MARRIED?"

The documents pertaining to the health insurance are all quite clear and require that eligibility for health insurance requires that a person be "legally married." The University provided numerous documents that define the term "spouse" as a person to whom the employee is legally married.

While there may have been some confusion by the grievant about what that term meant given her heritage and level of sophistication and familiarity with legal terminology, the only reasonable interpretation of that term is that it means that the employee must be married in a ceremony or other ritual that is legally recognized under the laws of the State of Minnesota.

Thus there was little question on this record that the terms of the plan itself left little doubt as to the requirements for eligibility. The fact that the grievant and Cha were never “legally married” would certainly have made him ineligible for coverage. The question here though is whether the grievant should be terminated based on her actions in this case. That of course requires a very different level of analysis.

DID THE GRIEVANT UNDERSTAND THE DIFFERENCE BETWEEN HER HMONG CULTURAL MARRIAGE AND BEING “LEGALLY MARRIED UNDER STATE LAW?”

The union went to great lengths to assert that the grievant had no idea what the term “legally married” meant in this context and that she reasonably believed that her marriage under Hmong culture constituted a legally binding marriage. As noted above, there was some doubt about whether the grievant really believed that. Perhaps she did believe it early on. However, after the Mercer audit, the number of pieces of information and the general knowledge that a person born and raised in the USA should reasonably have, it was apparent that at some point she must have known that her marriage to Cha was not one that was legally recognized for statutory, tax or other purposes under the laws of Minnesota.

Professor Vang acknowledged that while the marriage ceremony is essential to be recognized within the Hmong community, many within it understand that to be legally recognized, they must obtain a marriage certificate. As discussed above, while there was some evidence that the grievant was unaware or confused by what was meant by the term legally married when she placed Cha on her health insurance, it was clear that eventually she did understand and appreciate the difference.

OTHER CASES OF INELIGIBLE INDIVIDUALS ON THEIR HEALTH INSURANCE

The record revealed that some 590 other University employees had ineligible people on their health insurance at the time of the Mercer audit. Clearly this fact mitigated in the employees favor. Certainly too, if the University was truly serious about wanting to stop any possible abuse it could easily require a marriage certificate, birth certificate or other appropriate documentation necessary to verify eligibility before adding someone to an employee's health insurance. Here that was not done and the record showed that the grievant was able to simply add Cha to the health plan during the one enrollment period without any requirement of verification.

While it is also true that the amnesty program would have allowed the grievant to remove Cha without any apparent disciplinary consequences, she failed to take advantage of that program. As noted above, the question is thus not whether there was an ineligible person on the health plan but rather whether there was some sort of fraudulent or deceitful behavior by the grievant. There was little evidence of that – although it was clear that the grievant was at the very least negligent in not checking to make sure of Cha's eligibility. As noted this problem could presumably be addressed by the requirement of adequate documentation of eligibility before being covered.

The University argued that there were other instances of University employees who had ineligible individuals on her health plan who were either fired or who chose to resign. There was little evidence of these other cases. None apparently ever went through arbitration. The one case involving an employee in this union claimed a partner by a "spiritual" marriage and was terminated. The union did not grieve that action.

The mere failure to grieve a termination does not provide the basis for determining the guilt or innocence. There may have been reasons for the union not to grieve that action and many reasons to have decided not to proceed with arbitration even if it had. Thus, the cases cited by the University in support of the claim for termination were given little weight. On this record, if the sole issue had been the fact of having Cha on the health insurance the decision would have been very different indeed.

THE MAY 2013 PHONE CALL

The circumstances of that call have already been discussed at some length. The evidence did not support the grievant's claim that someone else made the call. The evidence pointed squarely at the grievant as the person who made the call yet she was dishonest about it throughout the investigation and the hearing. This was a troubling fact indeed. While this alone was not the determinative factor it weighed heavily on the conclusion here and undercut the assertion that the grievant is an innocent victim of Cha and of circumstances here. Instead the entire argument that someone else "set her up" as the grievant and the union suggested simply tainted much of the rest of the union's case in this matter.

THE ORDER FOR PROTECTION

This too has been discussed. Frankly, the fact that someone, likely the grievant,⁴ altered the OFP form given to the University as part of the grievance process in what can only be described as a somewhat clumsy attempt to mislead the University in the matter. See Employer exhibit 40.

THE GRIEVANT'S PERSONAL SITUATION

There is little doubt that the grievant has endured considerable emotional verbal and physical abuse at the hands of Cha Xiong. She is the mother of six children and the record revealed that her current situation is somewhat dire. The union is effectively arguing that because of that the grievant must be reinstated and her grievance sustained in full.

Just cause analysis requires a review of the facts of each case and whether there was adequate notice of the rule, proof of a fair and objective investigation, proof of an infraction and justification that the punishment is appropriate for the given rule violation. Frankly, if there is just cause for discharge he discharge should be upheld. If not then some other penalty, if any, should be imposed.

⁴ There was no evidence that the union altered the form without the grievant's knowledge. To have done so would have been to commit a most dishonest act that would have seriously undercut the relationship between the union and management in this case. Accordingly, given the grievant's somewhat evasive answer as to why and how that form was altered, it must be concluded that the grievant changed it and submitted it to the union to give to the University.

Here there were clear facts that mitigated in both directions. There was clear evidence that Cha was not eligible and that the grievant either did not know that or wrongly assumed that he was due to the marriage ceremony performed in 2004.⁵

Here there was adequate evidence to establish that the employer provided notice to the grievant, and indeed to all of the employees, that in order to be eligible for health insurance the “spouse” must be legally married. That part of the analysis does not strictly concern itself with how the employee might perceive that unless there is some evidence that the notice was not given or not understood. On this record there was no other “better” notice that could have been given as to the requirements of the health insurance plan. While the grievant and her union asserted that she never understood the true implications of what was required, as discussed above, there was evidence that she did or should have understood what was required.

There was an adequate investigation done here. Indeed there was no serious assertion that the investigation was flawed or biased. Moreover, there was no question that Cha was ineligible. There is no question that he should not have been granted insurance.

The fact too that there were so many others who had ineligible individuals on their health insurance as well mitigated in the union’s favor. There was also some lack of proof of some of the University’s claims – i.e. the claim that there was fraud in the premium relief program. Without the documentation no firm conclusions can be made – certainly not that here was fraud.⁶

What mitigated in the University’s favor for severe discipline was the apparent untruth regarding the call and the OFP issue. Why the grievant maintained that she did not make that call remains a mystery. What is clear is that someone did and that precipitated this investigation.

⁵It should be noted that the union’s “no harm no foul” argument – i.e. that the marriage certificate is a mere formality without any real substantive difference was not persuasive. There are certainly tax consequences if people are not “legally married. There is also the very real problem if “drawing the line” for others who might not be eligible. As noted several times however, the solution to the potential problem of allowing others in the future to place ineligible persons on their health insurance remains within the University’s control.

APPROPRIATE PENALTY

The most difficult part of this entire case was deciding what to do given this complex record and the fact that there was clear proof of some of the University's allegations and inadequate proof of others. There was very clear evidence of Cha's ineligibility and the fairly clear evidence that the grievant may well have understood the distinction between her cultural marriage and one that is legally recognized by the laws of the State of Minnesota. There were also the very troubling facts of the alteration of the OFP and the grievant's position regarding the initial call in May 2013.

On the other hand, the evidence showed that the mere fact of having an ineligible person on insurance would not have resulted in termination – despite the University's adamant assertions to the contrary. 590 people were in a similar position yet there was no evidence they were terminated or even disciplined. There was inadequate proof of the grievant's intentional fraud in applying for the premium relief program.⁷

There were facts that were somewhere in the middle. For example, the grievant failed to take advantage of the amnesty program – perhaps because she did not understand it, perhaps because she was afraid of Cha's reaction to it or perhaps because she still believed in good faith that he was eligible. She could also have known he was not eligible yet decided to leave him there as an intentional act to defraud the University. On this record it was simply not clear and given the burden of proof it was not possible to determine this definitively.

Several options were considered. Termination was very strongly considered based largely on the OFP and the grievant's position on the initial call. Here though, based on the discussion above it was simply determined that discharge was too harsh given the grievant's otherwise excellent work record and the lack of proof of some portions of the University's case.

⁶ Allegations of fraud, which are both serious and very damaging to an employee's future employability, must be based upon very strong evidence. On this record there was simply inadequate proof of that even though it was clear that the University employees felt that they had been lied to. This was simply a burden of proof issue.

⁷ The University asserted that the grievant may well have submitted false tax forms. There was inadequate evidence of that and frankly that is between the grievant and the IRS. No determination was made on that question on this record.

Reinstatement with full back pay was not seriously considered given the fact that the University did prove some significant portions of its case. Reinstatement with some form of suspension of various amounts of time were considered but it was ultimately determined that the grievant's actions and the positions she took in this entire proceeding very much militated in favor of reinstatement to her former position but without back pay or contractual benefits.

The arbitrator was mindful of the University's understandable concern about having people on its health insurance plan who should not be there. There is no jurisdiction to impose any other remedy here and it is of course up to the University to devise a way to prevent such problems in the future.

Finally, the grievant and the union should know that whether she is the victim of spousal or domestic abuse would not have justified this result. While very tragic, that fact alone was given little weight here. She must comply with all requirements for eligibility for any future submission regarding health insurance.

Accordingly, the grievant is ordered to be reinstated to her former position with the employer but without back pay or contractual benefits. Reinstatement is to occur within 10 business days of this award.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. The grievant is to be reinstated within 10 business days of this Award to her former position without any back pay or accrued contractual benefits.

Dated: April 24, 2014

U of M and AFSCME Vang 2014

Jeffrey W. Jacobs, arbitrator