

**IN THE MATTER OF ARBITRATION
BETWEEN**

HENNEPIN COUNTY, MINNESOTA

Employer,

and

**ARBITRATION DECISION
AND AWARD
BMS Case No. 14-PA-0717
(Halicki Discharge and Training
Time)**

**AFSCME MINNESOTA COUNCIL No. 5,
Local #2938,**

Union.

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	April 30-May 1, 2014 Hennepin County Court House Minneapolis, MN
Date Record Closed:	May 23, 2014
Date of Award:	June 30, 2014

APPEARANCES

For the Union:

Matt Nelson
Field Representative
AFSCME Council 5
300 Hardman Avenue
St. Paul, MN 55075

For the Employer:

Karen Wallin, Attorney at Law
Labor Relations Representative
Hennepin County Labor Relations
A-400 Hennepin County Govt. Center
300 South Sixth Street
Minneapolis, MN 55481-0040

INTRODUCTION

AFSCME Council No. 5, Local # 2938, Legal Unit, (“Union”) and Hennepin County (“Employer” or “County”) are signatories to a Collective Bargaining Agreement (“Contract”), Jt.

Exhibit 3, effective January 1, 2012 through December 31, 2013. The Union filed two grievances that have not been resolved on behalf of Stepfan Halicki . The Union filed a grievance on November 5, 2012, regarding the Employer’s failure to pay for the Grievant’s training time. On September 30, 2013, the Union filed a grievance alleging that his July 29, 2013, discharge from employment violated the Contract. After following the agreed upon internal step process without success, the Union duly exercised its right to invoke arbitration on each of these grievances.

On April 30 and May 1, 2014, the Arbitrator convened a hearing at the Hennepin County Courthouse, Minneapolis, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file briefs simultaneously by email on May 23, 2014, whereupon the record closed.

ISSUES

The parties stipulated to the following issues for arbitration:

1. Was the Grievant terminated for just cause? If not, what shall be the remedy?
2. Was the Grievant denied employer time to attend training in violation of the contract? If so, what shall be the remedy?

ISSUE I. WAS THE GRIEVANT TERMINATED FOR JUST CAUSE? IF NOT, WHAT SHALL BE THE REMEDY?

SUMMARY OF FACTS

Stepfan Halicki (“Grievant”) worked as an Investigator with the Welfare Fraud Unit of the Hennepin County Human Services and Public Health Department for 15 years. Previously, he worked for five years as an investigator for a private sector company in Minneapolis, and prior to that, he worked for five years as a police officer in North Carolina. During his tenure

with the County, his performance was reviewed as very good initially, and his performance in terms of how much money he recovered for the County continued to be good throughout. However, there are other measures of successful employment, and in the notice of intent to dismiss him from employment, Debra Bean, then Human Services Area Manager, described the reason for his dismissal as: "... a long history of difficult and contrary behavior while employed as an Investigator" that has had adverse impacts on the people with whom he worked and upon the Department's ability to prosecute welfare fraud. Over the years, County personnel complained of a number of unpleasant interactions with the Grievant, and there were instances of disciplinary actions for conduct that violated supervisors' directives.

Finally, on May 29, 2013, Emery Adoradio, Senior Attorney with the County Attorney's Office, sent a memo to Human Services Area Manager Bean, stating that they would no longer accept cases investigated by the Grievant for prosecution because he refused to follow investigation protocols and work cooperatively with them. The main purpose of a fraud investigator's work is to prepare cases so that they could be prosecuted by the County Attorney, if necessary, so this extraordinary memo precipitated a final review of the Grievant's conduct and was the catalyst for the discharge.

By the Notice of Intent to Dismiss issued to the Grievant July 17, 2013, Ms. Bean concluded that further efforts to modify the Grievant's behavior through the imposition of a major disciplinary suspension would be futile, leaving discharge as the only reasonable option. Joint ("Jt.") Ex. 22. The Welfare Fraud Unit management had been trying to discourage the Grievant's "defiant and difficult" behavior by counseling and progressive discipline for years. According to the County, the discharge was for a long-term pattern of refusal to conform to the

norms of the workplace, and was triggered by a final incident between the Grievant and the County Attorney's Office. Further statements of fact are set out in "Discussion," below.

UNION POSITION

The Union argues that one of the exceptions to the labor relations principle, "work now, grieve later", is that an employee need not obey an order to engage in unlawful conduct. The Union claims that the Grievant had a reasonable belief that to comply with an order to get a second search warrant would be illegal, and so his failure to comply cannot be just cause for discipline or discharge.

The Union argues that the Employer did not utilize sufficient progressive discipline before discharging the Grievant. The disciplinary record within the last few years included one written reprimand on October 25, 2012 and a one-day suspension one month later, November 29, 2012. The Union claims that the Grievant was given insufficient time to complete all of the directives he received. Termination seven months later as the next step in progressive discipline was excessive in light of the requirements of progressive discipline. The Union also argued that the Adoradio letter discussed a number of incidents that displeased the County Attorney's Office in addition to the precipitating Childcare Center incident, and that these incidents should not have been at issue in the hearing because there was no direct evidence about them. The Union argued, essentially, that much of it was hearsay and could not be used as a basis for discharge. The Union also disputed Mr. Adoradio's statements that the Grievant's prior actions in these other matters may constitute Brady material, making the Grievant a less believable witness at future hearings.

The Union argues that the County did not have just cause to terminate the Grievant, and that the reasons for discharge were unclear and shifting. On the insubordination charge, he was

within his rights to refuse an unlawful order; the County claimed he was a bully, but there was no evidence to that effect. The Union suggests that the Grievant did excellent work for the County based on the amount he was responsible for recovering in back payments, and that the volume of work he completed was among the best for the County. The Union maintains that he should be reinstated to the Fraud Investigative Unit with full back pay, benefits and seniority.

EMPLOYER POSITION

The Employer argues that the Grievant was disciplined and eventually fired for conduct demonstrating three serious problem areas in a workplace where cooperation and team effort are valued: 1) The Grievant acts as if the workplace rules do not apply to him; 2) The Grievant ignores or defies authority when confronted with requests he dislikes; and 3) The Grievant either bullies people who disagree with his position or evades the truth to avoid cooperating with others. The Employer maintains that the Grievant's stubborn insistence on "his way or the highway" cost him his job. Over a number of years, the Employer claims that when supervisors questioned, counseled or disciplined the Grievant about the Employer's expectations for his work performance and behavior, the Grievant simply ignored its requests and directives and instead, did what he thought was best. Finally, the County argues, when the Grievant's actions caused the County Attorney's Office to officially inform the County Human Services Department that it would no longer accept cases for prosecution investigated by the Grievant, the Employer decided to discharge the Grievant for his pattern of difficult, contrary and insubordinate behavior. The Employer claims this was the "straw that broke the camel's back"; that its written reprimand and one-day suspension during the previous year satisfy progressive discipline requirements. The Employer argues that it decided on discharge rather than a longer suspension as the next step, because the Grievant's type of problem conduct would be unlikely to

respond positively to further attempts to improve his conduct toward others. The Employer argues that under the circumstances of this case it had just cause to dismiss the Grievant from employment.

DISCUSSION AND DECISION

Article 32 of the Contract requires that discharge must be for “just cause.” This case involves discharging an employee for ongoing refusals to follow direction, insubordinate conduct, inability to work well with others in necessary team efforts, and conduct perceived as intimidating to other County employees and to members of the public whom he was investigating. The Employer alleges in its Notice of Discharge that after years of unsuccessfully attempting to change the Grievant’s behavior, the Employer needed to discharge the Grievant to “eliminate the adverse impacts [his] defiant and difficult behavior has on the people that work with [him] and upon HSPHD’s ability to prosecute welfare fraud.” Jt. Ex. 22. The Union raises questions about whether there was sufficient progressive discipline prior to discharge, whether the Grievant was justified in refusing to follow his supervisor’s orders because she ordered him to do something illegal, whether there was sufficient evidence that he tried to intimidate other employees, and whether the Employer’s reasons for discharge were sufficiently clear to meet the requirements for due process. Finally, the Union argues that the Grievant’s record of individual work in recovering money for the Fraud Unit was good, and should mitigate or overturn the penalty imposed. After thoroughly reviewing the evidence presented, I conclude that the Employer established it discharged the Grievant for just cause.

The Grievant had difficulty following the procedures that the Fraud Unit had instituted, published, and about which Supervisor Judy Grandel held meetings. Supervisor Grandel attempted to work with the Grievant individually, to reshape the Grievant’s methods through

coaching and one-on-one meetings every month for years prior to the written reprimand in 2012. She took notes at these meetings and emailed copies of the notes to the Grievant afterwards. Joint Exhibit 10, a 54-page document, contains 1) a copy of the policy requiring investigators to meet individually with the supervisor on a monthly basis to review cases, and 2) a copy of thorough notes of each meeting from January 8, 2009 through July 16, 2013. Although evidence indicates that the Grievant did not have formal performance reviews for several years during this period, annual reviews were not required at this time. Testimony (“T.”), Grandel. Supervisor Grandel testified that some official annual performance reviews were not prepared regarding the Grievant and others because investigators, including the Grievant, had filed unfounded complaints against her with the Hennepin County Diversity Manager in 2008.¹ Thereafter, there was some concern that performance review criticism would be viewed as retaliation for the complaint, and her then-manager advised her to avoid performance reviews. T., Grandel. The Grievant was at the top of his pay range, and lack of performance reviews did not affect his pay adversely. T., Grandel. Nonetheless, the monthly individual meetings and pages of notes that the Grievant had an opportunity to review on an ongoing basis, illuminate his performance and her concerns over that time. They demonstrate that he had reasonable notice of her directions and concerns.

On October 25, 2012, Supervisor Grandel issued a written reprimand that begins “You are receiving this written reprimand for exhibiting a continued pattern of unsatisfactory performance and conduct.” Jt. Ex. 13. Six violations are set out very specifically.

1. The Grievant violated a directive to “inform your supervisor, in advance” if the investigator is planning to present an ADH waiver to a client. In the last few months, the Grievant had violated this directive with seven different clients.

¹ Union Ex. 1, memo to Steve Halicki from Monica Long, Diversity Manager, August 1, 2009: “...The conclusion reached in the investigation is: There were no policy violations found...”

2. The Grievant did not use interpreters when necessary even though this had been previously discussed.
3. The Grievant did not keep his calendar up to date as specifically requested.
4. The Grievant did not complete tasks as assigned by his supervisor. He did not attend one-on-one meetings required.
5. There were three instances of failing to notify the supervisor when he initiated EBT cases so there would not be a duplication of effort.
6. After receiving a complaint, the Employer concluded that the Grievant intimidated a client into signing an Administrative Disqualification Waiver under duress.

One month after the written reprimand, on November 29, 2012, a one-day suspension was issued to the Grievant for continued failure to use an interpreter where necessary, failures to operate in accordance with the rules for complying with the administrative disqualification standard, and failures to attend one-on-one meetings with his supervisor. The suspension memo included language warning the Grievant of the seriousness of his conduct in working with his supervisor and stated that if similar incidents occur, he would be subject to termination. Jt. Ex. 14.

On January 22, 2013, at the second step response to the Ex. 13 grievance, Manager Debra Bean included additional written information:

...I believe that you spend entirely too much time challenging your supervisor and intentionally trying to engage in conflicts with her. You have made statements about your belief that she is retaliating against you for your actions, but there is absolutely no proof of that. You are obligated to follow the directions of your supervisor whether you like the directions or not. If you believe that the supervisor is directing you to take actions that are illegal or unethical in nature, then you have options for reporting these allegations. The bottom line is that you are to follow the instructions given to you by your supervisor.”
Jt. Ex. 13. (emphasis supplied)

This directive could not have been more clear.

The incident demonstrating continued failure to comply with supervisor's directives is the one that precipitated the Grievant's discharge. On May 29, 2013, County Attorney Adoradio, head of a unit that prosecutes welfare fraud cases, sent a memo to Manager Bean of the County

welfare fraud unit, advising her that the County Attorney's office would no longer accept cases presented by the Grievant because of his investigative practices and the way he handles evidence. Mr. Adoradio detailed past incidents of the Grievant's adverse impact upon personnel and practices of the County Attorneys' Office as additional bases for the memo. But the main topic of the memo was the Grievant's refusal to work cooperatively with Mr. Adoradio, supervising attorney for the County's Complex Crime Team, on a then-current case, which refusal dragged on for several months, beginning in March 2013.

The incident provoking Mr. Adoradio's memo involved an investigation of alleged fraud committed by a childcare provider, Chicago Child Care Center, LLC ("Childcare Center"). During the investigation, the Grievant had prepared a subpoena for documents and a computer at the Childcare Center. The subpoena failed to specify that the County not only had authority to seize the computer, but also to look at the relevant data in the computer. Additionally, the County Attorney's Office faulted the Grievant for failure to follow proper evidence handling protocols, which directed the Grievant to bring a member of the County's Digital Forensic Unit ("DFU") to the search and to turn the computer over to that Unit after seizing it so the County could utilize DFU's special expertise. *See*, Jt. Ex. 6, Fraud Investigation Unit Work Rules, Page 21. The Grievant not only failed to bring anyone from DFU to the search at the Center, he also refused to transfer the computer to DFU after he had seized it. The Grievant stated he did not bring a DFU employee to the search because he did not know of the Work Rule requiring him to do this.² He did not transfer the computer, either. He offered different reasons for refusing to bring DFU into the investigation: 1) because it would be illegal to have DFU look at the

² Er. Ex. 9 is a written acknowledgement that he had read and understood the Work Rule manual. Ex. 12 C, data from a 2006 grievance, shows that the work of the DFU was specifically discussed with the Grievant.

computer evidence;³ 2) because the Grievant had the necessary expertise himself;⁴ 3) because no one could look at the computer data where the search warrant did not authorize looking at the data.⁵ In March 2013, after he received numerous directions from his supervisor and Mr. Adoradio to prepare a second search warrant authorizing a search of the relevant data in the computer,⁶ he refused to do so, arguing that to do so would be illegal, and he refused to take an illegal action.

The Grievant's reasoning appears to be based on these facts: In accordance with the County system and Attorney Adoradio's advice, Supervisor Judy Grandel directed the Grievant to take the computer to DFU. He refused. Eventually, Supervisor Grandel and a DFU employee moved the disputed computer to the DFU, maintaining a chain of custody record. Then the DFU removed the Grievant's sealing tape and made a copy of the hard drive (which was not reviewed). Custody of the computer was maintained in a different County evidence room than the Grievant's County evidence room. The Grievant maintained that these actions broke the chain of custody, violated the search warrant, and rendered the potential evidence in the computer inadmissible in the event of trial. Later, the Grievant changed his story. According to Mr. Adoradio at the hearing, the Grievant advised him that Judy Grandel had told him not to prepare the much requested second warrant after all.⁷ When asked about the reason for this at the hearing, the Grievant stated that he could not in good conscience prepare a second warrant as

³ Jt. Ex. 23, Investigative Interview, at 2. When asked why he refused to contact DFU after directed to by supervisor, he replied that it would be illegal because DFU is not part of the Unit and to do so would violate the subpoena and the Data Practices Act.

⁴ *id.* at 2. (When asked why he thought DFU should not be involved, "...because I'm [a] certified instructor in nat'l white color crimes center")

⁵ Testimony of Grievant.

⁶ Exhibit 18, memos from Supervisor Grandel to file, beginning the day the computer was seized, February 21, 2013, and continuing through March and April.

⁷ Ms. Grandel denied she ever rescinded her direction. Her memory was supported by a written memo to Grievant, April 5, 2013 and testimony of Ms. Bean and Mr. Adoradio.

directed because to do so would require him to perjure himself and he refused to break the law by perjuring himself at the direction of a supervisor. He stated: I knew the computer was opened and searched.” On cross-examination, the Grievant stated that he had talked to members of the Union who were attorneys. He believed they had advised him that he could not get a second warrant that covered the contents of the computer after it had been opened, and he put their guidance ahead of his supervisor’s direct order. It apparently never occurred to the Grievant that he could put the actual facts about what had happened to the computer before the Judge who would then have a choice to sign or refuse to sign a subpoena.

The Union presented as a witness Paul Maravigli, who was with the Hennepin County Public Defender’s Office and apparently in the same bargaining unit. Mr. Maravigli had expertise on the due process rights of the accused, subpoenas, and the duty of prosecutors to disclose evidence to defendants. Mr. Maravigli believed the first Childcare Center subpoena should have included language about authorizing search of the data as well as seizing the computer, and that a second warrant would be needed to look at the data on the hard drive. Mr. Maravigli took the position that if the contents were reimaged, as the DFU had apparently done, that action was the same as a search of the computer. He acknowledged that a prosecutor could argue that this was not the case.

Attorney Adoradio, in his May memo to Manager Bean stated:

Troublingly, in discussions with Halicki, he refuses to acknowledge that his evidence handling has been in violation of accepted protocols. In the case of the computer, he objected to the involvement of the DFU, in what appears to be protection of his ‘turf’; when instructed, however, to transfer the computer to DFU, he argued that such a transfer would be ‘criminal’ and an ‘obstruction of justice.’ Over his objection, his supervisor ordered the transfer of the computer to DFU for proper evidence handling.
Er. Ex. 1.

Throughout the Grievant's employment, he had a habit of threatening coworkers he did not agree with by telling them that if they continued on the course of conduct he did not approve, they would be committing a crime. This type of bullying from a person with a little legal training appears to be a continuing thread over the course of his employment. Just in the documents and testimony presented at this hearing, the following examples occur:

1. April 6, 2006, Grievant receives a Written Reprimand for telling a coworker she would be violating the Data Practices Act by disclosing client information at a staff meeting with County forensics experts. When she attempts to proceed anyway, the Grievant tells her he would tape-record everything she said.
2. September 22, 2008, in an email from Grievant to a manager, the Grievant vociferously complains that he should be paid by his Employer for his time testifying in court in response to a subpoena from the Public Defender's Office. His supervisor advises him that he must use vacation time if he wants to be paid because he was subpoenaed by the opposing party in the case. The Grievant claims that this response means the supervisor is harassing him and retaliating against him. He describes the supervisor's actions as illegal: "I believe I am a victim of the crime of 'Witness Tampering.'" Employer Ex. 7.
3. February 26, 2013, in an email to his supervisor, who had asked him to move the Childcare Center computer to the forensics unit, the Grievant warns her that taking this action could be "a crime of Obstructing Justice and Tampering with Evidence in a Crime Investigation." Jt. Ex. 18.
4. On June 19, 2013, when a County Program Manager seeks to officially interview the Grievant about the Childcare Center computer issue, the Grievant's first response is that he can't discuss it with the Program Manager, because to do so would violate of the Data Practices Act. This delays the investigative interview while attorneys are consulted. Jt. Ex. 23.
5. When refusing to deal with attorney Adoradio's directive to get a second subpoena, the Grievant concludes that Mr. Adoradio has ordered him to perjure himself. "It was an illegal order. I knew it had been opened and searched. He asked me to break the law." Grievant's Testimony at hearing.

This recorded conduct has been considered as a sampling of the difficulty encountered by coworkers and supervisors attempting to work with the Grievant.

In addition to insubordinate and intimidating behavior toward other employees, there is a record of intimidating behavior toward the County's clients. Intimidating behavior toward clients may result in collecting money for the County more easily, but it could also have a

serious effect on the reputation and mission of the Fraud Unit. The best example of this is the Grievant's use of a County badge that looks like a peace officer's badge.⁸ In 2001 a now-retired supervisor ordered badges for the investigators in the Fraud Unit. According to the Grievant, he received one of these badges and paid for it himself. Over time, the policy about use of a badge changed. Supervisor Grandel, his supervisor since 2005, directed the fraud investigators to show their photo ID and hand their business cards to clients on first contact instead of the badge. Jt. Ex. 6. The Grievant ignored this directive and continued to approach people with a visible badge and misleading statements about his identity and his purpose. This approach so intimidated some clients that they complained to the Employer, despite their concerns about how such a complaint might harm their access to public assistance. Er. Ex. 8. Memo from Grandel to Grievant about complaint, April 11, 2013.

Supervisor Grandel counseled and ultimately disciplined the Grievant for this behavior. Jt. Exs. 10-14. But this behavior did not stop, and another client complained in writing to Supervisor Grandel about the Grievant's approach to her in a letter dated June 10, 2013. Er. Ex. 8.

The Employer established that the Grievant exhibited intimidating or bullying behavior toward clients, coworkers, and attorneys in the County Attorney's Office. There is ample evidence that he was also insubordinate and uncooperative toward supervisors. That this occurred over a period of years shows that it was not just a problem with one supervisor or manager.

Ordinarily, arbitrators might find that an Employer has made insufficient efforts to correct employees' conduct prior to discharging them when his recent record contains only one written reprimand and a one-day suspension. This case is different for several reasons. First, the

⁸ Employer's Ex. 2, a photo.

one written reprimand covered six different violations and could have been six written reprimands, and one month later, several of the same problems persist, resulting in a one-day-suspension. Second, there is ample written documentation that the supervisor had previously made counseling efforts over a long period of time. Third, the Grievant's widespread pattern of intimidating behavior evidenced over years is unacceptable in any workplace, and a habit that is not amenable to change. Under the circumstances of this case the Employer engaged in sufficient progressive discipline. For the same reasons, the fact of his long-term employment does not mitigate against the remedy employed by the County. Reducing the discharge to a lesser penalty has been considered. This does not seem reasonable because of the type of conduct exhibited by the Grievant as described above. To further demonstrate the futility of expecting him to change if reinstated, the Grievant still refuses to return his badge identifying him as an investigator for Hennepin County. On July 18, 2013 The Assistant County Administrator for Human Services sent a letter to the Grievant to the address he had on file with the County, directing him to return his badge, and telling him he did not have authorization to use the badge. The letter continues that the reason the Grievant gave for refusing to turn it in earlier is that he had personally purchased the badge, and the administrator offers to reimburse him for that cost. At the hearing on April 30, 2014, on cross-examination, the Grievant declared, he wouldn't return the badge, and it was not for sale. Even facing termination, the Grievant deliberately chose a course of conduct to refuse directives. This is not the behavior of a repentant employee who seeks another chance, agreeing to conform to the norms of the workplace. The requirements of progressive discipline have been met.

The Union argues that the Grievant should not be discharged for refusing to follow an order that he reasonably believed was illegal. Had the Grievant taken a DFU employee with him

to the search as he had been instructed, had he agreed to move the computer to the County's DFU division's evidence room as instructed, had he not taken it upon himself to act as if his understanding of the law was superior to the County Attorney's, had he not lied to Mr. Adoradio about his supervisor directing him not to prepare a second subpoena, the Union's argument might have merit. Based solely on the testimony I heard, there seems to be an honest difference of opinion among prosecutors and defense attorneys about whether making an image of the hard drive in itself constitutes a search. It is certainly not a question for an investigator with limited legal training to resolve. As such, the Grievant's idea that he could not prepare a search warrant because Mr. Adoradio had directed him to perjure himself is not a reasonable belief, and it is not a defense to the Employer's decision that discharge is the appropriate penalty for the Grievant's long-term pattern of conduct inimical to the efficient work of the Welfare Fraud Unit.

ISSUE 2: WAS THE GRIEVANT DENIED EMPLOYER TIME TO ATTEND TRAINING IN VIOLATION OF THE CONTRACT? IF SO, WHAT SHALL BE THE REMEDY?

FACTS

In August 2012, The Grievant requested approval for the County to pay for training he wished to attend. Investigators were required to attend a certain number of hours of continuing education. The class he wished to attend was called, "Advanced Criminal Intelligence Analysis to Prevent Terrorism" held in Pearl, Mississippi, and sponsored by an organization known as NW3C. Jt. Ex. 16. Ms. Grandel relayed this request to Manager Debra Bean. The Grievant believed that the course had some relevance to his work, he had attended conferences sponsored by the same organization before, and the County had allowed him to do so on work time, even when he had paid the registration fee himself. He did not specifically ask to attend the

conference on County time. Upon learning that the course was not directly related to fraud investigation work, Manager Bean denied the Grievant's request for funding for this training.

UNION POSITION

The Union argues that the Grievant was entitled to attend a training class as he had previously on paid work time rather than to use vacation leave while at the conference. In arguing for this result, the Union claims that the Employer had allowed the use of work time for training in the past and should have done so again. The Union claims that because the Grievant did not go to an earlier instate fraud conference that other employees attended on the Employer's time, it should have allowed the Grievant to attend the training in Mississippi on County time. The Grievant believed that when his request to pay for training was denied, there was no mention of denying his request to attend the conference on County time. The Union claims that because the Employer had allowed him to attend the conference paying his own costs, it should not, without notice, have required him to use vacation time instead. The Union claims this violates Article 11, Vacation Time, and past practice.

EMPLOYER POSITION

The Employer alleges that it did not violate the Contract when it denied the Grievant paid time to attend training when the Manager did not think it relevant to the Grievant's work as a Welfare Fraud Investigator. The Employer understands that in past years managers have approved requests allowing the Grievant to attend out of state courses on work time, but when an employee is not approved for training he cannot claim that he is entitled to regular work hours for that time. The Employer believes that it generously allowed the Grievant to use vacation pay for his absence rather than declining to approve any sort of pay after it had advised him that he would not receive County funding for the training.

DISCUSSION AND DECISION

The Union does not point to any provision of Article 11A, Vacations, that addresses the question of whether the Manager has authority to deny requests to pay for training on work time. Apparently, the argument is that one week of the Grievant's vacation hours to which he was entitled was unfairly taken from him when the Employer required him to change his time records from regular pay to vacation hours for the week he went to the training that was disapproved.

Previously, the Grievant attended conferences sponsored by NW3C. In 2008, the previous Human Services Program manager, Cathy Lindberg, allowed the Grievant to charge his time to the County while he attended a training conference called "White Collar Crime and Terrorism." Jt. Ex. 15. In 2009, the Grievant also attended an out-of-state training conference on cyber investigations sponsored by NW3C on County time approved by Ms. Lindberg. Jt. Ex. 15. In 2010 Steve received approval to attend an NW3C conference on County time entitled "Foundations of Intelligence Analysis Training." Jt. Ex. 15.

The Union correctly notes that under a previous manager, it had been the practice to allow the Grievant and others to attend training conferences that were not strictly related to Welfare Fraud on County time. But in 2012, Manager Bean denied the Grievant's request to attend the conference he wished to attend instead of the fraud conference that other investigators attended. In order to find for the Union, I would have to conclude that a new manager does not have discretion to make a different decision than the previous manager.

Many arbitrators, when called upon to decide whether a past practice should be considered a binding provision of the labor agreement, distinguish between cases where the past

practice provides an employee benefit and cases where the practice affects a basic management function. See, Elkouri & Elkouri, *How Arbitration Works*, at 610, BNA (6th ed. 2003).

Arbitrators hesitate to permit unwritten past practice to restrict the exercise of recognized functions of management, such as methods of operation or direction of the workforce. *Id.* at 612.

These concepts are set out in Umpire Harry Shulman's often quoted decision regarding the binding force of past practice regarding assignment of work:

But there are other practices which are not the result of Jt. determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion. The law and the policy of collective bargaining may well require that the employer inform the Union and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of practice of this character. *Ford Motor Co.* 19 LA 237, 241-42 (Shulman, 1952)

Elkouri & Elkouri, at 613

The practice of deciding whether the County budget should be used to fund training is in the nature of a recognized function of management discretion in directing the workforce. Manager Bean was within her discretion to deny the Grievant's request for County funding to pay for the Grievant's time to go to a conference on terrorism when his job was to investigate welfare fraud. If a manager denies a request for the County to pay for training, this would ordinarily include denying pay for the time the employee spent attending the conference that was not approved. The Grievant cannot reasonably assume otherwise, and I find no contract violation under these circumstances.

AWARD

Both Grievances are denied.

Dated: June 30, 2014

Andrea Mitau Kircher
Arbitrator