



**WITNESSES TESTIFYING**

Called by the Employer

Ruth Bornholtz,  
Rehabilitation Therapy Supervisor  
Department of Human Services  
Metro Resources Unlimited

Carol Pankow,  
President and CEO  
Midway Training Services  
Formerly, Manager of  
Minnesota State Operated Services

Called by the Union

Gary T. Motyka, Grievant  
Human Services Technician (Discharged)

Sonja Himmes,  
Formerly Health Services Technician  
Chatham Way Regional Treatment Center

**ALSO PRESENT**

For the Employer

No others were present

For the Union

JoAnn Holton

Barbara Sasik

**JURISDICTION**

The issue in grievance was submitted to James L. Reynolds for a final and binding resolution under the terms set forth in Article 17, Section 5 of the Collective Bargaining Agreement between the parties (Joint Exhibit 1). At the hearing the parties mutually stipulated that the issue was properly before the Arbitrator for a decision and that he had been properly called. The Arbitrator inquired if either party had any objection to the award in this case being published by the State of Minnesota Bureau of Mediation Services or by recognized organizations that regularly publish arbitration awards. No objection was raised by either party. The Employer requested that the names of any of

clients of the Department of Human Services that may appear in the award be expunged or abbreviated so as to hide their identity in conformance with data privacy requirements.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through oral summation at the hearing, and neither party filed a post hearing brief. With the conclusion of the hearing the record in this matter was closed. The issue is now ready for determination.

### **STATEMENT OF THE ISSUE**

The parties mutually stipulated the issue to be:

Whether or not the Employer had just cause to discharge Grievant Gary Motyka? If not, what is the appropriate remedy?

The sections of the Collective Bargaining Agreement that bear on the issue in this case are contained in Article 16 – DISCIPLINE AND DISCHARGE, and Article 17 – GRIEVANCE PROCEDURE. In relevant part they read as follows:

#### **ARTICLE 16 – DISCIPLINE AND DISCHARGE**

**Section 1. Purpose.** Disciplinary action maybe imposed upon an employee only for just cause.

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**Section 3. Disciplinary Procedure.** Disciplinary action or measures shall include only the following:

1. oral reprimand;
2. written reprimand;
3. suspension;
4. demotion; and
5. discharge

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**Section 5. Discharge.** The Appointing Authority shall not discharge any permanent employee without just cause. If the Appointing Authority feels there is just cause for discharge, the employee and the Local Union shall be notified, in writing, that the employee is to be discharged and shall be furnished with the reason(s) therefore and the effective date of the discharge. The employee may request an opportunity to hear an explanation of the evidence against him/her, to present his/her side of the story and is entitled to union representation at such meeting, upon request. The right to such meeting shall expire at the end of the next scheduled work day of the employee after the notice of discharge is delivered to the employee unless the employee and the Appointing Authority agree otherwise. The discharge shall not become effective during the period when the meeting may occur. The employee shall remain in pay status during the time between the notice of discharge and the expiration of the meeting. However, if the employee was not in pay status at the time of the notice of discharge, for reasons other than an investigatory leave, the requirement to be in pay status shall not apply.

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## **ARTICLE 17 – GRIEVANCE PROCEDURE**

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**Article 5. Arbitrator's Authority.** The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He/she shall consider and decide only the specific issue or issues submitted to him/her in writing by the parties of the Agreement, and shall have no authority to make a decision on any other matter not so submitted to him/her. The arbitrator shall be without power to make decisions contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations have the force and effect of law. The decision shall be based solely upon the arbitrator's interpretation and application of the expressed terms of this Agreement and to the facts of grievance presented.

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## **FACTUAL BACKGROUND**

Involved herein is a grievance that arose when the Employer discharged the Grievant on August 30, 2004 for the following four reasons:

1. Failure to follow policy #9613-Individual Supports-Contact Between Staff and Individuals Receiving Supports in that you took DT&H clients to a residential site for personal reasons on multiple occasions.
2. Failure to follow policy #2050-MSOCS Standards of Conduct-Prohibition of Sexual Harassment in that you made continued unwelcomed advances toward a co-worker.
3. Failure to follow the Code of Ethics-for unauthorized removal of a cooler from the worksite.
4. You were not forthcoming during the investigation.

In the letter of termination (Tab 1 of the Joint Exhibit Book) the Employer noted that the Grievant had received a previous corrective action, dated January 5, 2004, in which he was suspended for three days without pay and informed that further policy/procedural violations would lead to further discipline up to and including discharge. In imposing the three day suspension on January 5, 2004 (Tab 6 of the Joint Exhibit Book) the Employer accused the Grievant of 1) making photocopies of a picture of a former program participant with sexually suggestive language, posting them in multiple locations around the site in violation of the Vulnerable Adult Act, Minnesota Data Practices Act and Federal HIPPA regulations, 2) failing to keep program documentation current, and 3) failing to carry out assigned duties in accordance with established procedures. The record also shows that the Grievant had been issued a written reprimand on January 16, 2001 (Tab 6 of the Joint Exhibit Book) for failing to follow directives of a Contact Person and contact Supervisor on January 2, 2001. There is no evidence in the record that either the

written reprimand of January 16, 2001 or the three day suspension of January 5, 2004 were grieved.

The Employer is the State of Minnesota Department of Human Services. The Union is the exclusive bargaining representative for the employees covered by the provisions of Joint Exhibit 1. The parties have had a collective bargaining relationship for many years. An operating unit within the Department of Human Services is known as Minnesota State Operated Community Services (MSOCS). That operating unit provides day training services to developmentally-challenged adult citizens of the State. At the time of his discharge the Grievant was working as a Human Services Technician at the Metro Resources Unlimited-Westwood location.

The Collective Bargaining Agreement between the parties became effective July 1, 2003 and remained in full force and effect through June 30, 2005. For all relevant times the Grievant, was covered by its provisions. The Grievant has approximately 25 years of experience working with vulnerable adults. He was hired by the State as a Human Services Technician in July 1998, working at the Chatham Way Residential Group Home. He transferred to Metro Resources Unlimited-Westwood in early 2000. Metro Resources Unlimited is a fee-for-service program providing day training and employment opportunities for developmentally challenged adults. The clients pay for the services they receive under that program.

The duties of the Grievant included picking up clients at their homes in an Employer provided van, taking them on work outings such as cleaning of parks or theatres, then returning them to their homes later in the day. Some clients would from time to time act out and would need to be restrained by the Grievant or another Human Services Technician who would, from time to time, accompany him on the outings.

The Grievant was accused of rape by a client on May 28, 2004. The charges were referred to the Police Department with jurisdiction for investigation. They were found to be unfounded and no criminal prosecution was initiated. In the course of that investigation, however, other matters arose on which the Employer based the discharge of the Grievant.

The Grievant is charged with taking clients, without authorization, to the Chatham Way Group Home on several occasions in the summer of 2003. He admits to stopping at Chatham Way with clients in the van, but claims that the stop was for work related purposes. The Employer asserted in the discharge letter that such conduct was in violation of policy #9613. The Grievant testified that he did so to pick up tools needed by the clients in their work outing. He also testified that he had clients who waited in the van while he took CPR/First Aid refresher training at Chatham Way. He further testified that he was able to keep an eye on the clients in the van by looking out a window every few minutes. Another Human Services Technician was in the van with the clients at the time.

The Grievant also admits to having an affair with a female employee at the Chatham Way Group Home during the summer of 2003. The Employer charges that the Grievant's pursuit of that female employee constituted sexual harassment in violation of policy #2050. The Grievant denies that his pursuits constituted stalking as the Employer alleges.

The Grievant also admits to taking a cooler from his place of employment for his personal use. The Employer charges him with violation of the applicable Code of Ethics in doing so without authorization. The Grievant contends he had permission, the Employer contends he did not.

The Employer also charged the Grievant with not being forthcoming in the course of the investigation of the charges against him due to his piece-meal offering of the information sought in the investigation.

The Employer issued the letter of termination to the Grievant on or about August 27, 2004. A timely grievance of the termination was filed by the Union. It was heard in arbitration on January 26, 2006.

## **POSITION OF THE PARTIES**

### **Position of the Employer**

The Employer maintains that it had just cause to discharge the Grievant. In support of that position the Employer makes the following arguments:

1. The Grievant demonstrated poor judgment and lack of boundaries in the performance of his duties.
2. He was not credible when he stated that he went to Chatham Way to pick up tools or to receive needed recurrent training. His credibility is eroded when he testified that a police officer conducting an investigation of the rape charges against him assured him that he could continue to work with vulnerable adults. The police officer denied making that statement. His credibility is eroded when he said that his supervisor authorized him to use the cooler at a party. The supervisor denied that such permission was granted. His credibility is eroded when he claimed that he had to take CPR training at Chatham Way because his currency was expiring. The record shows that it was not expiring when the Grievant claimed it was. His credibility is further eroded when he claimed that he remained licensed to work, when the Division of Licensing notified the Employer on December 8, 2004 that he should be removed from any position allowing direct contact with clients.
3. The time and attention he gave to the female worker at Chatham Way while on duty did not benefit the clients who were in his charge at the time.
4. The stops he made at Chatham Way is the critical issue in this case. Such stops were not authorized and were not related to the care of clients and not what they had paid for.
5. He took a cooler from the Employer for his personal use without authorization.
6. The Grievant received progressive discipline in the form of a written reprimand in 2001, and a three day suspension in 2004.
7. The Grievant was also warned of the concerns the Employer had in regard to his conduct through his performance evaluation of 2003 and the letter of expectations he received on January 12, 2004. He understood that the Employer was not tolerant of his actions.
8. The State cannot wait for another incident. It could loose the program due to his continued conduct. The Employer has lost confidence in the Grievant conducting himself in a manner in accord with the legitimate interests of the State.

## **Position of the Union**

The Union argues that the discharge of the Grievant was not for just cause, and that he be reinstated and made whole. In support of this position the Union offers the following arguments:

1. The Employer is burdened to show that it had just cause to discharge the Grievant, and it has not shouldered that burden in this case. Its investigation proved that just cause was not present.
2. The Employer has not demonstrated with clear and convincing evidence that the Grievant broke any policies or codes governing his actions.
3. The Grievant drove clients to Chatham Way, not for personal reasons as the Employer asserts, but for legitimate business reasons such as picking up required tools or dropping off donated flowers. Such actions were of long standing, and not previously criticized by the Employer.
4. The Grievant monitored his training requirements for CPR and First Aid, and took timely action to remain current. He should not be penalized for following through on those training requirements by attending training at Chatham Way when he did.
5. His license to practice in the field was reinstated in the spring of 2005.
6. The Employer was lax in enforcing the Code of Ethics in regard to employees using State property for their personal use. Borrowing of State tools and equipment was widespread, and the Grievant did nothing that was not done by other employees.
7. The Grievant broke off the affair that he and the female employee at Chatham Way were having. His conduct cannot be considered harassment.
8. The Employer does not want to believe the Grievant. His co-workers, on the other hand, have expressed positive comments about their working relationship.
9. The Grievant had been on ten weeks of investigatory leave at the time the Employer was questioning him. It is understandable that his memory could have lapsed in certain areas. He promptly reported information that he later recalled. In all respects he was forthcoming.

## **ANALYSIS OF THE EVIDENCE**

Article 16 of the Collective Bargaining Agreement provides that the Employer may impose discipline only for just cause. This case turns on whether or not the Employer had just cause to discharge the Grievant under the facts and circumstances present. Article 16 also provides for progressive discipline, with discharge as the final step.

The record shows that the Grievant had received adequate progressive discipline and warnings prior to the events that gave rise to his discharge to be aware that the Employer had some serious concerns in regard to his conduct. The purpose of progressive discipline is to provide an employee with the opportunity to correct his conduct if it is found to be unacceptable by the employer. There is no doubt that the progressive discipline and warnings received by the Grievant should have alerted him to the concerns of the Employer. The fact that the discipline and warnings imposed were not grieved, and that the Grievant's testimony in this case that he regarded the three day suspension imposed in January 2004 as a "wake-up call" compel a finding that the Grievant was forewarned and aware of the concerns of the Employer.

As to the four charges on which the Employer based the discharge of the Grievant, the evidence supports two of them. The charge that he failed to follow policy #2050 – MSOCS Standards of Conduct-Prohibition of Sexual Harassment by continuing to make unwelcomed advances to the female coworker at Chatham Way is not supported by the evidence. The alleged victim to this harassment did not appear to testify at the hearing,

and the record contains conflicting statements that, in the aggregate, are not sufficient to compel a finding of harassment.

The charge that he was not forthcoming during the investigation could not be substantiated from the evidence. The record did show that the Grievant subsequently added to his statement given during an initial interview. Such addition, however, cannot be seriously regarded as proof of a failure to be forthcoming. To the contrary, it is more likely that providing such additional information is more likely an attempt to be complete in the statement given.

The other two charges against the Grievant are sustained by the evidence. The record does not justify the Grievant's claim that he stopped at Chatham Way with a van full of clients to drop off flowers or pickup tools. The Grievant admits that he was having an affair with a female worker at Chatham Way at the time of those visits. In any event, the clients did not pay their fees for such stops on the way to their work. The Grievant's explanation that on one occasion he had to stop at Chatham Way with a van full of clients to take recurrent CPR or First Aid training is simply not credible. The record shows that training assignments are not made in the manner utilized by the Grievant. The record further shows that the Grievant's certifications were not about to expire at that time in any event.

The record shows convincingly that the Grievant used a State owned cooler for his personal use without authorization. He claimed that he had permission from his

supervisor to use the cooler. His supervisor, however, testified convincingly that she never granted such permission, and would not because it would violate the Code of Ethics. The Grievant's claim that others also made such use of State property is not convincing. The Code of Ethics on that matter is clear, and his actions are not justified simply because others may have done so. Importantly, aside from the Grievant's assertions that others made personal use of State property there was no evidence to support a finding that the Employer was lax in enforcing the code prohibiting such use.

It is troubling to find in the record of this case some serious inconsistencies in the testimony of the Grievant. Such inconsistencies were found in his testimony pertaining to a police officer stating that he would be allowed to continue to work with vulnerable adults, his testimony that his supervisor gave permission to use the cooler, and his testimony that he remained licensed to work in the field of human services. Such inconsistencies undermined the Grievant's credibility.

The charges used by the Employer as a basis of discharging the Grievant that were sustained by the evidence in this hearing, and the unchallenged charges that formed the basis of the three day suspension imposed in January 2004 present a picture of an employee who is not sensitive to the boundaries within which he must work. The evidence presented in these disciplinary actions compel a finding that the Employer did have just cause to discharge the Grievant on August 30, 2004.

The issue in this case is whether or not the Employer had just cause to discharge the Grievant. The evidence compels a finding that it did. Accordingly, pursuant to Article 17, Section 5 of the Collective Bargaining Agreement, the Arbitrator is without power to reverse the discharge action taken by management. The grievance must be denied.

**IN THE MATTER OF ARBITRATION BETWEEN**

MINNESOTA STATE EMPLOYEES UNION  
AFSCME COUNCIL 5  
Union

-and-

STATE OF MINNESOTA  
Department of Human Services  
Employer

| BMS Case No. 05-PA-849

| Discharge Grievance of  
| Gary T. Motyka

**AWARD**

Based on the evidence and testimony entered at the hearing, the grievance and all remedies requested are denied.

*s/ James L. Reynolds*

Dated: 2/7/06

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James L. Reynolds,  
Arbitrator