

IN RE ARBITRATION BETWEEN:

TEAMSTERS LOCAL #320

and

STATE OF MINNESOTA BOARD OF PUBLIC DEFENSE

DECISION AND AWARD OF ARBITRATOR

BMS 13-PA-0776

**JEFFREY W. JACOBS
7300 METRO BLVD.
SUITE 300
EDINA, MN 55439**

ARBITRATOR

SEPTEMBER 16, 2013

IN RE ARBITRATION BETWEEN:

Teamsters Local #320,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 13-PA-0776
Jan Mansell grievance

State of Minnesota, Board of Public Defense.

APPEARANCES:

FOR THE UNION:

Kevin Beck, Attorney for the Union
Jan Mansell, grievant
Steve Nicol, Esq. Part-time Public Defender

FOR THE COUNTY:

Sara McGrane, Attorney for the State
Virginia Murphrey, Chief Public Defender 10th Jud. Dist.
Bill Robyt, Managing Attorney Public Defender's Office

PRELIMINARY STATEMENT

The hearing in the matter was held on July 29, 2013 at the FMCS Office in Minneapolis, MN.

The parties presented oral and documentary evidence at which point the hearing record was closed.

The parties submitted briefs dated August 23, 2013.

ISSUES PRESENTED

Did the State have just cause for the termination of 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, 2011 through June 31, 2013. Article X 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 arbitrability issues and that the matter was properly before the arbitrator.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE VIII – DISCIPLINARY ACTION

8.1 Administration of discipline

In the case of a permanent employee, disciplinary action may be taken only for just cause, which shall include the failure to maintain any license required in the position. For all Employees, disciplinary action should be taken only for reasons that are clearly communicated to the employee. Discipline may include, in any order, only the following: oral reprimand, written reprimand, suspension, demotion, and/or discharge.

RELEVANT POLICY LANGUAGE

Code of Ethics

Employees shall act so that they are not unduly affected or appear to be affected by kinship, position or influence from any party.

Employee shall not request or accept any compensation or fee beyond that received from their employer for work done in the course of their public employment. However, employees may engage in outside employment as long as it does not conflict with the performance of their official responsibilities or violate this code and as long as they have notified their supervisor.

STATE’S POSITION:

The State’s position was that there was just cause for the termination of the grievant. In support of this position the State made the following contentions:

1. The State Board of Public Defense, Board, is part of the judicial branch and provides defense for certain indigent clients who are charged with crimes and who face possible incarceration as the result of those charges. The State asserted that its mission is to provide the highest quality representation of its clients and to maintain the highest standards of ethical standards as well. The attorneys working for the Board are subject to the rules of professional responsibility and are expected to know and adhere to these standards at all times. In addition, the attorneys who work for the Board are subject to clearly stated and well known rules regarding their work as Public Defenders.

2. The grievant has been a fulltime Public Defender, PD, for 13 years and knew the rules with regard to her responsibility as an attorney and of the special rules pertaining to PD's in the State. The State asserted that the grievant signed the Ethics policy and was made aware of her responsibility to adhere to those policies and rules, including the prohibition against representing family members in her capacity as a PD. While it is acceptable to represent family members as a private attorney, even if one is a full time PD, it is not acceptable to do so as a member of the Public Defender's office. The grievant's claim that she was unaware of this is disingenuous at best – the State claimed that she knew this long before the incidents that led to her termination.

3. The State further acknowledged that the grievant is a capable and well-respected attorney and represents her clients ably and well but that she was not terminated for her abilities but rather for her judgment and her clear insubordinate behavior in the latter part of 2012, as discussed below. The State did however note that there have been some concerns about her courtroom demeanor and delays in getting back to her clients. See State exhibit 5.

4. The State pointed to the ethics policy itself, See State Exhibit 1, which has two specific provisions that prohibit the use of the official position of a PD to secure “benefits, privileges, exemptions or advantages for that employee or any other person.” It also requires that employees “shall not act so that they are unduly affected or appear to be affected by kinship.” In other words – the rule is clear – a PD may not represent a family member while acting in the capacity of a PD.

5. The State also pointed to the testimony of Mr. Robyt who indicated that “we cannot represent family members” as full time PD's. He also testified that it is universally understood and communicated that while a PD may represent a family member as a private attorney, PD's are “not to present themselves as PD's when representing family members.”

6. Turning to the specifics of this matter, the State asserted that the grievant has violated this clear policy on multiple occasions – including one such violation that came literally within a day of being told not to represent a family member. The State asserted that well prior to 2012 the grievant was told that she could not represent her son in a criminal matter and that this would have to be conflicted out and sent to another office. This occurred on several occasions and the grievant was well aware of the rule against representing a family member.

7. In late 2011 Ms. Virginia Murphrey, the Chief PD in the Tenth Judicial District, informed the grievant that she could represent her son as a private attorney but not as a member of the PD staff. Despite this clear admonition, the grievant in fact represented her son in a criminal matter when he was not eligible for the services of the Public Defender's Office.¹ She sent official documents on Public defender letterhead to the Court asking for a resetting of a probation hearing – thus representing to the Court that the PD's office was representing the grievant's son.

8. She filed another document on official letterhead in 2012 asking for a reassignment to a different judge – once again in clear violation of the earlier warning not to do this in her official capacity as a PD for her son.

9. She appeared on behalf of her grandson in May 2012. See Employer Exhibit 2. Moreover, she sought a favor from the prosecutors by asking for a reduction in bail to \$5,000.00 because she had "\$500.00 and because it is me." This comment made the prosecutors so uncomfortable that they decided to refer the case to another county to avoid any appearance of impropriety or conflict of interest.

¹ There are income guidelines for eligibility for legal representation by the PD's office. These guidelines were not specifically discussed nor were they at issue in this matter. The parties agreed that the grievant's son was eligible for these services at one point but that in late 2011 he was not due to his employment and income status.

10. Further, the State alleged that in late 2012 the grievant talked another attorney in the office, Mr. Leary, to appear on her son's behalf before a judge with whom the grievant had a strained relationship. She failed to inform the other attorney that the son was not eligible for PD services and essentially led him to believe that her son was eligible. When that motion was denied, the grievant again, in clear violation of the earlier warnings, attempted to file a motion for reconsideration again on PD letterhead. It was only because Mr. Robyt happened to see it by accident and intercepted it that this document was discovered. He confronted the grievant and only then did she re-draft it on personal stationary. Despite that the official court file contained the first motion signed by the grievant as a PD. Mr. Robyt again told the grievant she could not represent family members in court proceedings.

11. After Mr. Robyt intercepted the motion to the court referenced above on November 26, 2012 the State commenced an investigation to determine the extent of the violations. Her memo setting the meeting to discuss these allegations clearly told the grievant that the meeting was she was to have with her supervisors was, "regarding the use of position as a public defender to represent a family member, contrary to your supervisor's instructions." The State asserted that the memo could not have been clearer in terms of its message – you are being investigated for representing family members, contrary to your supervisor's instructions."

12. The State asserted that this was a clear message not to continue to do so yet literally one day later she did it again. The grievant appeared again in Court on behalf of her son and introduced herself as representing the son as a public defender. See Employer exhibit 7.

13. Mr. Robyt and Ms. Murphrey met with the grievant on December 3, 2012 and again told her that she could be not represent family members as a PD. This order could not have been clearer or more pointed. The State asserted that the grievant acknowledged it and understood it. Yet only nine days later, almost astonishingly, she did it again.

14. Despite these multiple and clear warnings, according to the State, the grievant continued to ignore the rules and represented her granddaughter in a Court proceeding in which she was charged with domestic assault. See Employer exhibit 8. The State noted that the judge in that matter was understandably puzzled as to why the grievant was there when advised of the relationship.

15. The State also asserted that the grievant violated basic ethics standards by talking directly to a co-defendant without his lawyer present and that she used her position as a PD to get past bailiffs to get to that individual. The State asserted that this was a serious breach of professional ethics and of the rules with respect to representing family members.

16. The State asserted that these are not mere oversights or minor issues as the union suggests but rather constitute serious insubordination. It further reflects directly on the grievant's judgment and her adherence to ethics rules in place for all attorneys and for those special rules in place for PD's as communicated to her by her supervisors.

17. The State asserted that it conducted a thorough and fair investigation; getting transcripts and official documents filed with the Court and with other agencies that showed clearly that the grievant ignored directives from her managers and appeared on behalf of family members as a PD and not as a private attorney.

18. The State also asserted that the "other cases" cited by the union are not germane to the 10th Judicial District even though covered by the same CBA. The State asserted that Ms. Murphrey is free to set her own discipline for these clear violations and is not limited by anything in the CBA nor by what other Districts might do to other attorneys under different circumstances. Further, there have been no other attorneys in the 10th District who have been found to have represented family members while acting as a PD. Thus there are no other analogous situations and no disparate treatment claim.

19. The State argued that the union's claims should be disregarded and lacking merit. The claim that the actions were "not all that bad, i.e. no harm no foul" must be rejected. The grievant appeared at important Court proceedings including one asking for the removal of a judge from one of her family member's cases. These were not inconsequential matters. Moreover, it could well appear as though the PD's office is giving preferential treatment to family members.

20. In addition, the grievant violated clear rules and essentially misled another attorney in getting him to represent her son even though he was not a client of the PD's office. Moreover, the claim that some of these actions were just "mistakes" is not credible. While signing a document without realizing its contents might be excusable once – the grievant did this multiple times. Also she appeared in Court on multiple occasions even after being told not to. These were no mere oversight or clerical error – the State asserted that these were intentional.

21. The State asserted too that despite the grievant's apologies and her apparent remorse, they can no longer trust her and are concerned that she might well do this again. The state reminded the arbitrator that the grievant was about to send an official motion to the Court in November 2012 and that it was only by happenstance that this document was waylaid before it went out.²

22. The State argued finally that the managers recognize that the grievant is a talented and competent attorney but that her competence is not the issue; it is her judgment and her insubordination and failure to follow clear directives by her supervisors – sometimes within days of being given the directive. The State asserted that her actions reflect poorly on the office and that to return her would potentially jeopardize the credibility the PD's office has with the Court, prosecutors and other agencies with which the PD's office does daily business.

The State seeks an award of the arbitrator denying the grievance in its entirety.

² As noted above, that document apparently went out anyway although it was not clear how that happened.

UNION'S POSITION

The union contended that there was not just cause for the grievant's termination. In support of this position the union made the following contentions:

1. The Union pointed to the grievant's 13 year history of outstanding work and the many excellent reviews attesting to her work on behalf of the PD's clients. See Union exhibits 4, 5, 8 and 9. The union also noted that the grievant has been congratulated by her supervisors for her excellent record on behalf of her clients and noted that she has been granted multiple salary increases over the course of her employment with the PD's office.

2. The union also noted that the grievant experienced many personal issues that spilled into her professional practice, including a domestic assault that occurred in the fall of 2011. The union noted too that the managers were aware of these issues and even instituted a security system in the office that many in her office unjustifiably blamed the grievant for.

3. The union further noted that the events that gave rise to her discharge all occurred within approximately a year and that this series of events should not taint such a long and dedicated career. The union also noted that the grievant has been with the PD's office for 13 years and had no prior discipline until the year prior to her discharge.

4. The union asserted that a necessary element of insubordination is a clear directive from management and that there was no such clear order here. The union noted that the directives were mere suggestions and that there is no clear rule against representing family members. The ethics rules noted above do not specifically prohibit representing family members and are ambiguous and unclear as to the specific conduct prohibited. The union pointed to the specific language of the Ethics Code cited above and asserted that it does not prohibit the representation of family members by a PD; it in fact appears to allow a PD to represent a family member as long as "they are not unduly affected or appear to be affected by kinship, position or influence." Here there was no evidence of that at all and the grievant's brief representation of the family members was both short and non-substantive in nature.

5. The union asserted that Ms. Murphrey's claim that these ethics rules prohibit representation of family members while acting as a PD is not supported by this language and that if the rule in fact meant that it would have in fact said that in more certain terms. It does not say, for example directly that, "a PD may not represent a family member" or "employees shall be prohibited from representing family members as a PD" or words to that effect.

6. Moreover, the training provided to the attorneys does not specifically prohibit representing family members as a PD. The union argued that there was no evidence of the substance of the training or of the information given to attorneys regarding the Ethics Code or on conflicts of interest. The union asserted that without such evidence of this, the state's case fails for lack of proof of a clear rule that was allegedly violated.

7. Further, the union asserted that the grievant was never in fact told she was violating any directive or rule by her actions in this matter. The union asserted that the directives were couched in terms of "suggestions," not orders, and that there has been inconsistent enforcement of any rule against representing family members over time.

8. The union pointed to the allegation that Ms. Murphrey gave a direct order in 2011 not to represent family members. The union denied that the grievant asked Ms. Murphrey if it would be permissible to represent her son as a PD in a DWI matter. The grievant was aware that her son was not eligible for PD services due to his income at the time of this conversation. In fact, the grievant asked if it would be acceptable to represent her son as a private attorney and this was approved.

9. The union turned to the May 2012 incident in which the grievant appeared for her grandson and flatly denied that she attempted to influence the prosecutors in any way to set bail. First, the union asserted that the Court, not the prosecutors set bail and that there are many times when agreements are not followed by the Courts. Moreover, the grievant did not use the words as alleged but rather indicated that she said, "Can you agree to \$500.00 because that's what his [the grandson's] girlfriend has?" She did not indicate that it "was her" or anything to that effect.

10. Further, the union asserted that appearing at a bail hearing is vastly different from an actual Court hearing or other substantive matter. There is typically little or no discussion of the merits of the case and is a very quick appearance for the limited purpose of setting bail. In addition, the grievant did not recall actually entering a formal appearance and there was no evidence of that. There was also a student attorney present at the time who may well have entered that appearance and because he did not testify there is insufficient evidence that the grievant actually “appeared” at that hearing. Simply being there does not equate with entering a formal appearance on the record.

11. The union further asserted that even if she did, to say that the grievant “represented” her grandson is an overstatement of what actually happened. Once that appearance was done the matter was immediately turned over to another attorney.

12. The union next turned its attention to the November 28, 2012 letter and the December 3, 2012 meeting with supervisors. The union asserted that the November 2012 letter did not contain the blanket prohibition against representation of family members as the State suggested but rather was focused only on the limited issue of the use of her signature as a PD in signing letters to the Court and was further limited only to a directive not to represent her son as a PD. The union noted that the November 28th letter was in direct response to the November 26th incident in which Mr. Robyt had found the documents signed by the grievant in her capacity as a PD and asked that she correct this. Thus the focus was clearly on that incident and was not intended to be a broader discussion of representation of family members in general.

13. The union also noted that the grievant had been allowed to represent her family members in prior years and even went to a hearing in Hennepin County to do so along with another attorney in the office. She had been allowed to represent her son in May 2012 as a private attorney as well without apparent problems from her supervisors.

14. The union acknowledged that the grievant improperly filed three documents with the Court due to simple inadvertence, (the union asserted that there was no evidence that the grievant did any of this intentionally or willfully) and sent 2 letters to agencies on PD letterhead that should have been on her personal stationary. The union acknowledged that these should not have been sent but that a few instances out of literally hundreds that were properly filed do not rise to the level of discharge.

15. The union asserted that this was a case that called for progressive discipline and that the employer should have given a far lesser penalty given the circumstances of this matter. To move to immediate discharge here is inconsistent with the notion of corrective discipline and just cause.

16. Moreover, the union asserted that other more serious misconduct has resulted in lesser discipline in other similar cases. These cases were not in the 10th District but involved other PD's in other Districts who are covered under the same labor agreement, are in the same bargaining unit and can be considered as disparate treatment. The union pointed to one case where an attorney was engaged in the private practice of law for remuneration outside of the PD's office – a clear violation of the Ethics Code – yet was not discharged. Others have received lesser forms of discipline for similar rule violations. See Union Exhibit 10.

17. Finally the union argued that the grievant's long and otherwise good work record, her clear abilities as an attorney, her candor and remorse as shown at the hearing are all factors that mitigate in favor of reinstatement. The grievant acknowledged her errors and promised that they will never recur if given another chance. Further many of the personal issues that had been distracting her have been resolved or are resolving so she can focus on her duties and responsibilities as a PD. There was no evidence that the relationship with the Courts or other agencies has been so inexorably ruined to prevent her from appearing on behalf of the PD's office and no evidence that she cannot be an effective and zealous advocate for her clients. There is thus ample justification for reinstatement

The union seeks an award reinstating the grievant with back pay and benefits but proffered an alternative for reinstatement without back pay or benefits.

DISCUSSION

FACTUAL BACKGROUND

The PD's Office provides defense for individuals accused of serious crimes and hires both full time and part time attorneys to provide legal defense and advice to clients who qualify. There are income guidelines and individuals must qualify for these legal services. The PD's office in the 10th Judicial District is headquartered in Anoka Minnesota but provides services to the entire 10th District.

There is no question that the attorneys who work for the PD's office are subject both to the code of ethics applicable to all attorneys licensed to practice law in the State of Minnesota as well as those rules and ethical rules in place for PD's. The grievant, is a licensed attorney in the state of Minnesota and has been with the PD's office in a full time capacity for some 13 years. The evidence showed that the PD's office provides regular training in legal defense and other legal matters as well as ethics and other professional responsibility rules to its members. The grievant acknowledged that she must adhere to these rules in order to maintain her law license as well as to maintain her standing as a PD.

The evidence showed that the grievant was aware of the Policies and Expectations of Attorney Staff, See State Exhibit 2, and that she signed an acknowledgment receiving a copy and that she understood the contents of these policies. The grievant claimed at the hearing that she did not fully understand these rule and that there was no training provided on them. She further claimed that "many people" routinely sign these types of acknowledgments without reading the contents of them carefully.

This argument rang somewhat hollow for an attorney who should understand the significance of a signature on a legal document. Further, while it may well be true that the grievant signed these without reading them carefully, she was still responsible for knowledge of their contents. Further, the question here is not so much whether the grievant understood some esoteric rule or little used canon of professional responsibility but whether she had been told specifically enough by her supervisors that representing family members as a PD was not permitted and the consequences of doing so.

The evidence showed that for most of her career, the grievant was a well-respected and effective advocate on behalf of her clients. The evaluations submitted by the union, and even the one submitted by the State, showed that the grievant was successful in many respects, kept her clients abreast of developments in the case, was well prepared for trials and other Court appearances and was generally well respected. See Union Exhibits 5 and 9, and State Exhibit 5.

Any concerns raised in these evaluations had to do with the “cliquishness” of the office and that the grievant, who is somewhat older than many of the other attorneys in the office, is the “lone wolf.” See State Exhibit 5. This however was apparently getting somewhat better. See Union Exhibit 9.

In the 2012 evaluation there as a concern raised about personal issues that “spilled over” into the office and were affecting the grievant's attention to her duties. See also, letter from Attorney Leary in State Exhibit 3 in which he raised concerns about how the grievant’s personal issues with her family were adversely affecting his practice and were becoming a “yawning maw.” It was clear that there were personal issues that were adversely affecting her practice. These ranged from being the victim of a domestic assault, concerns over her son’s alcohol problems and DUI arrest, her grandson’s legal issues and her granddaughter’s legal issues. As discussed below, these issues were shown to have clouded her judgment and affected her ability to focus on her other duties. Finally, these issues arose in the last 12 to 15 months of her employment.

THE GRIEVANT’S REPRESENTATION OF FAMILY MEMBERS

The operative facts that led to her discharge stemmed from her representation of various family members from late 2011 until late 2012. There was little question that the grievant prepared and sent documents on PD letterhead for the grievant’s family members both to the Courts and various agencies in that time frame. There was also little question that the grievant appeared in Court for family members during this time frame. While there was some question as to whether she truly represented herself as a PD in some of these it was clear, as discussed below, that there was understandable confusion created as to the nature and extent of her representation of these family members.

The grievant's son was arrested in December 2011 in Hennepin County for DUI. That triggered a probation offense in Anoka County, where the 10th Judicial District and the grievant is located. He had been arrested for other similar actions in the past and had qualified for PD services at those earlier times but when arrested in December 2011 he had a job and did not qualify for the PD office. In both prior instances his cases were conflicted out to other agencies, i.e. Washington and Sherburne County.

The grievant inquired of her supervisor at the time of the December 2011 arrest if she could represent her son. The evidence showed that she was told she could not represent him through the PD's office but could represent him in a private capacity. She was also informed that if the son applied for services of the PD the case would have to be conflicted out.

There was evidence that despite this admonition by her supervisor, the grievant sent at least 2 letters, one to the Court and one to Anoka County Community Corrections, on PD letterhead regarding her son's case. See joint Exhibit 2, at pages 9 and 10. The grievant also prepared a document for the Court requesting a removal of a particular judge from her son's case. The grievant asserted that these were mere mistakes and that when these were brought to her attention in late 2012 she immediately took ownership and responsibility for these documents and claimed that it would not happen again.

In November 2012 the grievant asked a fellow PD attorney to appear on behalf of her son for a sentence modification hearing. The evidence showed that for whatever reason the grievant and this particular judge had a strained relationship and that the grievant felt it would be beneficial to have another attorney make the appearance. The evidence showed though that her son was not eligible for PD services at that time and that she led the other attorney to believe that he was. While there was no evidence to suggest that she actually told her colleague that the son was eligible, there was some evidence to suggest that she simply never informed him that he was not eligible

The union asserted that the grievant never misled Mr. Leary and that he represented the grievant's son as a friend because he knew of the strained relationship between the grievant and the judge involved in the case. The union asserted that there was no intentional misrepresentation nor was there any material omission made by her to get Mr. Leary to appear on behalf of her son.

This piece was troubling. The evidence showed that it is common for attorneys in the PD's office to help each other out in this regard and make appearances for each other. This is to be expected, however, it was clear here that the grievant's son was not eligible at that time for PD services and that this was not disclosed to Mr. Leary.³ The evidence here showed that he assumed he was simply helping out the grievant by making an appearance for someone whom he reasonably believed was eligible for PD services. Whether he would have done this if he had been made aware of this fact is unknown since he did not testify and the memos do not reference that. Still, that this was not affirmatively disclosed to him was a concern and demonstrates poor judgment by the grievant.

When the motion for sentence reduction was denied the grievant then attempted to file a motion for reconsideration. This was originally printed on PD letterhead and set for service. Mr. Robyt discovered it by happenstance on November 26, 2012 and brought it to the grievant's attention. She acknowledged the error and re-drafted it with her personal address on the motion. The original motion was filed but no one seems to know how that happened. See Joint Exhibit 2 at pages 5 and 6.⁴

³ It was clear that Mr. Leary felt put upon by the time and energy he was spending on the grievant's family members and described it as a "yawning maw" that was taking up inordinate amounts of his time. See State Exhibit 3 at page 14. Mr. Leary did not testify in this hearing so it was not possible to gauge what he knew or when he knew it from this record. Having said that though, while the grievant did not inform Mr. Leary that her son was not eligible at the time she asked him to make these appearances two things would have been clear at that point. Either Mr. Leary would have reasonably believed that the son was eligible for PD services in which case he did not raise any issue with regard to a potential conflict or he believed that the grievant was representing her son as a private attorney and was doing her a favor of sorts by making the appearance before an unfriendly judge. On this record his cannot be determined but the documents showed that Mr. Leary complained only of the time it was taking, not of the potential conflict for the office. While Mr. Leary was not shown to be the grievant's manager these conclusions did undercut the severity of the actions with respect to his representation of the grievant's son.

⁴ Both documents contain the same typographical errors and it appears that the only change was to the signature block in the lower right hand corner of the document. Throughout this the grievant maintained that she was overworked and distracted by the many personal issues in her life. She further alleged that she signs some documents regarding her son's case without reading them carefully due to being rushed to get her son's paperwork done quickly in order to avoid a conflict with her regular PD duties. There was some evidence to suggest that was the case.

The evidence further showed that upon investigation following the November 26th incident, it was discovered that the grievant had represented her grandson in Court in May 2012 as well. It was here that the State asserted that the grievant misused her position as a PD to ask for a reduction in the bail. The allegation was that she asked for a reduction and offered \$500.00 “because it is me.” The grievant denied using those words or that she used her relationship with Anoka County prosecutors to seek a reduction in the bail amount. She claimed that she asked for a reduction in bail (which is not an uncommon request for a PD to make) “because it was the entire amount the grandson’s girlfriend had.”

On this record it was not possible to definitively determine what exactly was said since the prosecutors involved did not testify. While it was clear that the matter was conflicted out by the Anoka County Attorney’s office for prosecution by another agency, that could well have been because they knew that the defendant was Ms. Mansell’s grandson or for some other reason. On this record there was insufficient evidence to sustain the State’s burden on this allegation.

Mr. Robyt testified that he was told that the grievant had accepted the appointment as a PD on behalf of her grandson. See, Employer Exhibit 2 at page 7. There was no transcript of this proceeding however even though one could have been obtained. In the alternative, the Anoka prosecutor could have been called to testify but was not. The memo from Mr. Leary which forms the basis of this allegation indicates only that the Anoka prosecutor told him that the grievant had accepted the appointment and that the grievant “said that she had \$500.00 and would bail out her grandson.” Significantly even this memo, which contains considerable amounts of double hearsay, does not mention the “because it’s me” allegation which was a major part of the State’s case in this regard. Accordingly, the evidence fails to establish that the grievant accepted the appointment or that she made the statement, which formed the basis of at least one part of the discharge.

Returning to the investigation that commenced as a result of the discovery of the November 26th motion to the Court on behalf of the grievant's son, the evidence showed that the grievant was given a letter dated November 28, 2012 regarding her representation of family members. That letter stated as follows: "A meeting regarding the use of your position as a public defender to represent a family member contrary to your supervisor's instructions will occur Friday November 30, 2012..."⁵

The union characterized this meeting as a very limited discussion of the representation of her son and asserted that it did not extend to all family members – but rather just the son. Clearly the directive was not limited to just the son but was intended to apply to all family members. There was sufficient evidence that she would have been able to "read between the lines" and understand what was being required of her.

The meeting referenced in the November 28th letter occurred on December 3, 2012. The evidence showed that the contents of that meeting focused largely on the November 26th motion documents. The union asserted that the discussion was only about that and did not include a broader prohibition against representing family members. The union further noted that the only "message" the grievant took from this meeting was a prohibition against representing her son and claimed that she never did that again. The union further claimed that there was no explicit or even implicit prohibition against representing her grandchildren.

The evidence suggested that even though the focus was on the representation of the son, the message should have been taken in a somewhat broader sense. Further there was some evidence that as of December 3, 2012 the employer did not know of the May 2012 event referenced above. Thus the claim that the employer was "apathetic" to the May 2012 events was not supported on this record. As discussed below, the elements of insubordination require a clear warning not only of the prohibition but also of the consequences of a violation of that directive.

⁵ The meeting did not actually occur until December 3, 2012 due to schedule conflicts.

While there was evidence to suggest that the directives could have been clearer, the evidence as a whole showed that there was notice to the grievant that representing family members, even at bail hearings or the like (which are typically preliminary matters that are short and do not get deeply in the merits of the charges) was against the employer's wishes. Moreover, the grievant acknowledged that emotionally, representing family members in these types of serious criminal matters is a bad idea for multiple reasons.

Moving on, the day after receiving the November 28, 2012 letter advising her of the meeting to discuss her involvement with her son, the grievant appeared on her son's behalf in court. See Employer exhibit 7. There she was identified as a "Public Defender" on the transcript. In the actual transcript however she identifies herself as "Jan Mansell on behalf of Jonathon Mansell, who is present to my right, your honor." There was nothing further to indicate that she was representing herself as being from the Public Defender's office. It is also noted that the reporter who transcribed this may have assumed that the grievant was from the PD's office, since she appears in Court so often, but there was no formal appearance as being from that office on the official record.

On December 12, 2012 the grievant appeared on behalf of her granddaughter at a Court hearing. She was again identified as being from the Public Defender's office and on the official transcript indicated as follows: "Jan Mansell on behalf – well, I think she's going to apply." The evidence shed here that the "she" was her granddaughter and that the "apply" was to apply for PD services. This was a more concerning appearance even though it was a preliminary hearing. Clearly, the Court had concerns about the relationship and inquired quite specifically if there was a personal relationship. When informed by the grievant that "this most likely will get conflicted out of the office" the court indicated, "I would expect so."

The evidence further showed that there was a student attorney at the hearing for the granddaughter who might well have been able to handle the arraignment but that the grievant appeared instead, as noted above. She also spoke directly to the co-defendant in the case without his attorney there although it was apparently to make arrangements to take care of the couple's minor child and did not involve the merits of the charges.⁶

When Ms. Murphrey discovered that the grievant had appeared in these latter two proceedings the grievant was placed on administrative leave pending further investigation. She was discharged on February 12, 2013 for representing her son as a PD even though she should have been representing him privately. For misusing her position as a PD and currying favor from the prosecutor's office while asking for a bail reduction to in her grandson's case, for accepting appointment as a PD for both her grandson and granddaughter in contravention of the directives of her managers and for using her position as a PD to gain access to a co-defendant without his counsel present.

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

THE EMPLOYER'S CODE OF ETHICS

The union asserted that the code of ethics was ambiguous and does not clearly define what is allowed and what is prohibited. It does not say in so many words that a PD may not represent a family member as a PD. However as discussed herein, there were clear enough warnings to her from her direct supervisors that representation of a family member as a PD even for those family members who are eligible for PD services was prohibited. Further, while there was no clearly delineated statement that doing so would lead to discipline, it was clear that the "suggestions" to her by Mr. Robyt should have been a clear warning signal. As an attorney, the grievant is entitled to a greater level of discretion in her work.

⁶ The granddaughter and her boyfriend were both charged with domestic assault following an altercation in the couple's apartment. The evidence further showed that the granddaughter as a very low IQ and needed someone to assist her with the criminal proceeding as well as to make arrangements to take care of the child. Again, some of the evidence regarding the conversation between the grievant and the co-defendant was hearsay and even double hearsay. See State Exhibit 3. Neither the co-defendant nor the attorney representing him were called in this proceeding.

On the other hand a person in that position is held to a somewhat higher standard of understanding of the rules in place for ethical and appropriate behavior. On this record, the ethics policy alone would not have been enough to sustain the burden of showing a clear warning and notice to the grievant. When coupled with the warnings given to her both verbally and in writing though there was sufficient notice to her that she was not to represent family members as a PD.

ELEMENTS OF INSUBORDINATION AND THE VERBAL WARNINGS TO THE GRIEVANT

The State's main assertion here is that the grievant was guilty of gross insubordination for continuing to represent family members even though she was under investigation and subject to possible discipline for doing that very thing. It was clear that initially, even Mr. Robyt would not have discharged the grievant for her earlier actions. It was due to the actions in late November and December 2012 that was of the greatest concern.

First one must examine the essential elements of insubordination in order to determine if the grievant's actions here rose to the level of insubordination. Black's Law Dictionary describes insubordination as "a willful disregard of express or implied directions of the employer and refusal to obey reasonable orders." In more common terms, insubordination is the willful disobedience of a legitimate order from a superior.

There is no issue here as to whether Mr. Robyt and Ms. Murphrey were "superiors" in the chain of command and were authorized to give a direct order to the grievant. The question is whether there was a direct order. There is no need to use some magic language or some phrase such as "I am giving you a direct order" and the fact of a direct order may be inferred or concluded from the totality of circumstances. See, e.g. *Plymouth Tube Co. and IAMAW, Local 1239*, 118 LA 1660, 1663 (Speroff, 2003); *Coshocton County Engineer and AFSCME, Ohio Council 6, Local 343*, 98 LA 1145 (Murphy, 1991).

The union asserted that the conversation in May 2011 between the grievant and Ms. Murphrey was unclear and did not strictly prohibit the grievant from representing her son as a PD when he was PD eligible. She was however told that she could not represent her son as a PD even though he was PD eligible at that time but that she could represent him privately. While this was not couched in terms of a “direct order” no magic words were necessary. The clear implication to anyone of reasonable intelligence was that she should not represent her son as a PD.

The next time this issue arose was in May 2012 when the grievant attended a bail hearing for her grandson. Mr. Robyt again admonished the grievant that she should not be representing family members as a PD. While there was a dispute about whether the grievant made the statements as alleged to get the bail reduced, see discussion above, there was evidence that Mr. Robyt told her not to represent family members. Even if this was not a direct order it was clear at that point that the grievant was on notice that representing family members was contrary to the directives and desires of her managing attorneys.

Again, in late November 2012, when Mr. Robyt discovered the errant motion papers he again informed the grievant that this should not have been sent on PD letterhead. The grievant acknowledged that it was an error and immediately re-drafted the documents to reflect her personal address and deleted the reference to the PD’s office. As noted above, the papers were filed anyway but it was unclear how that happened. It was clear that the grievant did not file this herself however.

The crux of the case focuses on the actions after the November 28, 2012 letter. The grievant made two appearances – once for her son and once for her grandson subsequent to that letter. The union asserted that the focus of the letter and of the meeting on December 3rd was solely to discuss the drafting of the motion and was not intended or conveyed to the grievant to be anything other than for that limited purpose.

That argument draws too fine a distinction essentially seeks to limit the discussion to the issue limited to the very narrow conduct of identifying herself as a PD for her son's case. The wording of the letter and of the discussion on December 3, 2012 was broader than that and must be viewed in the context of the other discussions with the grievant about representing family members. When viewed in that broader context it was clear that the message was that she should not be making any court appearances for family or representing family members as a PD. Her subsequent representation of the granddaughter was thus a clear violation of the directive not to represent family members in these matters as a PD.

The last element of insubordination is whether there was a refusal of the order. This again need not be any magic language – actions can speak louder than words depending on the circumstances. Here the grievant claimed repeatedly that her actions were unintentional and in some cases were mere oversights. The motion papers done on November 26, 2012 were a prime example of that. While those documents were likely the result of mere carelessness, they did constitute negligent behavior, as characterized by Ms. Murphrey.

The union also argued that the actual appearances were de minimus in effect and were merely preliminary appearance that did not focus on the merits of the case and were easily fixed by conflicting out the case later. Mr. Nicol made that point adequately. However while it was shown that the grievant's involvement with some of these matters were preliminary, others were not. The appearance on behalf of her grandson was such an example. The appearance for her son in which the grievant and Judge Walker got into a somewhat contentious debate over the sentence modification was not. There though it was not completely clear that she was in fact representing him as a PD or whether this was on her own and done privately.

Taking the evidence as a whole it was clear that the grievant was made aware that representing family members was against policy. It was not completely clear, as discussed above, that all of the instances where the State alleged that she represented family members were in fact in violation of that policy. In at least one such instance – i.e. the request to reduce the bail to \$500.00 there was insufficient proof of the assertions against her. Further, and significantly, it was clear that her emotional involvement with these cases clouded her judgment. As discussed more herein, the “no harm no foul” stance the grievant and the union took here was troubling.

At the end of the day it was clear that she was aware of the policy, it was not shown that she violated it in all of the instances, it was shown that she did violate it in others and did so under the mistaken assumption that she could represent a family members in some sorts of proceedings but not in others and it was shown that she should have known after the December 3, 2012 meeting at the latest that representing family members in any way was contrary to policy. She did so twice after that. The question now is what to do about that given her long and relatively clean history and excellent record as a PD.

IS DISCHARGE APPROPRIATE UNDER THESE FACTS?

As noted above, the grievant knew or should have known that representing family members in any way was against policy. She claimed that some of the instances were inadvertent and indeed some were. She was also unclear as to whether she was there as a PD or whether she was there privately. Frankly she could have and should have made that clearer especially since she was appearing in Courts and before judges and against prosecutors who knew her as a PD.

Finally, the evidence did not show a recalcitrant employee bent on flaunting or undermining the legitimate authority of management. The State's concern was both legitimate and understandable but the grievant's actions appear to have been motivated by a desire to help her family. Moreover, while it could all have been an act, her clear remorse and apology was significant on this record.⁷

While it is not necessary to prove intent in such a case, the record here shows a grievant whose otherwise good judgment was clouded by her relationship with her son, grandson and granddaughter. Also while these violations were serious and were troubling in light of the multiple times she was told not to represent herself as a PD for her family members there were perhaps 4 or 5 instances of these most of which occurred in a short period – especially the two that occurred after November 26, 2012.

Obviously her actions cannot be swept aside as mere oversight or inadvertent error. These mitigated in favor of a very serious penalty. On the other hand, two things mitigated against discharge. First, her prior history and excellent record must be taken into account here in determining the appropriate remedy. There is no question that the grievant is an able and capable advocate on behalf of her clients. Length of service and a clean disciplinary record is a factor to be taken into account in disciplinary matters. Here the grievant's 13-year clean disciplinary record coupled with her record as a lawyer were important here.

Second there is the clear evidence that there was no progressive discipline imposed in this case. While the discipline article does not require progressive discipline and provides that discipline may be imposed in any order, there is the underlying notion that discipline should be used to correct aberrant or undesirable behavior. There is also the notion that must be taken into account here as to whether the grievant's actions can and would be corrected if reinstated.

⁷Simply saying "I'm sorry, it will never happen again" is not enough on its own. Grievants frequently say that at such hearings in order to save their jobs. Here though the evidence showed an extraordinary amount of stress on the grievant in the year prior to her discharge and further showed that she is capable of conforming her behavior to the directives or her managers.

The State asserted that her reputation was so damaged that she could never be effective. There was no hard evidence of that other than the bold assertions made by her managers and by the States counsel. There was evidence to the contrary in this matter, see, letter from Judge Pendleton and the testimony of Mr. Nicol, and on balance the union showed that the grievant “gets it” now and that further violations of this nature will not occur.

Arbitrators do not, in this arbitrator's opinion, have the power to impose a “last chance agreement.” Those are done through negotiation between union and management for employees to be reinstated after discharge and entail a series of terms that should not be imposed by an arbitrator but rather through negotiation by the parties. Here though the grievant had better know and fully understand that this cannot happen again and that representing family members in court or before any agency or the use of PD letterhead or the use of her official position as a PD in any way on behalf of her family members however distant the relationship is against the stated policy of the PD’s office.

The sole remaining question is what to do with the remedy here. The union submitted a series of disciplinary letters from other districts. These were reviewed but the facts were different enough that they did not provide much guidance. As noted herein several times, the grievant’s actions were serious and could well have misled both her colleagues and the Courts as to the nature of her representation. While discharge was not appropriate given her record and the other evidence in this case, a very stern disciplinary result must accrue here to underscore the seriousness of these actions.

Several options were considered. Reinstatement with full back pay was rejected for obvious reasons. A reinstatement with some sort of suspension was considered but also rejected because of the somewhat arbitrary nature of what length of time to impose and because under these circumstances, requiring back pay was simply inappropriate. Thus reinstatement without back pay or contractual benefits was considered and found to be the most appropriate result in this matter. Accordingly, The grievant is reinstated to her former position but without back pay or accrued contractual benefits as set forth above.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant is reinstated to her former position but without back pay or contractually accrued benefits. She is to be reinstated within five (5) business days of this Award.

Dated: September 16, 2013

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Jeffrey W. Jacobs, arbitrator