

IN THE MATTER OF ARBITRATION BETWEEN

MINNESOTA COUNCIL NUMBERS 5 AND 65)	OPINION AND AWARD
AMERICAN FEDERATION OF STATE, COUNTY)	
AND MUNICIPAL EMPLOYEES, AFL-CIO)	BMS NO. 14-PA-0810
AND)	
MINNESOTA JUDICIAL BRANCH)	Grievance re: Discharge

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ARBITRATOR: Charlotte Neigh

HEARING: October 31, 2014

POSTHEARING BRIEFS RECEIVED: November 26, 2014

AWARD: December 19, 2014

REPRESENTATIVES

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JURISDICTION AND PROCEDURE

Pursuant to the parties' Labor Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held at which time both parties had a full opportunity to offer evidence. Posthearing briefs were filed by the agreed deadline of November 26th, at which time the record was closed.

ISSUE

(Stipulated by Parties)

Did the Employer violate the Collective Bargaining Agreement, particularly the provisions regarding discipline (Article 17), when it terminated the employment of the Grievant?

If so, what should be the remedy?

PERTINENT AUTHORITY

LABOR AGREEMENT

ARTICLE 17 - DISCIPLINE, DISCHARGE AND RESIGNATION

Section 1 Purpose

Disciplinary action may be imposed upon an employee who has attained permanent status only for just cause.

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Section 3 Disciplinary Procedure

Discipline is intended to be corrective; not punitive. This process is intended to assure employees understand the Employer's expectations, standards, and rules, and are aware of the consequences of unimproved conduct or performance.

Disciplinary action shall include only the following forms and depending upon the seriousness of the offense shall normally be administered progressively in the following order:

- 1) Oral reprimand*
- 2) Written reprimand*
- 3) Suspension*
- 4) Demotion*
- 5) Discharge*

A written reprimand shall not be referenced or relied upon for further disciplinary action provided that no disciplinary action of a similar nature has been administered for two (2) years following the date of the written reprimand. Nothing in the above listing of types of discipline shall preclude the Employer from exacting stringent forms of discipline where the egregiousness of the offense so warrants. If the Employer or its designee has reason to discipline an employee, it shall not be done in the presence of other employees or the public. Oral reprimands shall be identified as such. . . .

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Section 5 Notice Hearing

If the Employer believes there is just cause for suspension, demotion or discharge, the employee shall be notified, in writing that the employee may be disciplined and shall be furnished with the supporting reasons for the contemplated action. The Employer shall schedule a notice hearing wherein the employee, along with union representation, may present his/her side of the story to refute the charge(s) or offer mitigating evidence. Nothing herein shall preclude the Employer from placing the employee on investigative leave prior to the notice hearing.

COURT EMPLOYEE CODE OF ETHICS

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Article I. Abuse of Position and Conflict of Interest

A. *Employees shall not use or attempt to use their official positions to secure any unwarranted privileges or exemptions for that employee or any other person . . .*

...

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

...

E. *Employees shall use the resources, property, and funds under their control judiciously and solely in accordance with the prescribed legal procedures. See the following policies and links: . . . Policy on the Use of the Internet and Other Electronic Communications Tools . . .*

F. *Employees shall avoid conflicts of interest, or the appearance of conflicts, in the performance of their official duties. Examples include but are not limited to: processing cases involving family, friends, and self; using one's position with the courts to manipulate case processing; or influencing the outcome of a case whether positively or negatively for any persons, including yourself. . . .*

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Article V. Performance of Duties

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I. *Employees shall avoid any activity that would reflect adversely on their position or court. . . .*

MJB POLICY NO. 323 - APPROPRIATE USE OF DATA AND RECORDS

Effective Date March 1, 2013

Supersedes Policy 318(b)

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. . . (E)mployees . . . have access to data and records in various information systems and databases that may be used in connection with the performance of their work-related duties and responsibilities. . . include those operated by the Minnesota Judicial Branch (MJB), justice partner agencies and entities, and Executive Branch agencies. For those systems operated by an agency or entity other than the (MJB), access agreements are in place between the (MJB) and the agency or entity with provisions outlining the appropriate use of the information systems.

. . . (T)hese information systems and databases shall only be used by employees . . . as a means to access, use and share data and records for work-related duties and responsibilities. . . shall not be used as a means to access public, confidential (non-public) or sealed data for personal, non-work-related purposes. Employees . . . must use publically accessible means to access public data for personal, non-work-related purposes . . .

Reports of misuse shall be promptly investigated, and prompt and appropriate corrective action shall be taken when it is determined that inappropriate access, use or sharing of data or records has occurred. Violation of this policy will result in disciplinary action, up to and including discharge. . . Employees . . . may be subject to personal liability for damages arising from inappropriate access, use or sharing of data or records.

BACKGROUND AND UNDISPUTED FACTS

The Grievant was first employed in the County District Court administration office in 1993. When the state took over the court system in 2004, the County was included along with several other counties in a Judicial District. The Grievant had advanced to the position of Senior Court Clerk prior to her discharge in November 2013.

In a 3/1/13 e-mail to all Minnesota Judicial Branch (MJB) employees, the State Court Administrator transmitted the updated policy regarding appropriate use of data and records, and reminded employees of their responsibility to handle information appropriately, with specific reference to the Department of Vehicle Services (DVS) system. It referenced "*recent problems in other state agencies with inappropriate use of information systems and databases*", and cautioned employees that violation of the policy "*will include disciplinary action up to and including termination*", as well as possibly criminal liability and personal civil liability for damages arising from "*inappropriate access, use or sharing of data or records*".

All employees were required to sign a form acknowledging receipt of the policy, stating that they had reviewed it and understood their responsibility for complying with its requirements. The form also stated: "*I understand that, if I wish to access public data for personal, non-work-related purposes, I am required to use publically accessible means. . . I understand that if I use my employee . . . access . . . for personal, non-work related purposes that I will be subject to disciplinary action including discharge, that the state may be liable and I may be personally liable for any damages resulting from prohibited use*". The Grievant signed and dated this form on March 4, 2013.

In the autumn of 2013 the MJB conducted an internal audit for the years 2009 - 2013 to try to detect whether any of its employees were inappropriately using their access to the DVS database. Employees with authorized access use log-ins and passwords that make them identifiable to the DVS. Their records were examined by the MJB's auditor for questionable "lookups" - searches that seemed unlikely to be work related. This resulted in the auditor's sending a summary of the activities of approximately 29 District employees to the District's Human Resources Director (HR Director); she researched whether there appeared to be any court-related reason for the lookups flagged by the auditor.

Based on the HR Director's findings, investigative interviews were conducted with 26 District employees in three counties, with the majority in the Grievant's office. The Grievant was among the employees questioned on October 30th, the first day of interviews in the District, and she answered all of the questions put to her. In a 10/31/13 memo the Grievant's Supervisor informed her: of an intention "to pursue potential disciplinary action for inappropriate use of the . . . DVS system"; that "a decision to proceed with discipline will be made after you have had an opportunity to review the charge and respond"; that a meeting would be held the following day to give the Grievant an "opportunity to admit, refute, or mitigate the allegation"; and that her Union Representative would be present.

Background and Undisputed Facts (continued)

After the Grievant left the meeting, the Management team decided to terminate her employment. In an 11/1/13 letter the County Court Administrator informed her that: she was dismissed immediately; an investigation found evidence of her inappropriate use of the DVS system; *“the inappropriate searches were conducted without a valid business purpose and in violation of (MJB) policies, including: . . . Code of Ethics . . . Appropriate Use of Data and Records . . . HR Rules; Misconduct”*. The letter concluded that *“based on the nature and extent of the misconduct cited above, we have determined that there is just cause to discharge you from employment with the (MJB).”*

A grievance was filed that same day; a third-step appeal was heard by a Specialist in the Human Resources Department of the State Court Administrator’s Office, resulting in a denial of the grievance, which proceeded to arbitration.

SUMMARY OF THE PARTIES' ARGUMENTS

THE EMPLOYER ARGUES THAT:

- It is undisputed that the Grievant repeatedly used the DVS system to look up records for personal, non-work-related reasons, contrary to MJB policies. Her inappropriate use of the DVS system was egregious enough to warrant termination.
- The Grievant was admittedly aware of the MJB policies. She signed and dated multiple acknowledgments from 2004 to 2011, indicating that she had read and understood the policies and Code of Ethics. Also, the Grievant was aware of the warning on the DVS login page that access is limited to authorized personnel conducting legitimate business, and that there may be criminal and civil consequences for violations.
- The Grievant acknowledged receipt of the 3/1/13 warning and updated policy, which was reinforced in a 3/5/13 staff meeting. The Grievant's Supervisor testified that everybody knew the difference between personal and business use.
- The Grievant was aware of the consequences of violating the standards: she knew about the warning on the DVS login page; she signed the acknowledgment form on 3/4/13, stating "*I understand that if I use my employee . . . access . . . for personal . . . purposes that I will be subject to disciplinary action, including discharge . . .*"
- The lookups made by the Grievant for personal reasons included: multiple ones for a few individuals and their family members; and multiple ones for herself and her family members. During the interview the Grievant acknowledged that: she was aware of the policy; and she made lookups for personal reasons.
- The Grievant also made a number of personal lookups after the 3/1/13 memo warning against inappropriate use: assisting her daughter in dealing with the DVS about a learning permit and testing; and helping a friend with a DVS problem.
- The decision to discharge the Grievant was made by a Management team consisting of: the Administrators of the District and the County; the HR Director; and two Supervisors. It was based on the Grievant's violation of: court policy, terms of use of the DVS system, state and federal law; and the trust and integrity of the MJB.
- The standards applied to the Grievant have been uniformly applied. All District employees with questionable usage of the DVS system were investigated in the same manner and all were given an opportunity to explain their usage. The Employer considered the totality of the circumstances for each employee.

Employer Arguments (continued)

- The Grievant was not discharged solely on the basis of the number of lookups, or lookups after March 1, 2013, but on the fact that she focused on numerous specific people, and also violated the Code of Ethics and the Data Policy. Two other District employees were discharged for inappropriate use of the DVS system.
- The DVS usage of every person in the County office with access to the system was reviewed; others received a lesser disciplinary action; and some others were discharged. The level of discipline was determined by looking at each case individually regarding number, type, nature and extent of the lookups; decisions were based on the totality of each employee's lookups. Consideration was given both to lookups before and after March 1, 2013. The same factors were applied to the Grievant as to other employees.
- The focus of Grievant's lookups on individuals was a concern; no other employee focused on lookups on individuals to the extent that the Grievant did. The Grievant was focused on certain current and past personal relationships, and people who currently had relationships with those people. The nature of the Grievant's lookups was obsessive on certain individuals, which heightened the liability of the MJB if this misuse became public.
- The Union's allegation of unequal treatment has not been supported by evidence. Although the Union disagrees that the focus on individuals should be a factor, it gave no examples of other employees who did it. Nor did the Union provide evidence of any other employee who violated the Code of Ethics by assisting family members as the Grievant did by misusing the DVS system.
- Discharge was appropriate under the circumstances. The Grievant's conduct was distinguishable from others who received a lesser discipline: 438 lookups for personal purposes; assisting family members by using her court access to the DVS system; and a focus on particular people to the point of being obsessive.
- The Grievant's misconduct was habitual and likely to be repeated, as demonstrated by her repeated misuse of the system despite notice of MJB policies and the DVS warning screen; this conduct continued even after she signed another acknowledgment form in March 2013.
- The Employer considered the potential liability of the MJB, its integrity, and the respect of the public based on the nature of the Grievant's lookups focusing on individuals and assisting family members. Abuse of the DVS system has eroded public trust and confidence in government employees' access to private information.
- Accessing private data for non-work-related purposes not only violates MJB policies but also state and federal law, with a potential for personal criminal liability and civil damages. Because of the egregious nature of the Grievant's misuse of the DVS system, discharge is appropriate. The discharge was for just cause and did not constitute disparate treatment; it should be sustained.

THE UNION ARGUES THAT:

- The Grievant admittedly looked up people without a legitimate work-related reason and some level of discipline is appropriate; the question is the appropriate level of discipline. The Employer has not met its burden of showing that the Grievant's discharge: was corrective rather than punitive; constituted progressive discipline; and was justified by the facts, considering that so many other coworkers guilty of the same offense got much lighter discipline.
- The Grievant's past work record is an important consideration in determining the appropriate level of discipline. Management admittedly did not look at the Grievant's personnel file before deciding to discharge her. The Employer failed to recognize the Grievant's twenty years of service and good work record, including positive performance evaluations showing her to be a valuable member of the team. She had only one disciplinary action, a 2009 written reprimand that has no effect after two years.
- Management failed to take into consideration the lack of training for the staff, although its witnesses admitted that there were no classes on statutory prohibitions regarding driver license records or other confidential data regularly encountered in their work. Nor has there been any remedial training for the many employees who were not disciplined for their misuse of the DVS system. As two employees testified for the Union, they received little or no training other than being shown by coworkers how to look up names or license plates. Both admitted to not paying much attention to the MJB's written policies regarding database use, usually just signing the form when requested to do so. They also didn't pay any attention to the warning on the DVS login screen because their screens were set to enlarge the sign-in box, which caused the warning to be out of sight.
- Management knew of and tolerated lookups for improper purposes; lax enforcement of the rules may lead employees to reasonably believe that the conduct in question is sanctioned by management. The Grievant was once asked by a supervisor to look up a license plate of a vehicle with which she had just had a negative encounter; the Grievant sought guidance from another supervisor who told her that it was acceptable to do it, which is contrary to the Employer's current position about the seriousness of such a violation. The Employer condoned lookups for personal reasons if it was a supervisor or a judge or a prosecutor who wanted it done.
- The Union Representative who was present for all of the investigative interviews testified that: it was apparent that in this workplace culture the use of databases to look up friends and neighbors was commonplace and well known; and there was a great deal of complacency about privacy because today the internet makes so much information available.

Union Arguments (continued)

- The Union Representative also testified that the interviews revealed that the rules regarding use of the DVS database were not generally understood due to the lack of training and so the Employer was complicit in the wrongdoing. The MJB did not take data privacy seriously until the Wabasha County lawsuit got a lot of media attention, which prompted the March 2013 e-mail warning and the MJB's review of computer records.
- The crux of this case is disparate treatment. After interviewing twenty-six District employees who allegedly looked up names and vehicle license plates in the DVS system without apparent work-related purpose, Management decided that most of them, although guilty of misuse of the DVS database, would receive no discipline at all. A total of seven employees received discipline: one oral reprimand; two written reprimands; one 5-day suspension without pay; and three were discharged, including the Grievant. One employee resigned during the interview process. One of the interviewed employees whose total of questionable lookups was similar to the Grievant's received no discipline, while the Grievant was discharged. All employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists to vary the punishment.
- The Union Representative had trouble understanding why the Grievant was discharged while many of her coworkers received no discipline or only reprimands. Employees in other Districts covered by the same Labor Agreement who had similar numbers and types of lookups received "work directives" or suspensions of 10 or 15 days. In a Teamster-represented District an employee with a large number of inappropriate lookups received a six-week suspension. The Grievant was not given the same chance as her coworkers to change her behavior. If her behavior is somehow more egregious than the others, she could be suspended for more days.
- The other two District employees who were discharged had a much greater number of questionable lookups and both refused, at some point during the interview, to continue answering questions about the lookups. Both are grieving their discharge.
- Article 17 of the Labor Agreement states that "*discipline is intended to be corrective; not punitive . . . intended to ensure employees understand . . . expectations, standards, and rules, and are aware of the consequences of unimproved conduct or performance*". The Management witnesses were not able to defend clearly why they chose to discharge the Grievant while choosing little or no discipline for others. Even their fuzzy rationale that the Grievant's focus on certain people "seemed unhealthy" does not negate the contract's intention to correct rather than punish. The Grievant's behavior could be corrected by some lesser level of discipline, which would certainly have gotten her attention.

Union Arguments (continued)

- The Grievant did not understand the expectations, standards and rules concerning data privacy and use of the DVS system, as many of her coworkers did not. Nor did they understand the consequences of violations. If the consequences had been clear then the personal use of the DVS system would not have continued over the years and even after March 2013. The Employer could have made its expectations clear by following up after the 3/1/13 e-mail to ascertain whether everyone understood that the District had no more tolerance for this kind of misuse of the DVS system.
- Two exhibits deserve mentioning: a letter from a local judge; and a letter by the Grievant's Supervisor. The judge praised the Grievant's work over thirty years and said that the punishment of discharge did not fit the crime. In a 5/16/14 letter, the Supervisor recommended the Grievant for employment, stating: "*did an excellent job and was an asset to our organization*"; "*can-do attitude*"; and her "*positive energy was greatly appreciated*". The letter stated that the Supervisor had volunteered to write it because she was "*very grateful for the contributions she gave our office and very confident that she has the intelligence, work ethic, and communication skills to add value wherever she works*". This does not sound like the kind of employee who deserves to be discharged rather than receiving corrective discipline.
- The Employer did not have just cause to terminate the Grievant's employment: it has not demonstrated that discharge was necessary or appropriate relative to others with the same violations who received no or only minor discipline. The Grievant deserves as much chance as her coworkers to show that she can learn from her mistakes now that she knows what is expected and what the consequences are.
- The discharge should be reversed and some appropriate unpaid suspension should be imposed; the Union recommends ten days. The Grievant should be immediately returned to her position as a Senior Court Clerk and made whole for backpay and benefits since the date of her discharge less the suspension period.
- The Arbitrator should retain jurisdiction for 90 days to enforce the award.

ANALYSIS AND DISCUSSION

Investigation

Many of the District employees had work-related reasons for using the DVS system. When external concerns were raised about potential abuse of the system, the MJB auditor did an initial screening to try to identify potentially inappropriate lookups. Her summaries were refined by the District HR Director to identify the lookups about which employees should be questioned.

The questionnaire designed for the interviews related to: work-related needs for access; understanding of permitted use; awareness of the warning on the DVS login screen, the 3/1/13 e-mail and acknowledgment form, and prior acknowledgments of MJB policies; and lookups flagged as questionable performed by the employee from 2009 to early March 2013. One set of questions pertained particularly to lookups performed after March 7, 2013. Some questions were specifically about accessing records on family members, coworkers, other MJB or county employees, unrelated family groups, and other particular names. Follow-up questions concerned: whether there was a valid business reason; what was done with the information found; whether the subject of the lookup was aware that the employee was doing it; and whether anyone else knew about the lookup.

Only a few of the twenty-six employees interviewed did not admit to some personal lookups relating to self, family, coworkers, neighbors or others. However, only seven were disciplined: three were discharged; and four others received disciplinary action ranging from an oral reprimand to a 5-day suspension. One who had a high total number of lookups and apparently a lot of questionable ones before and after the 3/1/13 warning resigned. Although the record contains some information about the total numbers of lookups done by most of the employees interviewed, it does not always reveal the number deemed inappropriate, or details about repetition, relationships or reasons. Nor does it reveal: why the majority of the violators were not disciplined; what factors were considered serious enough to warrant disciplinary action; and at what level. Of the three who were discharged, only the Grievant cooperated with the investigation and answered all of the questions in the interview.

Basis for Disciplinary Action

Although the Union argues that the Grievant's total number of lookups was close to the same number by another employee who was not disciplined, the significant number is for non-work-related lookups. During the interview the Grievant admitted to personal reasons for several hundred lookups from 2009 to September 2013, including at least eight after the 3/1/13 warning. Apparently the many lookups done on members of the Grievant's family were mostly at their request and/or for their benefit; the same is true for some of her friends; presumably the results were shared with them. A few of her subjects and their family members were looked up numerous times and, although the Grievant claims she is on a friendly basis with them, it is not clear that they knew that she was doing this. Nor has the Grievant satisfactorily explained the reason(s) why she looked them up repeatedly. A couple of other repeated subjects were explained by Grievant's wanting to know what they were driving so that she could be on the alert for them for personal safety reasons.

Basis for Disciplinary Action (continued)

It is undisputed that the Grievant repeatedly used the DVS system inappropriately, but so did many other employees who had received the same notices about policy and could see the warning on the DVS login screen. The question is why the Employer drew the lines where it did in discipline determinations. The Employer argues that the Grievant's discharge was not based solely on the number of lookups or ones done after 3/1/13, but on her focus on numerous specific people, as well as violating the Code of Ethics and the Data Policy. The Employer argues that the Grievant's inappropriate use was relatively more egregious than that of others.

The HR Director testified that: no one particular factor was relied upon; although the number of lookups after 3/1/13 was a factor, a change in behavior after that date would "not necessarily" affect discipline; some employees who were not disciplined had misused the system more in prior years but had tapered off; using it to look up addresses for greeting cards was not an "elevated level"; the policy had been changed about six months before the hearing so that clerks no longer do lookups for attorneys in the courtroom, although it is permissible to do it for the judge; and in the other counties the discipline decisions were made by a different Management team.

The Employer maintains that there was no particular numerical threshold for triggering disciplinary action and argues that: the level of discipline was determined by the number, type, nature and extent of lookups; decisions were based on the "totality" of each employee's lookups; and consideration was given to lookups both before and after March 1, 2013. Apparently "number" and "extent" of lookups means the same thing: the number of inappropriate lookups. The Employer has not defined what it means by "type" and "nature" of lookups, but by inference in the Grievant's case, it is the focus on a few individuals as opposed to other patterns of lookups deemed not to be at an "elevated level". The record does not enable a comparison between the Grievant and others of the number, type and nature of inappropriate lookups. The Union rightly points out that there is no way to determine which factors were used or how they were weighted in the various discipline determinations within the county. It also seems likely, as the Union suggests, that this lack of objective measurements, combined with decisions being made by different Management teams, could account for disparities among the counties in the level of discipline.

The Employer argues that the Grievant's focus on individuals was a concern and no other employee did that to the same extent. The Employer characterizes this pattern of lookups as obsessive, and claims that it heightened the liability of the MJB if this misuse became public. However, the Employer has not explained why this would heighten its liability; furthermore, in the disposition of the grievance after the third level hearing, the MJB hearing officer stated that "the State as an employer has no liability under the DPPA" (federal Driver's Privacy Protection Act). The record does not reveal what other basis for liability, if any, the Employer is referencing. Whether or not the Grievant's conduct exposed the MJB to greater liability than did the violations by its other employees, there has been no showing that the Grievant would have been aware of this or that she would have deliberately sought to make that happen. Given the Grievant's shock at her discharge, and the distress shown by the Coworkers who testified, they were not only unaware of the potential liability of the MJB, but also of their own.

Basis for Discharge (continued)

The Management team appears to have sincerely believed that the repeated lookups of selected individuals was an aggravating factor that warranted a penalty more severe than that given to other violators. However, the Employer has not shown that this, even combined with misusing the DVS system for the benefit of herself, her family and friends, warrants discharge. Given the lack of any disciplinary action for the majority of violators, and the relatively mild disciplinary actions for a few others, there is substantial room for a more severe penalty for the Grievant short of discharge.

Performance History

Although the Grievant's repeated lookups for a few subjects and their families is remarkable and perhaps even fairly called obsessive, there is no claim that it interfered with her work performance. Despite the Supervisor's testimony that she supported the discharge decision because she thought the Grievant's lookups were "excessive" and "a little bit unhealthy", she praised the Grievant's performance before and after her discharge. Moreover, the Supervisor testified at the arbitration hearing that she stands behind her glowing recommendation for employment in her 5/16/14 letter, even though she didn't know the type of job being sought. There has been no showing that the Grievant's service record of twenty years with good performance evaluations, which should have been a mitigating factor, was considered in the Management team's decision to discharge her.

Training and Culture

The Union has shown that there was a complacent attitude about non-work-related use of the DVS database in this workplace. Misuse was widespread and it appears to have been generally known that "everybody did it", and coworkers would talk about old boyfriends and neighbors, as the Grievant testified. Moreover, the Grievant's claim that she was instructed by the County Court Administrator to do a lookup as requested by a supervisor for personal reasons was uncontested. The Grievant understandably took this as a signal that personal lookups would be tolerated. The Grievant's Supervisor testified that her earlier instructions distinguishing between personal and business use of court resources was "more related to internet and telephone", and that it was at the 3/5/13 staff meeting, after the Administrator spoke to the staff, that she talked about electronic usage.

The Grievant and two Coworkers who were not disciplined testified that: they received no DVS training other than instructions from coworkers on how to do it; and they would sign acknowledgment forms regarding reviewing policies without always reading them. The Grievant testified that: she used to think that the policy regarding confidentiality of records related to paper documents; and she didn't know that her personal DVS lookups were impermissible. One Coworker testified that: the DVS warning was too hard to read; and she "should have known" the prohibition on personal use but "everybody used it so much, we just got complacent". The other Coworker testified that: she didn't read the DVS warning but she knew the system was meant for business use only; and at her investigative interview she refused to answer questions about her lookups related to her family members.

Training and Culture (continued)

The 3/1/13 focus on a single policy and the express warning in the acknowledgment form contrast with prior policy notices and acknowledgment forms. The Grievant's 6/27/11 acknowledgment form stated: "*I hereby acknowledge that on the date indicated I reviewed the policies and information listed above. . . .*", referring to an extensive list of documents including: the labor agreement; 1 governance, 3 finance, 31 human resources, 2 education and organizational development, and 6 district policies. Prior acknowledgment forms followed the same format. It is not surprising that the employees would sign such an acknowledgment form without reviewing the extensive list of documents and there is no evidence that the policy regarding accessing databases, including the DVS system, was ever previously brought to the employees' attention as forcefully as on 3/1/13.

The Union has demonstrated that there was a widespread lack of understanding of permissible use of the DVS system and the seriousness of violations. Despite the written policy, it was not taken seriously before concerns were raised about violations in other agencies. It is understandable that many employees believed that merely accessing the information out of curiosity or for a benign purpose was harmless and unobjectionable. The employees were not given adequate guidance or supervision about using the system. From the testimony it appears that there is still some uncertainty about whether or under what circumstances a court clerk can respond to a telephone inquiry by sharing information from the DVS system. The Employer admittedly has not conducted any formal training before or after this chain of events.

March 2013 Changes

Although the casual attitude about using the DVS system before March 2013 is understandable, it is hard to imagine how the employees could not have been alerted by the 3/1/13 e-mail. Although the updated policy regarding *Appropriate Use of Data and Records* refers generally to "information systems and databases" without specifying the DVS system, the e-mail that transmitted it specified its application to the DVS system. Furthermore, the acknowledgment form contained an explicit warning against using the MJB's access to any database for non-work-related purposes, and the possible disciplinary consequences for violations, as well as state and personal liability.

The Grievant's testimony was vague regarding her awareness after the 3/1/13 memo but it apparently had some effect: during the six months between March 8 and September 10 she looked up her primary subject only one time. The other demonstrably non-work-related lookups were: six to deal with her daughter's driving permit; and one responding to a friend's request for assistance with a DVS issue. The Grievant apparently considered it her mission to help people with a DVS system that she considered not to be user friendly. She testified that before she learned it was inappropriate she would help anyone who asked. This use of the court's access for personal purposes is cited as the Ethics Code violation for which the Grievant should be disciplined. The Grievant testified that it was common for her coworkers to use their access to deal with non-work-related DVS issues; the Employer argues that the Union has not shown any instances of this, but the Employer did not refute the Grievant's claim. Nevertheless, the Grievant's persistence in misusing the DVS system after the 3/1/13 warning clearly warrants disciplinary action.

CONCLUSION

While the Employer needed to have the behavior cease, it has not shown that this objective could not have been achieved by a lesser degree of discipline, as contemplated in Article 17's emphasis on corrective rather than punitive discipline. The Employer has not shown that the Grievant's misconduct, in this context of widespread confusion about expectations, standards, rules and consequences, along with similar violations by other employees, was so egregious as to warrant discharge, especially considering the discipline or lack thereof applied to other violators.

The Employer argues that the Grievant is likely to repeat this misconduct because it was habitual. Given the trauma and embarrassment of losing her job more than a year ago, it is not likely that the Grievant would again inappropriately use the DVS system; the Employer could reinforce the lesson by putting her on notice that any further willful similar violation will result in immediate discharge.

AWARD

1. The grievance is sustained. The Employer did not have just cause to discharge the Grievant and violated Article 17 of the Labor Agreement when it terminated her employment.
2. The Grievant shall be immediately reinstated to her position as a Senior Court Clerk and made whole for backpay and benefits since the date of her discharge, less an unpaid suspension period of ten days.
3. The Arbitrator will retain jurisdiction for 90 days to address any issues that may arise regarding the reinstatement.

December 19, 2014

Charlotte Neigh, Arbitrator