

**IN THE MATTER OF ARBITRATION
BETWEEN**

AFSCME Council 5,

Union

**BMS Case No.: 14-PA-0411
(Schrader Suspension Grievance)**

and

OPINION AND AWARD

University of Minnesota,

**A. Ray McCoy
Arbitrator**

Employer

Appearances:

For the Union

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For the Employer

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JURISDICTION

The Collective Bargaining Agreement between the University of Minnesota and AFSCME Locals 3800 & 3801 Council 5, AFL-CIO Clerical & Office Unit, Effective July 1, 2011 through June 30, 2013 (hereinafter "Agreement" or "CBA" was in force and effect during the period of time covering the events leading up to this grievance/arbitration and therefore governs the resolution of this dispute. Section 5 of the Parties Agreement states:

"The arbitrator shall have no power to: A. Rule on an issue excluded by this Agreement from the scope of the grievance procedure; B. Amend modify, nullify, ignore, add to, or subtract from the provisions of this Agreement;...E. Make decisions contrary to or inconsistent with or modifying or varying in any way from the law or the application of the law." (Agreement at p. 48)

The University of Minnesota (hereinafter "University" or "Employer" suspended the Grievant, an employee with the University Student Legal Services (USLS) for ten (10) days. AFSCME Council 5 (hereinafter "AFSCME" or "Union") filed a timely grievance challenging the discipline on October 11, 2012. The Parties processed the grievance through the various steps outlined in their collective bargaining agreement. The Parties' grievance procedure includes consideration before a hearing officer at Steps 2 and Step 3. At both steps the Parties have an opportunity to present testimony and documents to a hearing officer who submits a written decision. Having failed to convince two hearing officers (both employees of the University) to overturn the grievance, the Union requested arbitration.

The Parties notified the undersigned arbitrator of his selection to hear this matter on March 4, 2014. The Parties selected September 29 and 30th for the hearing of this matter. The hearing was held on September 29th and the Parties determined that that the second hearing date would not be needed. The hearing was held at the Employer's offices located at 200 Oak Street SE, McNamara Alumni Center Suite 360 Minneapolis, MN 55455.

Both sides had a full and fair opportunity to present testimony, examine witnesses and present supporting documentary evidence. At the close of the hearing the Parties elected to submit their closing arguments by way of post-hearing briefs. Post-hearing briefs were exchanged on October 17, 2014. The arbitrator closed the record on that date. The Parties agreed the matter is properly before the arbitrator for resolution.

FINDINGS OF FACT/UNDISPUTED FACTS

The Grievant was employed in the University Student Legal Service (USLS) office established at the University of Minnesota. That office provides legal services to University of Minnesota students. USLS is a fully functioning law firm serving student legal needs. The Grievant was hired as a legal secretary to serve the office in 2005. Following an extensive review of the USLS office by an outside consultant a new office manager was hired. That new office manager was assigned the task of supervising the Grievant and informed of staff concerns regarding the quality of the Grievant's work.

In short, the new office manager was given a directive to work with the Grievant to improve her performance as an important part of her new job as office manager. The new office manager testified that shortly after undertaking her duties as office manager she began to notice mistakes in the Grievant's job performance and made attempts to assist her with correcting those mistakes. The office manager testified that from the outset, the Grievant was resistant to coaching. The office manager completed the Grievant's March 2010 formal written performance review. She concluded that:

“[The Grievant] is the only individual in the office that opens & closes case files. This function is very important to the office but the process is undocumented & remains inaccessible to the others.” (Employer Exhibit 2, “Hereinafter Er. Ex. ___”)

In the category "CASE FILE MANAGEMENT - physical files" [The Grievant] received a rating of 2-3. The office manager concluded:

"More frequent attention to the archived files in the USLS library, timely filing and culling, is needed. An understanding of the relevance of

these procedures of the department and of the U Wide policies is helpful." (Er. Ex. 2)

The office manager addressed the Grievant's poor performance again in October 2010 providing the Grievant with a Letter of Expectations. (Er. Ex. 3) The office manager wrote, among other things,

"We have discussed and had coaching meetings in the past about errors and the unacceptable and frequent lack of accuracy in documents created for legal staff members, creating a delay in the completion of court documents and a lack of confidence by legal staff that assignments given you will be accomplished properly in a timely manner." (Er. Ex. 3 at p. 1)

In January 2012, the Employer gave the Grievant a formal oral warning for two incidents that occurred in December 2011. In the first incident the Grievant violated client confidentiality. The second incident involved the Grievant's failure to verify client information. In March 2012, the Employer gave the Grievant a formal written warning for errors resulting in loss of documents and delay of service. In July 2012, the office manager completed a formal performance review of the Grievant. The office manager rated the Grievant a 1-2 on a five (5) point scale where a 1 or 2 would mean unacceptable performance. (Er. Ex. 16)

In October 2012, the Employer issued the Grievant a formal 10-day disciplinary suspension for destroying a file in violation of the file retention policy. The policy called for all files involving children to be retained, at least until the child reaches the age of majority. The Grievant stated that she understood the policy to call for the destruction of files more than seven years old unless the file involved children. The file that the Grievant destroyed was a paternity case and by definition involved children.

RELEVANT CONTRACT PROVISIONS

ARTICLE 22 DISCIPLINE

Section 1. Discipline for Just Cause

Disciplinary action shall be taken only for just cause...Disciplinary action, except for discharge, shall have as its purpose the correction or elimination of incorrect work-related behavior of an employee.”

ISSUE

Did the Employer have just cause to discipline the Grievant and if not what is the appropriate remedy?

POSITIONS OF THE PARTIES

The following is a summary of the Parties’ respective positions as largely reflected in their post-hearing briefs.

Union’s Position

The Employer failed to maintain a clear and accountable administrative process for tracking and culling closed case files. The Employer failed to offer the specific instruction on performance issues the grievant needed to correct potential problems, and relied instead on punitive discipline. There is no evidence that the Grievant, who was primarily responsible for records management, even knew the Employer’s records retention policy. It is unfair to punish the Grievant for violating a policy she did not know existed. No one told the Grievant of the policy. The Employer had ineffective procedures for recording which documents were destroyed. Management is responsible to manage and that means taking responsibility to make sure that important administrative functions are efficient and enforced. When management fails in that responsibility, and the potential for a malpractice lawsuit arises it is not fair for the Employer to punish the clerical staff in order to hide its own mismanagement.

The most important point is that the Grievant was not trained on the records retention policy that management disciplined her for violating, and that some paternity files might have been destroyed over the years that the Employer would rather have retained. The destruction of those files is no fault of the Grievant’s. The record shows that the Employer pointed out the Grievant’s poor performance with regard to culling

files in her March 2010 performance evaluation and did nothing to train the Grievant or help her improve her inadequate performance.

The Employer missed its' opportunity to guide, support and instruct the Grievant to improve her management of closed files. In this case, it appears that the Employer was not interested in correction but only punishment. Going from a written warning to a ten-day suspension in this case is harsh, unwarranted and unhelpful. The Grievant should be made whole.

Employer's Position

The facts establish just cause for the 10-day suspension of the Grievant. There were ongoing problems with the Grievant's performance. The Grievant was notified of the problems, and given opportunities to correct them. Before giving the Grievant the 10-day suspension the Employer gave the Grievant a formal oral warning and a formal written warning. The facts and circumstances surrounding the 10-day warning itself justified the movement to the next step in the progressive discipline process. Concerns regarding the Grievant's performance pre-dated the hiring of the new office manager. That new office manager was specifically tasked with monitoring the Grievant's performance, and addressing the concerns that had been raised by USLS staff regarding mistakes in her work. The first performance review of the Grievant prepared by the new office manager in 2010 noted concerns about mistakes in documents. The new office manager specifically addressed the need for the Grievant to understand the relevance of policies and procedures regarding the archived files in the USES library. The letter of expectations issued to the Grievant in 2010 also addressed ongoing concerns regarding mistakes and the expectation that her work be free of errors. Despite the performance review, letter of expectations, and ongoing attempts at coaching, the Grievant's performance problems continued. As the new office manager testified, the Grievant was resistant to suggestions regarding ways to improve her performance. The new office manager testified that the Grievant often responded to suggestions for improvement by saying she is a "trained and experienced legal secretary" who did not need to be told what to do.

The Grievant was the only person in the office solely responsible for the maintenance of the archived files, including the culling of archived files. The Grievant acknowledged responsibility for the file's destruction. There is also no indication that anyone else could be responsible for its destruction. In the USLS file retention policy, paternity files are included under the general heading of "Domestic" files. According to the policy, Domestic files should be destroyed after seven years, "except when the case involves: Children-shred after youngest child is 18..." (Employer Exhibit 17)

The policy was posted on a clipboard in the file library, and was also available on the USLS computer system. At the hearing, the Grievant claimed she was not familiar with the policy. However, when confronted her regarding the missing paternity file, the Grievant responded that she was only supposed to retain files beyond seven years that involved children. This is consistent with the language of the policy, and shows the Grievant was familiar with the policy. It appears, however, that the Grievant did not understand that paternity cases involve children.

The University notes that, even with regard to the seven year document retention period, the Grievant failed to follow the USLS policy. The USLS file database shows that the file that is the subject of the disciplinary suspension was in fact destroyed prior to the end of the seven-year period. So, even if this had not been a paternity file, and had simply been subject to the normal retention period, the Grievant still would not have complied with the policy.

Finally, the need for the Grievant to place more emphasis on the archived files and to pay more attention to and understand the policies and procedures related to those files was indicated in her 2010 and 2012 performance reviews. In her comments to the 2012 review, the Grievant specifically noted that she was culling files according to University and State Board guidelines.

Given the ongoing problems with the Grievant's performance, the lack of any acknowledgment of responsibility on her part regarding her performance, and her failure to recognize the seriousness of the incidents giving rise to the discipline imposed against her, the University felt it had no choice but to proceed to the next step in the progressive discipline process.

OPINION AND AWARD

The plain and unambiguous language of the Parties' Agreement is that "discipline shall be taken only for just cause..." (Agreement, Article 22, p. 49) Here, the Employer imposed a 10-day suspension on the Grievant for destroying a file in violation of the USLS's file retention policy, failure to adequately perform job responsibilities, failure to assume responsibility, absence of skills and knowledge required of a legal secretary, poor judgment and exposing the USLS to a potential malpractice suit. (Er. Ex. 23)

The Grievant does not deny that it was her job to either retain or destroy files file in accordance with her understanding a file retention policy. However, the Grievant argues she should not be disciplined for following the training provided her by a former supervisor and that she was unaware of the USLS file retention policy. The Grievant acknowledged that she was trained by a prior supervisor on a file retention process. As the Union stated in its post-hearing brief, the Grievant said her previous supervisor told her to retain files labeled 25. The Union went on to say: "in order to make sure they were catching files with minor children, [the Grievant and her prior supervisor] wrote down the birth date of the year that would make the child 18 on the date they were going through the files. The date was then taped to their work tables, so they would have an easy reference when going through the files, [the Grievant] said." (Union Post Hearing Brief at p. 5; hereinafter U. PH Br. at p. __)

It is, in other words, abundantly clear and admitted that the Grievant was aware that it was important to the record retention process to retain files of minors. What is also clear is that the Grievant understood and failed to follow a very important file retention mandate. Consideration of the actual policy given the Grievant's admission is largely unnecessary. The Union's fairness argument fails because the facts show that the Grievant had sufficient knowledge, training and understanding to know that files involving minors were to be retained. The fairness issue also fails here because it is actually irrelevant given the facts described above. The necessary question is whether the Grievant engaged in the conduct that led to the discipline and the inescapable answer is "Yes." Given that reality, fairness can only come into play if the Union were

attempting to argue that the punishment did not fit the conduct that led to the discipline. In other words, this arbitrator believes that “fairness” is only relevant to an argument designed to have the discipline reduced because while the Grievant actually committed the act that resulted in discipline, the discipline imposed was too harsh.

Here the Union seeks to argue that it is unfair to hold the Grievant responsible for an act she actually committed because she should have been better coached or the policy should have more clearly stated the expectation. The Union argued: The Grievant received no “verbal instruction regarding the retention and destruction of closed case files from anyone at USLS other than [her former supervisor]” (U. PH Br. at p. 5) This, of course, is an admission that the Grievant did in fact receive verbal instruction on the retention and destruction of closed files from her supervisor. The fact that the supervisor was no longer employed at USLS at the time the Grievant improperly destroyed the file doesn’t change the fact that the Grievant did in fact receive training from the Employer on the very subject at issue here.

It is hard to imagine why the Grievant seeks to shift the blame to the Employer since the Grievant acknowledged that that supervisor specifically worked with her to establish a system to retain files involving minors. The Union also quotes the Grievant as saying no one instructed her to “look through the public drive of the office in order to study policies and procedures for the retention and destruction of closed case files...” (U. PH Br. at p. 5) That admission makes abundantly clear the very issue that the Employer sought to address by issuing the suspension to the Grievant ...the need to exercise basic judgment and take responsibility for her role as a legal secretary in a fully functioning law office.

The Grievant cannot claim the Employer failed to provide her with policy details so that she would not mistakenly destroy a file involving minors and also state, as she did in response to her performance evaluation issued in 2012,

“I annually cull seven-year old files on a yearly basis, keeping the files that are necessary to keep and recording the proper data in the database according to University and the State Bar guidelines.” (Er. Ex. 16)

The Union pointed out that the Grievant was instructed by her former supervisor to go through files labeled 56 and 21. The files labeled 56 contained wills prepared on behalf of clients and the files labeled 21 involved dissolution cases, some of which involved minor children. The Union clearly stated that the Grievant was told to go through the file and look for information that might require certain documents or the entire file to be retained. For example, the Union said that the Grievant was instructed to look for signed wills or cases involving minor children. (U. PH Br. at p. 4) What is significant about this training is that it made clear that simply looking at the label on the file would not necessarily resolve the question of whether some or all of the contents of the file needed to be retained. It is a small step to assume that files labeled 25 or with any other number might need to be examined prior to destruction in order to be certain they did not contain documents that needed to be retained. It is obvious that a legal secretary needs to exercise some judgment based on the totality of her training and experience as she carries out her job duties. What is consistent about the Grievant's record is that she consistently makes errors of the type that led to the destruction of files that should have been retained. Those errors reflect a consistent failure to pay attention to details. The devil is truly in the detail. The Grievant consistently failed, as indicated by her performance evaluations, oral and written warnings, letter of expectation and approach to her daily duties, to pay attention to the details. What the Employer attempted to do was to help the Grievant understand the importance of and the urgent need to improve her performance.

The Parties' Agreement states:

"The normal corrective disciplinary procedure shall consist of three (3) steps, except that initial minor work deficiencies shall be privately brought to the employee's attention through coaching. Both parties agree that the order of discipline below is the progressive order of discipline; however situations may arise where it will be appropriate to depart from this order.

- A. An oral warning shall be given to the employee specifying the nature of any incorrect work-related behavior and pointing out that non-correction

will result in further disciplinary action. Oral warnings shall be documented by use of a standard University form that shall be sent to the department/administrative unit file with a copy provided to the employee.

- B. A written warning shall be given to the employee with an explanation specifying the nature of any continuing incorrect work-related behavior and pointing out that non-correction will result in further disciplinary action.
- C. A notice of suspension shall be given to the employee with a written explanation specifying the nature of any continuing incorrect work-related behavior and pointing out that non-correction will result in further disciplinary action.” (Agreement, Article 22, Section 6. Corrective Disciplinary Procedure at p. 50)

A full two years prior to the suspension, the Employer issued a “Letter of Expectations” to the Grievant. (Er. Ex. 3) That Letter of Expectations addressed the Grievant’s failure to utilize resources to advance job knowledge and skills. Moreover that letter of expectation specifically stated that the Grievant was expected to file “closed files” weekly and to redistribute culled files into cabinets monthly. The letter ended by encouraging the Grievant to ask question if she had any. (Er. Ex. 3 at p. 2)

When an employee is issued a letter of expectation it is a red flag that the employee needs to take action to figure out how best to meet expectations in order to secure their employment. Here the Grievant took no such steps, did not appear to exercise any real judgment with regard to the letter of expectations and continued to exhibit substandard performance. This was evident given the oral warning the Employer issued to the Grievant on January 19, 2012. (Er. Ex. 8) The two specific instances contained in the oral warning again indicate a lack of attention to detail on relatively simple matters commonly handled by legal secretaries. The office manager ended the letter by saying: “I expect your performance will improve immediately and on a continuing basis and that your performance will be satisfactory in all aspects of your job.” (Er. Ex. 8 at p. 2)

The record shows that the Grievant continued on the very same destructive course leading to the Employer’s determination that a written warning should be issued to the Grievant on March 23, 2012. (Er. Ex. 14) The written warning included the following statement: “[The Grievant] has been encouraged to enroll in further software

classes, or any other instruction that will assist in her job performance, but declines additional instruction.” (Er. Ex. 14 at p. 2)

At the hearing of this matter, the Grievant testified that her prior supervisor trained her regarding file retention procedures and attempted to distinguish that training from what she came to learn was the file retention policy. It is the lack of responsibility for the performance of expected duties that make it abundantly clear to the arbitrator that the next step in the progressive disciplinary process was required. Given the numerous attempts by the Employer to put it plainly to the Grievant that her performance was lacking in so many ways, it is curious that the Union put forth nothing in the way of evidence to show a single, solitary attempt by the Grievant to improve her performance between 2010 and the 2012 when the Employer issued the suspension.

Here, the Employer followed the Agreement to the letter. Moreover, it should be noted that given the Grievant’s failure or refusal to accept assistance to improve her poor performance that the Employer would have been perfectly justified in skipping aspects of the progressive disciplinary process and beginning with harsher discipline in order to bring home the significance of its concerns. The Agreement states: “...situations may arise where it will be appropriate to depart from this order.” (Agreement, Section 6 at p. 50)

The Employer, in short, fully complied with the requirements of the Agreement. The Employer provided the Grievant more than ample opportunity to address her poor performance. The arbitrator finds most credible the testimony of the office manager who repeatedly described the Grievant’s unwillingness to accept responsibility for her poor performance and therefore her willingness to accept guidance or coaching.

The Grievance response to her 2012 performance evaluation indicative of this point. The Grievant, while not addressing any of her supervisor’s concerns regarding her performance, simply describes how much work she accomplishes in a “very difficult and noisy work environment.” (Er. Ex. 16) Most curious is the Grievant’s lack of a request of any kind for assistance, training, additional support to complete daily tasks etc. It is disingenuous to now claim that support and training was not provided.

As to the spark that led to the Grievant's suspension, the destruction of a file that should have been retained, the record is abundantly clear that the Grievant failed to pay attention to the detailed required of her daily tasks. Most notable was the Grievant's response to the Step 3 hearing officer's questioning. The Grievant acknowledged destroying the file prior to the expiration of seven years, said she did not notice that the code on the file in question indicated that children were involved and that she simply did not look at the portion of the screen that showed the file type. Moreover, the Grievant admitted that she knew that cases labeled 25 were paternity cases and therefore involved minor children. However, as she explained to the hearing officer, she was only looking for files coded 21 or 56. This makes plain the Grievant's inability or unwillingness to pay attention to details, to connect the dots and complete very simple tasks.

As the Grievant's 2012 performance appraisal states: "[The Grievant] appears to be lacking in skills & desire to adequately support legal staff & does not show an interest in being proactive by creating current, frequently used forms that can be shared...does not acknowledge a need for improvement and I feel that additional training & further discussion of job responsibilities is warranted at this time." (Er. Ex. 16 at p. 2)

How does an Employer get the attention of an employee who fails to heed one warning after another that improvement is badly needed? The Agreement provides for but does not require progressive discipline. Having followed the progressive disciplinary procedures contained in the Agreement meticulously, the arbitrator finds that the Employer, in this case, went above and beyond what was necessary in attempting to coax improved performance out of this Grievant. Based on the foregoing and the testimony drawn from the hearing process and the record as a whole, the arbitrator finds that the ten (10) day disciplinary suspension was clearly warranted.

AWARD

The Employer's ten (10) day suspension of the Grievant was supported by just cause. The discipline stands. The grievance is denied.

Respectfully submitted,

A. Ray McCoy
Arbitrator

January 17, 2015