

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a

Dispute Between

**WABASHA COUNTY**

BMS Case 16 PA 0165  
(Scharpen Written Warning)

and

**AFSCME COUNCIL 65**

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**Appearances:**

**Ms. Sarah Lewerenz, Esq.**, AFSCME Council 65, 517 West 6th Street, Duluth, Minnesota 55806, on behalf of the Union and Grievant.

**Mr. Jacob Barnes, Esq.**, Assistant County Attorney, Wabasha County Criminal Justice Center, 848 17th Street, Wabasha, Minnesota 55981, on behalf of the County.

**ARBITRATION AWARD**

The parties jointly selected the Undersigned from a panel maintained by the Minnesota Bureau of Mediation Services to hear and resolve a dispute between them concerning a May 1, 2015 written warning given to Grievant Teryl Scharpen. The parties agreed to hold the hearing on April 15 and May 16, 2016 at Wabasha, Minnesota. No stenographic transcript of the proceedings was taken. The parties submitted no Joint Exhibits. The County offered eight exhibits and the Union offered sixteen, all of which were received into the record. The County called two witnesses, in its case in chief and two rebuttal witnesses; the Union called the Grievant and four other witnesses (one of these was County witness Luke Simonett recalled by the Union). All witnessess were sworn on oath or affirmation by the Arbitrator before they testified.

The parties made opening statements and they had a full and fair opportunity to call witnesses, offer documentary evidence and to make arguments and objections. The hearing closed at 2 p.m. on May 16th. The parties agreed to submit written briefs in lieu of making closing statements. The parties agreed that the briefs should be postmarked and e-mailed to each other and to the Arbitrator on June 24, 2016 and that any case precedents relied on by the parties (not already received at hearing) should be sent to the Arbitrator by regular mail. The parties waived the right to file replies. The Arbitrator received the briefs and cases by June 24, 2016, whereupon the record was closed.

**ISSUES**

The parties stipulated that the following issues should be determined herein:

- 1) Did the Employer discipline Teryl Scharpen for just cause?
- 2) If not, what should the remedy be?

### **RELEVANT CONTRACT PROVISIONS**

#### ARTICLE XV. DISCIPLINE AND DISCHARGE

- A. Employees shall be disciplined and discharged only for just cause. Discipline will be in one or more of the following forms:
1. Oral Reprimand
  2. Written Reprimand
  3. Suspension
  4. Demotion
  5. Discharge

Although discipline is considered to be progressive, the Employer may depart from progressive discipline steps for certain offenses.

- B. Employees shall have the right upon request to have a representative of the Union present during an investigation that may lead to disciplinary action. The Employee and his or her Steward shall be notified in writing of the reasons for the discharge.
- C. Any disciplinary action or measure imposed upon an Employee may be processed as a grievance through the regular grievance procedure. Employees will be afforded an opportunity to review only their own personnel files upon request. Employees will be given a copy of any written disciplinary action.

If the Employer has reason to reprimand an Employee, it shall be done in a manner that will not embarrass the Employee before the other Employees or in public.

### **RELEVANT WORK RULES**

#### **Employee Conduct and Work Rules**

Wabasha County affirms its right and responsibility to develop and administer the regulations, disciplinary measures and general work rules necessary to ensure the efficient operation of services, fair treatment and safe working conditions. The

County retains all rights and privileges not specifically addressed in these regulations.

## **I. Misconduct**

The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment:

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- Insubordinate conduct, refusal to follow a supervisor's direction or willful violation of rules or regulations.

...

- Conduct that fails to satisfy the duties, responsibilities or safety rules of the job.

...

The above-referenced list is not intended to be an all-inclusive listing of improper conduct for which an employee may be subject to discipline. Misconduct not addressed by this policy will be treated as a violation of a general rule requiring the maintenance of good order and the standards of conduct and/or performance that the County has a right to require of its employees.

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## **II. Absenteeism and Tardiness**

Prompt attendance is important. Failure to be on the job promptly not only disturbs the smooth functioning of county business, but also inconveniences other interrelated jobs. We owe it to the public we serve and to co-workers to be on time in reporting to work and to maintain a good attendance record.

If an employee is unable to report to work due to illness or other justifiable reasons, the employee must contact his or her supervisor as soon as possible prior to the employee's scheduled start time and no later than ½ hour after the employee's scheduled start time.

Frequent absenteeism and/or tardiness cannot be condoned and will necessitate disciplinary action.

Wabasha County reserves the right to request a Physician's statement in an absence.

## **Disciplinary Action**

### **I. Overview**

Wabasha County affirms its right and responsibility to develop and administer the regulations, disciplinary measures and general work rules necessary to ensure efficient operation of services, fair treatment and safe working conditions. The County retains all rights and privileges not specifically addressed in these regulations. Members of a bargaining unit who are covered by a collective bargaining agreement shall follow procedures outlined in their respective union contracts.

Employees shall be subject to discipline for inappropriate conduct. The Employee Conduct and Work Rules policy includes examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment. The Employee Conduct and Work Rules policy is not intended to be an all-inclusive listing of improper conduct for which an employee may be subject to discipline. Misconduct not addressed specifically by that policy will be treated as a violation of the County's general policy requiring the maintenance of good order and the standards of conduct and/or performance that the County has a right to require of its employees.

In addition, individual departmental policies also apply.

### **II. Discipline**

Wabasha County believes in progressive discipline where appropriate. However, egregious and serious incidents of employee misconduct or violation of County policy could result in immediate discharge. Generally speaking, the disciplinary action should be taken within ten (10) days after the Supervisor or Department Head becomes aware of the violation. A record of the action taken must be put in the employee's personnel file within two (2) working days after the action is taken.

The County may elect to utilize one or more of the following forms of discipline:

Verbal warning: An *informal* action by a supervisor to inform an employee of a minor or first occurrence of a policy violation or misconduct. A verbal warning shall identify the unacceptable performance or misconduct, and provide a statement of the desired improvement and consequences for failing to correct the infractions. Documentation of the action shall be signed by the employee and the supervisor and be made part of the employee's personnel file.

Written warning: A *formal* action by a supervisor, providing official notice of the violation or misconduct, the required corrections in behavior, a specific time frame for making such corrections, and the consequences for failing to correct the behavior cited. Documentation of the action shall be signed by the employee, supervisor, Department Head and the County Administrator.

Work Re-Assignment: A *formal* action by a supervisor resulting in the temporary or permanent change in duties, transfer, reassignment, or demotion of an employee. A work re-assignment must receive prior approval from the Department Head and the County Administrator.

Suspension: A *formal* action by the County Administrator and County Board resulting in the temporary removal of an employee from their assigned position, with or without compensation, seniority or benefits. The notice of suspension shall be in writing and shall notify the employee of the unacceptable behavior or performance, the required correction(s) in behavior or performance, the specific time line for making such corrections, and the consequences for failing to correct the behavior or performance problems cited. In situations in which the County Administrator and Department Head have determined immediate suspension is necessary for the safety of staff and/or for the protection and security of Wabasha County, the County Attorney's office will be notified. In these rare circumstances, the County Attorney's office may advise immediate suspension prior to formal action of the County Board.

Termination: Termination is a *formal* action by the County Administrator and County Board resulting in the termination of an employee for gross misconduct or when, after receipt of corrective action, and/or disciplinary action, the employee has failed to: 1) correct and improve unacceptable performance; 2) obtain compliance with policies or practices; or 3) correct inappropriate conduct.

County Board ratification is required for termination of all Wabasha County employees.

Any documentation regarding disciplinary action shall be maintained in the employee's personnel file for a period of three years with the exception noted in the Offensive Conduct, Sexual Harassment and Violence Policy, Section VI.

See also Personnel Files & Information Changes policy.

Employees may file a grievance on any formal disciplinary action (excluding verbal warning) taken against them. All grievances shall be handled according to the Grievance Procedure policy, departmental policy, and/or bargaining unit contracts.

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**MAY 1, 2015 WRITTEN REPRIMAND**

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Wabasha County Policy Number 106, Employee Conduct and Work Rules, outlines general work rules that are necessary to ensure efficient operation of services to Wabasha County citizens and clients. The policy further describes examples of misconduct that are infractions of the rules of conduct and may result in disciplinary action. Insubordinate conduct, which is described in the policy as, "refusal to follow a supervisor's direction or willful violation of rules and regulation" is considered employee misconduct.

1. April 9, 2015 – I sent you an e-mail on an adoption inquiry from a foster care provider. When I asked you several hours later if you had a chance to review it, you said that the other social worker had looked into and it was something you were not going to do. You indicated that maybe this is something that I could do. Through my own inquiry, I discovered the customer was looking for a copy of her home study. As noted in paragraph 3 below, attempts to meet and discuss this case with you since April 4<sup>th</sup> (sic) have been refused by you without union representation.
2. April 20, 2015 – I attempted to schedule a meeting with you for 4-21-15 and you replied you were doing assessments at the Criminal Justice Center on the 21<sup>st</sup> and were unavailable for a meeting.
3. April 23, 2015 - I had a meeting scheduled with you at 10:30 a.m. I e-mailed you in advance about the subjects we were going to discuss. My e-mail indicated that the meeting was not intended to be disciplinary in nature; therefore it was not appropriate for you to have a union representative at our meeting. You arrived at our scheduled meeting with a union steward.
4. April, 2015 – I asked you to give me an update on the adoptions caseload and to update the client spreadsheet. You did not respond to my request.

Be advised that this is a disciplinary action, in the form of a written warning. You have failed to follow your supervisor's direction on several occasions and have violated office rules and regulations. This is insubordinate conduct and it is not acceptable. The decision to issue a written warning instead of an oral warning was based on the information presented in paragraphs 1-4 above, as well as the following prior history of conduct:

5. March 17, 2015 – At a meeting with the Director and me regarding concerns over the Teen Challenge, you were instructed to let either the Director or me respond to any further inquiries about the program from the Sheriff's Office. On 3-24-15 instead of discussing an appropriate response with the Director or me first, you replied via e-mail to Sheriff Bartsh indicating you felt pressure to do something unethical.
6. February 20, 2015 – I assigned an adult mental health client to you. You told me you would not take any further AMH clients. You also stated you could not work with adult protection clients fearing burnout.
7. September 24, 2014 – You continue to work unscheduled overtime; (sic) on two recent occasions. Your supervisor, Ms. Fiedler, met with you to discuss the need to have approval for overtime and to schedule your appointments to fit within the 37.5 hour workweek.
8. July 9, 2014 – You were absent from a mandatory waiver meeting without notification to your supervisor Ms. Fiedler. The supervisor e-mailed you that your absence from a waiver meeting was unexcused. The supervisor again told you to notify her if you are unable to attend the meeting.
9. July 8, 2014 – You refused to attend a standing staff meeting. You e-mailed your supervisor, Ms. Fiedler, indicating you were coordinating a treatment placement and would likely be unable to attend the meeting. Your supervisor had directed you to not schedule home visits for this meeting time.
10. June 18, 2014 – Your supervisor, Ms. Fiedler, e-mailed you asking you to be more specific on what your day at the CJC is like on Tuesdays. In reply you mention Tuesdays would work for a short stand up meeting. You did not provide the requested information to your supervisor.
11. June 16, 2014 – An e-mail was sent to you by your supervisor, Ms. Fiedler, requesting that you come to a 10 minute stand up meeting every Tuesday. Your e-mail response indicated that Tuesdays are not a very good day for you.
12. June 13, 2014 – Your supervisor, Ms. Fiedler, sent you an e-mail asking when you could meet to review the results of the recent SCHA audit that was discussed at the meeting you did not attend

on 6-11-14. Your response was that you didn't have time to meet but the following week should work.

13. June 11, 2014 – You called in sick to a scheduled staff meeting that (sic) audit results were to be reviewed with staff. You arrived at work at 10:00 a.m., after the meeting was over.
14. June 3, 2014 - At your performance evaluation with your supervisor, Ms. Fiedler, you refused to sign your evaluation. You requested to review it with the union steward first. You never submitted the signed document to your supervisor.
15. June 3, 2014 – A meeting was held with you and your supervisor, Ms. Fiedler, to discuss scheduling your work time and appointments within regular hours worked. Your time card documents show you had not been utilizing the flex option even when supervisor suggested coming in late or leaving early in the work week in order to do so. Pursuant to the collective bargaining agreement, an employee needs to receive authorization for overtime when the situation is not an emergency.

Please be advised that the incidents described above show a pattern of insubordination and warrant disciplinary action. Based on your conduct during the described incidents, I am issuing this written warning for violation of Wabasha County's Policy Number 106 by your insubordinate conduct. On many occasions you have refused to follow directives given by your supervisors and you have not attended required meetings. A copy of this warning letter will be placed in your personnel file in the Wabasha County Human Resources Office.

Moving forward it is expected that you will follow all workplace rules, to include the correction of the violations outlined above. This includes, but is not limited to, following directions given by your supervisors and attending required meetings. I will be monitoring your progress over the next six months. If you have any workplace violations or insubordinate conduct during that time, you will be subject to further discipline, which could include termination.

### **BACKGROUND**

Teryl Scharpen (hereafter Grievant or Scharpen) was hired by the County on June 3, 2013 as a Social Worker. Scharpen's major duties at hire were Senior Care and Chemical Dependency cases (U. Exh. 4). The County's Social Services Department employs approximately 63 employees. The Department has undergone major changes since the December, 2013 hire of current Director John Dahlstrom. In April, 2014, Dahlstrom hired two individuals, Tammy Fiedler and Luke Simonett to supervise the County Social Workers<sup>1</sup> Fiedler supervised 4 to 5 Social Workers and 5 Public Health employees and Simonett

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<sup>1</sup> Prior to April, 2014, County Social Workers were supervised by only one supervisor.

supervised ten Social Workers and one Case Aide. Both Simonett and Fielder were working supervisors with their own caseloads – Fiedler took the elder waiver cases Scharpen had been assigned.

In October, 2014, Scharpen was transferred from Fiedler's supervision to Simonett's supervision and her caseload changed. Although she continued to work on Chemical Dependency cases (half time) she lost her elderly waiver cases to Fiedler and she was assigned Adult Mental Health and Adoption cases to fill out her caseload.

On her first annual evaluation, dated June 3, 2014, Fiedler had rated Scharpen as "Meets Expectations" in all 13 categories. Scharpen signed this evaluation under protest because Fiedler had only been her supervisor for 2 weeks before this issued. On her 2015 evaluation, Simonett rated Scharpen "Meets Expectations" in ten of 13 categories: leadership, decision making/problem solving, <sup>2</sup> job skills and understanding, initiative/motivation, dependability, <sup>3</sup> cost consciousness, teamwork, knowledge of department function, objectives, creativity and time management. On adaptability <sup>4</sup> and communications <sup>5</sup> Scharpen was rated "below expectations". On the quality of work category Scharpen was rated "meets expectations plus."

Regarding referrals to Teen Challenge and contact involving that facility, Scharpen admitted herein that on or about March 17, 2015 in a meeting she had with Simonett and Dahlstrom, Dahlstrom told her that if she were approached regarding Teen Challenge, she should refer the contact to Dahlstrom for response. Simonett stated herein that in this meeting he recalled that Dahlstrom made it clear to Scharpen that Dahlstrom would contact the Sheriff concerning Teen Challenge in the future. However, on March 23, 2015, Sheriff Bartsh (a proponent of the Teen Challenge treatment facility) sent Scharpen the following e-mail (cc'ing Dahlstrom and Simonett):

I hope that Luke was able to fill you in on our visit to MN Adult and Teen Challenge in Rochester last week. Here is what I saw. They were very apologetic for any past problems and are still working through some of the issues that we discussed. They are very committed to being a treatment provider for our county.

While there, we toured the campus. Here's what's interesting. Out of the approximately 30 gentlemen in the short term program, two approached me. Two young men had some changed attitudes and looked to be changing their lives. It was pretty cool. I hope to hear many more success stories as we go along. Also, if it ever works, I sure would like to give you a tour over there. Thanks again for the open dialog we have had in regards to Teen Challenge.

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<sup>2</sup> The comments included that Scharpen should be "mindful that it is important to keep supervisor apprised and consult when needed" (U. Exh. 6, p. 1).

<sup>3</sup> The comments stated "When requesting sick time or vacation time she is careful to check with her backup" (U. Exh. 6, p. 2).

<sup>4</sup> The comments stated Scharpen "has had some resistance to change" in Adult Protection and AMH cases and that "agency demands sometimes require all of us to learn new duties and areas of service" (U. Exh. 6, p. 4).

<sup>5</sup> The comments stated, "At times Teryl has not responded well to requests for updates or elaboration to an issue she has encountered. In the last month and a half great improvement in this area has been noted." (U. Exh. 6, p. 4).

(Er. Exh. 6, and U. Exh. 10, p. 4)

On March 24, 2015, Scharpen responded to the Sheriff (with cc's to Dahlstrom and Simonett) as follows:

I am no longer comfortable with the discussions about this provider, due to pressure to engage in something I am unable to do ethically. Please direct further discussions regarding this topic to my immediate supervisor and/or my director. Thank you.

(Er. Exh. 6, and U. Exh. 10, p. 4)

Scharpen stated herein that by sending the e-mail above, she believed she had done what Dahlstrom told her to do on March 17. Simonett and Dahlstrom met with Scharpen after they received Scharpen's e-mail and told her that she should refer all contacts from the Sheriff to them. Simonett stated herein that this meeting with Scharpen was not disciplinary. Neither Dahlstrom nor Simonett told Scharpen that she would be disciplined if she failed to follow their directive(s).

Regarding work assignments made by Simonett in early February, 2015, Simonett stated that Scharpen told him she could not take client, C.R.<sup>6</sup> and stated she could not take any more clients without something being removed and that Scharpen later refused another AMH client, K.W. Simonett stated he told Scharpen her caseload would remain the same and she would get new AMH cases, but he would not assign any more APS cases to her. Scharpen stated herein that Simonett's supervisory notes on this point (Er. Exh. 7 or U. Exh. 11) were inaccurate and she denied saying she would not take a client, she stated that she never refused to do anything. No evidence was submitted to show that the County ever warned Scharpen that she would be subject to discipline for (allegedly) refusing to accept assigned cases/clients.

Regarding unscheduled overtime, Scharpen worked in September, 2014 due to in-home client meetings running over. Scharpen stated herein that in September, she was trying to transition out of her elderly waiver cases and she made appointments when her clients would be home, and that one of them had a panic attack during her visit. Scharpen stated she thought she had scheduled these September visits early enough so she would have time to drive back to the office. E-mails were exchanged on Scharpen's OT/comp time requests for these dates (U. Exh. 12) as well as overtime emails from June, 2014. On June 18, 2014 at 10:17 a.m. Fiedler sent the following e-mail to Scharpen:

My directive to you is to complete your home visits and your travel back to the county office in the 7.5 hour work day. If you need to reschedule your appointments to accomplish this please do.

(U. Exh. 12, p. 4).

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<sup>6</sup> The initials of clients will be used in this Award to protect their identities.

On September 24, 2014, Fiedler e-mailed Scharpen again regarding three OT/comp requests she made in mid-September for client visits:

. . .As we discussed in the past, it is my expectation that you schedule these appointments to fit in your 37.5 hour work week to avoid OT/comp time for non-emergency situations. . .

(U. Exh. 12, p. 2)

One hour later, Scharpen responded to Fiedler that the overtime situations involved non-planned emergencies. Fiedler responded to Scharpen as follows:

. . .From here forward all clients that you expect may have difficulty with. . .change should be scheduled to avoid going beyond your regular work hours. . .

(U. Exh. 12, p. 1)<sup>7</sup>

Regarding Scharpen's alleged failures or refusals to attend staff meetings which occurred from June 11 to July 9, 2014 (Items 8 through 13 on the written reprimand, (Er. Exh. 4, p. 2), Scharpen stated herein that Fiedler was never angry with her over her failure/inability to attend bimonthly staff meetings and 10 minute meetings. Scharpen stated that she did not know the bimonthly staff meetings were mandatory and she did not know they should take precedence over unscheduled calls from clients, unscheduled calls from treatment providers and her activities as (daily) backup intake officer. Scharpen stated that she never understood that the County expected her to attend staff meetings and 10 minute meetings over her scheduled home visits that were on the Departmental calendar, although she knew that the bimonthly staff meetings were held to give employees important updates regarding their cases that everyone needed to know. Scharpen stated that on June 11, 2014, she had a migraine, had called in sick and she used accrued sick leave, and when she felt better, she came into work that day.

When asked why she could not flex her time as Fiedler had repeatedly requested her to do,<sup>8</sup> Scharpen stated she had case notes and paperwork to complete and other appointments and meetings to attend. Scharpen stated that using the flex option was encouraged but not mandatory and she denied ever working over her schedule without approval because she always (later) submitted a comp time sheet.

Regarding Fiedler/Scharpen e-mails starting June 13, 2014, Fiedler did not insist that Scharpen attend a June 13<sup>th</sup> SCA meeting which Scharpen e-mailed she could not attend because she was "on intake and finishing some other work" (U. Exh. 13, pp. 10-11). Concerning the standup (10 minute meeting) set for June 24<sup>th</sup>, Fiedler again did not insist Scharpen attend when she said "that (Tuesday) may not work for me" (U. Exh. 13, pp. 8-9). Fiedler suggested "we

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<sup>7</sup> The written reprimand at Items 14 and 15 stated Fiedler discussed Scharpen's scheduling visits within her work hours at her June 3, 2014 evaluation (U. Exh. 12, p. 3). Fiedler did not testify. No time cards were submitted. No other details were offered. Scharpen, in fact, turned in her 2014 evaluation so Item 14 is also inaccurate.

<sup>8</sup> Scharpen admitted on cross that she had numerous conversations about flexing her time with her supervisors. She also admitted that updates that all Social Workers needed were covered in bimonthly staff meetings.

could look at a different day if that is an issue” (U. Exh. 3, p. 8). This was also true of the staff meeting on July 8<sup>th</sup>, when Scharpen e-mailed that she was handling a call from a provider regarding a client's treatment placement. Fiedler merely thanked Scharpen for letting her know (U. Exh. , pp. 6-7).

However, the next day Fiedler sent Scharpen the following e-mail concerning the July 9<sup>th</sup> meeting:

I wanted to touch base about our HCBS meeting. I did a quick search of my e-mail and I am not able to find any previous e-mail from you about not being able to make it today. Just to avoid any confusion in the future if you are unable to attend, please let me know. We as a group set the meetings for the 2<sup>nd</sup> and 4<sup>th</sup> Wednesday of each month. Our smaller SCHA group meets following the first meeting of each month and the TCM group meetings following the second meeting of the month.

(U. Exh. 13, p. 5)

Scharpen replied saying she had a meeting in Elgin “on my calendar” scheduled several weeks before and asked whether Fiedler wanted e-mail notice also. Fiedler responded as follows:

In the future please schedule home visits so they don't conflict with this standing team meeting. The exception to this would be urgent client needs that arise last minute as those are out of our control. If a situation comes up in the future please notify me by e-mail.

(U. Exh. 13, p. 4)

It should be noted that the written reprimand (quoted above) listed eleven items dating from June 3, 2014 through March 17, 2015, which the County relied upon to justify issuing Scharpen a written rather than an oral warning because they constituted a “prior history of conduct” (Er. Exh. 4, p. 2). It is undisputed that the County never issued Scharpen any formal or informal disciplinary notices regarding these eleven items and she was never warned that she would receive further discipline if she continued to engage in similar misconduct in the future. Furthermore, no evidence was submitted to show that Scharpen was ever asked for her side of the story on any of these items. The evidence submitted regarding these eleven items came from Fiedler and Simonett's supervisory notes and from e-mails between Fiedler, Simonett and Scharpen or agency clients/individuals.

### **FACTS**

The details that led to this grievance being filed are disputed. The e-mails surrounding Simonett's hallway conversation with Scharpen on April 9, 2015 showed that on April 8th at 4:46 p.m., Beth Evers contacted Supervisor Simonett to ask for assistance in submitting a home study to an out-of-state adoption agency so she and her husband could be considered to adopt a child (Er. Exh. 5b, p. 2). Simonett responded to Evers' e-mail the next day at 10:45 a.m. and

then Simonett forwarded the e-mail chain at 10:46 a.m. to Scharpen (Er. Exh. 5b, p. 1), writing "please look into this possibility and cc me. Thank you." (U. Exh. 8, p. 5). Scharpen did not respond to Simonett's e-mail request. Scharpen stated herein that between 10:46 a.m. and 4:07 p.m. she looked into whether the County could send the home study to Evers' adoption agency and whether a release from Evers would be needed. Scharpen did not state what if any answers she found and the Union submitted no evidence to show her efforts in this area.

At approximately 3:30 p.m. on April 9th, Simonett was in the hall near the offices of Scharpen, Smiley and Tolzin<sup>9</sup> where Simonett saw Scharpen and asked if she had had any luck checking into Beth Evers' request. Scharpen and Simonett's versions of what occurred next are contradictory.

Scharpen stated that she asked Simonett for help (adoptions were normally handled by another employee, Becky Krueger who was absent on April 9th). Scharpen stated that she also asked Simonett whether the County could do as Evers requested. Scharpen stated herein she also told Simonett she did not know where the home study documents were. Scharpen stated that at this point Simonett interrupted her, raised his voice, and either wagged his finger at her or raised his hand. Scharpen stated that Simonett said, "I'm your supervisor and I'm giving you a directive what to do. You need to put it in an e-mail to me."

According to Simonett, in response to his inquiry, Scharpen said that this was Becky's job and that maybe this was something Simonett could do and she started to walk away. (U. Exh. 8, p. 2). Simonett stated that he thought Scharpen's response to him was very disrespectful. He denied yelling at Scharpen, although he admitted "he felt angry". Simonett stated that he spoke firmly and professionally to Scharpen and directed her to summarize what she knew about Evers' request and send it to him in an e-mail.

Scharpen stated that after this confrontation, she felt embarrassed and belittled because there were people walking in the hallway during this confrontation.<sup>10</sup> Scharpen stated that although her door was closed, she believed that Sylvia Tolzin could have heard her conversation with Simonett.<sup>11</sup> Scharpen stated she took a few minutes and then went to her office (which she shared with Jaimi Smiley). Scharpen asked Social Worker Smiley to go with her to Dahlstrom's office as her steward. Smiley stated herein that Scharpen told her she felt she had been reprimanded by Simonett in the hallway and that other co-workers could have overheard. Smiley stated that Scharpen told Dahlstrom this. Smiley could not recall any other details of this meeting with Dahlstrom. Smiley stated that on April 9th, she did not recall hearing Simonett yelling or raising his voice in the hall.<sup>12</sup>

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<sup>9</sup> It is undisputed that the office walls in this hallway are thin and that even with their office doors closed, employees can hear hallway noise and loud conversations.

<sup>10</sup> The evidence failed to support Scharpen on this point. No witnesses were called who stated they were in the hallway at the time of this confrontation.

<sup>11</sup> Social Worker Tolzin testified herein that on April 9<sup>th</sup> 2015, she had to let a non-client into her office and she saw Simonett and Scharpen conferring in the hall. Tolzin stated that she did not hear any raised voices or tones of anger at this time and that if voices had been raised, she would have heard them. Tolzin did not remember if anyone else was in the hall.

<sup>12</sup> Smiley did not state herein that Scharpen was crying or upset on April 9<sup>th</sup>.

John Dahlstrom, Department Director, stated that on April 9th, Scharpen came to his office with Union Steward Jaimi Smiley. Scharpen said that Simonett had disciplined her in public. Dahlstrom responded that this was hard to believe as this would violate the contract and disciplining employees in public is not something the County does. Dahlstrom asked why the Union was present and Scharpen said Smiley was there to observe and document. Dahlstrom did not object. He asked whether Simonett gave her a reprimand. Scharpen replied that Simonett did not say it was a reprimand but it was Simonett's tone in the hall in speaking to her, that Simonett had embarrassed and belittled her in front of other employees. Dahlstrom stated that Scharpen explained Simonett had asked her to call a client about a home study for an adoption, but this was something Simonett could do himself. Dahlstrom stated herein he got the impression Scharpen was not going to do as Simonett had asked her to do. Scharpen stated that Dahlstrom asked if she intended to respond to Simonett's e-mail, and that she responded that she would do so but only with what she knew.

After Scharpen and Smiley left his office, Dahlstrom called Simonett and asked him what had happened with Scharpen. Simonett told Dahlstrom what he thought had occurred. Dahlstrom told Simonett to talk to Scharpen and clear the air, that Simonett should not ask Scharpen any questions and that he did not want Simonett to discipline Scharpen over the incident.

Dahlstrom stated herein that although he felt Scharpen's actions were insubordinate, he wanted Simonett to downplay it. Dahlstrom told Simonett that no investigation and no discipline should be done. Dahlstrom explained that County Social Workers had complained about Fiedler and Simonett after he hired them; that they had questioned Simonett's experience/credentials in child protection cases and his qualifications for his County position. Dahlstrom also stated that he had found that a heavy hand on discipline does not build the teamwork needed in a Social Services Department, and that he wanted Simonett's discussion with Scharpen to be non-disciplinary, more of a "teachable" or "coachable" moment.

At 4:07 p.m., Scharpen responded to Simonett's 10:46 a.m. e-mail as follows:

All I know is that they need to work with the adoption agency that is working with the children they are interested in adopting. Since I don't do the licensing or work with the foster parents I don't have home studies or any other paperwork related to them.

(U. Exh. 8, p. 5).

Scharpen did not email Simonett the results of her asserted investigation between 10:46 a.m. and 4:07 p.m. that day whether the County could provide the Evers home study to the California agency and whether the County would have to get any releases in the process.

Simonett stated that on April 14th after letting things cool down, he e-mailed Scharpen that he wanted to meet with her. Scharpen replied by e-mail at 6:13 p.m., asking "What is this regarding?" to which Simonett responded it was about the Beth Evers' request (U. Exh. 13, p. 2). Scharpen responded at 8:51 a.m. on April 15th:

Because of how the last conversation with you about this topic ended I will be bringing along a union representative as a witness in this meeting.

Simonett consulted with Dahlstrom and H.R. Director Krissa Bedstad.<sup>13</sup> On April 15th Bedstad called Scharpen and left a voicemail about her April 9th encounter with Simonett, asking her to call Bedstad. Scharpen responded that she had not authorized anyone to speak about her situation and if she needed Bedstad's assistance she would contact her. Six minutes later, Bedstad again asked Scharpen to call her. Approximately one hour later, Scharpen responded by e-mail to Bedstad:

Under Weingarten Rights since I believe this discussion could lead to my being disciplined and (sic) I therefore request that my union representative be present.

(U. Exh. 15, p. 2)

Bedstad responded by e-mail:

If you would please call me I can address your concern.

(U. Exh. 15, p. 2)

In an undated memo, Scharpen recounted what occurred when she called Bedstad on April 15th with Steward Tammy Loretz present:

...

I placed a phone call to Krissa Bedsted (sic) from the office of Tammy Loretz. I stated that I had Tammy Loretz as my union representative and I was invoking my Weingarten Rights as I believed the conversation could lead to disciplinary action. Krissa stated that it was not appropriate to have a union representative and I was not able to invoke my Weingarten Rights. She then stated I could not refuse to meet with my supervisor. I placed the phone call on speaker and stated that I had never refused to meet with my supervisor; I had accepted the meeting request through Outlook. Krissa stated she had e-mails proving what she was saying. I asked who stated that I refused to meet with my supervisor because this was not correct. I again stated that I had never refused to meet with my supervisor. I had simply invoked Weingarten Rights because I believed based on this phone call as well as my recent interaction with my supervisor I believed that it would lead to disciplinary action. I stated that my last conversation with him, which took place in the hallway with co-workers and clients, ended with feeling embarrassed and belittled as well as a hand pointing in my face. Krissa stated that there was no investigation to prove that and there was not going to be an investigation. Krissa stated that I would not be written up, that she could guarantee the conversation would not lead to disciplinary action. Krissa also stated that my supervisor wanted to meet with me and it was not appropriate to have a union representative

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<sup>13</sup> Bedstad did not testify herein.

there. I was forced to state that I would meet with my supervisor without union representation as Krissa continued to raise her voice at me during the conversation.

I stated under duress that I would meet with my supervisor without union representation in order to end the phone call.<sup>14</sup>

(U. Exh. 15, p. 1)

After this phone call, a meeting was set for April 15th but Scharpen again declined to meet without her Union Steward present, and Simonett cancelled the meeting by e-mail (U. Exh. 8, p. 3). On April 20th Simonett sent the following e-mail to Scharpen:

I'd like to meet with you in regard to the request from Beth Evers on 4-9-15. This is not a disciplinary meeting, therefore having a union representative is not warranted. I'd like to discuss work assignments and timelines, and how the adoption caseload is going.

Your calendar appears open for 10 a.m. tomorrow, 4-21. Please confirm.

(U. Exh. 8, p. 3)

Scharpen responded she was doing CIC assessments on the 21st and out for a funeral on the 22nd.

A meeting was then set for April 23rd. Scharpen brought Union Steward Loretz with her to this meeting. When Scharpen arrived, she handed Simonett a card that read as follows:

#### WEINGARTEN RIGHTS

I believe this discussion could lead to my being disciplined. I therefore request that my union representative be present to assist me at the meeting. I further request reasonable time to consult with my union representative regarding the subject and purpose of the meeting. Please consider this a continuing request; without representation, I shall not participate in the discussion.

(U. Exh. 9)

It is undisputed that Simonett did not hold the April 23rd meeting because H.R. had told him it was not appropriate for Scharpen to insist on union representation at a non-disciplinary meeting and the meeting should not occur if she continued to insist on such representation.

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<sup>14</sup> Scharpen and Loretz testimony herein on this point, which supported the contents of Scharpen's memo.

On May 1, 2015, the Letter of Reprimand (quoted above) was given to Scharpen. She had union representation at this meeting. Thereafter, this case was timely appealed to arbitration before the Undersigned.

### **POSITIONS OF THE PARTIES**

#### **County**

The County argued that the issues herein were whether grievant Teryl Scharpen (Scharpen) was insubordinate on April 9 and 23, 2015 and whether the County therefore had just cause to issue her a written warning on May 1, 2015. The County urged the Arbitrator to deny and dismiss the grievance.

The County summarized the evidence as follows. On April 9, 2015, at 10:46 a.m. Supervisor Simonett e-mailed Scharpen to look into the possibility of forwarding a previously completed home study to an adoption agency in a time-sensitive situation. At 3:30 p.m. that day, Simonett saw Scharpen in the hall and asked her if she had looked into the home study yet. Scharpen stated she had not, that adoption agencies do home studies and this was something Simonett should do. Scharpen then turned to walk away. Simonett said in a stern but professional voice, "Teryl, you are the adoption worker and I'll need you to summarize what you know in e-mail and send it to me. Thank you." (U. Tab 5). The County noted that the record evidence presented failed to show that anyone – employees or the public – heard this exchange.

Scharpen then immediately sought Union Steward Smiley and the two went to talk to Director Dahlstrom. Scharpen then reported that Simonett had yelled at her in public because she had not completed an assignment which, Dahlstrom recounted, Scharpen said was something Simonett should do, not her. Dahlstrom stated, and Smiley did not contradict him, that Scharpen never asked for help or guidance and she never said she did not know how to forward the home studies.

Dahlstrom and Simonett met regarding this matter and decided no discipline should be given to Scharpen but that Simonett should use this as a "teaching opportunity" to meet with Scharpen to discuss work assignments, timelines and "the adoption caseload. . ." Simonett requested a meeting with Scharpen via Outlook calendar for this purpose (U. Tab. 13, p. 2). Scharpen responded that she wanted her Union Representative present. On April 20th, Simonett e-mailed Scharpen, that the meeting "was not a disciplinary meeting" so her request for a Union Representative was unwarranted and Simonett specifically listed the topics of discussion, quoted above. The meeting was set for April 23rd, 12 days after Simonett's e-mailed task assignment to Scharpen.

On April 23rd, Scharpen showed up at the meeting with Union Steward Tammy Loretz and handed Simonett a "Weingarten Rights" card (Er. Tab 5a) essentially stating she would not participate in any discussion without a union representative. Simonett cancelled the meeting.

The County noted that Loretz stated herein that she had no knowledge of Simonett's e-mail to Scharpen stating the meeting would not be disciplinary. Furthermore, the County

observed in Union Attorney Joppa's testimony, she had told County management that if it stated in writing the meeting would not be disciplinary, the Union would agree to the meeting occurring without representation. In these circumstances, the County urged, no *Weingarten* violation had occurred, and Scharpen's original April 9th refusal to do as twice directed by Simonett regarding the home study followed by Scharpen's continued insistence on union representation when no such representation was warranted, constituted clear insubordination actionable under County Policy 106, as a "refusal to follow a supervisor's direction." Therefore, the County had just cause to issue Scharpen a written warning for her misconduct.

The County noted that Scharpen was the appropriate employee to do the work, as Becky Krueger, the primary adoption worker was absent on April 9th; that Scharpen was then in training and assigned to do adoptions and that Scharpen admitted herein that her job description requires her to assist and cover for other employees as assigned. The County asserted that Scharpen's assertion herein that she never refused to do the assignments but was seeking clarification from Simonett did not comport with the record evidence. The County observed that Scharpen never replied to Simonett's e-mail seeking clarification and she made no other efforts to ask for help or guidance from either Simonett or Dahlstrom. The County urged:

County policy defines insubordination as a "refusal to follow a supervisor's direction." Here not only do we have Grievant Scharpen not performing an assigned task, or in any way following up to clarify the task, but we have her actually opposing the assignment on the grounds that somebody else – specifically her supervisor – should do it. This is egregious insubordination, a kind that disrupts workplace environments, and requires more of other employees, is one that the Employer has a right to correct. The Employee's conduct on April 9, 2015 constituted insubordination.

(Er. Br., p. 9)

Concerning the Union's *Weingarten* claims, the County urged that Scharpen's conduct is a "gross misapplication of the important rights articulated in *Weingarten*, and an injurious infringement on the Employer's rights" (Er. Br., p. 10) First, the County argues that *Weingarten* itself requires the employees belief to be objectively reasonable that a meeting will result in discipline, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251.253 (1975). And that a meeting to give instructions and needed corrections in work techniques would not give an employee a reasonable fear of an adverse impact arising from a meeting.<sup>15</sup>

Here, Simonett gave Scharpen written notice (as Attorney Joppa stated herein was sufficient) that the April 23rd meeting would not be disciplinary and listed the topics for discussion. Simonett sent this e-mail more than 10 days after the encounter in the hallway so that tempers had cooled. These facts demonstrate that Scharpen's belief was unreasonable. It was only after April 23rd when Scharpen continued to insist on bringing a union representative to a non-disciplinary meeting that the County decided to discipline Scharpen.

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<sup>15</sup> The County also cited *NV Energy, Inc.*, 355 NLRB No. 7 (2010) and *Village Apartments*, 347 NLRB 1065 (2006).

The County contended that Scharpen's April, 2015 conduct fully supported a written warning but the County also had listed misconduct dating back to June 3, 2014 which it urged showed "a pattern of insubordination" by Scharpen which, when considered together, supported the discipline issued.<sup>16</sup> Therefore, the County urged the Arbitrator to deny and dismiss the grievance.

### Union

The Union submitted a 38-page brief, pages 4 through 23 of which included a detailed timeline with argument on each numbered item contained in the May 1st warning letter, summarized as follows:

1. June 3, 2014 (#15) concerned alleged unauthorized overtime/refusal to flex. No requirement to flex is in the contract -- mutual agreement to flex is required.
2. June 16, 2014 (#14) Scharpen returned her signed evaluation on June 17, 2014, contrary to this item.
3. June 11, 2014 (#13) concerned accrued sick leave use by Scharpen with no allegation or proof that Scharpen had been abusing her sick leave.
4. June 13, 2014 (#12) Fiedler never insisted and Scharpen never refused to meet with Supervisor Fiedler. Scharpen stated she was on intake and finishing her other work that day.
5. June 18, 2014 (#s 10 and 11) concerned Scharpen's Tuesday schedule and 10 minute meeting attendance. Fiedler was not upset with Scharpen and later suggested the 10 minute meetings be set for a day when Scharpen could attend.
6. July 8, 2014 (#9) concerned Scharpen's alleged refusal to attend a standing staff meeting. Scharpen took a phone call regarding a chemical dependency placement; she did not schedule a home visit during this meeting. Fiedler was not upset.

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<sup>16</sup> In its brief, the County summarized these additional supporting allegations as follows:

The severity of the Grievant's conduct is enough to satisfy a finding of just cause for the written rather than oral reprimand. However, even beyond that minimal finding the Employer further identified a pattern of insubordination on the part of the Grievant dating back to June 3, 2014. See, Written Reprimand, Employer's Tab 4, at 2. These instances included a continued refusal to flex time despite being advised to do so, communicating directly with the Wabasha County Sheriff regarding a service provider despite a prior conversation with her supervisors instructing her not to do so, and absences from mandatory meetings (meetings which she admitted were important, on her calendar, and other staff attended). (Er. Br., p. 13)

7. July 9-10, 2014 (#8) concerned mandatory staff meeting attendance. Scharpen had put another meeting on her electronic calendar which she felt should have notified Fiedler. Scharpen volunteered to e-mail Fiedler in the future if she had a conflict. Fiedler advised Scharpen in the future not to schedule home visits during staff meetings and to e-mail her if "a situation" came up. Fiedler never said Scharpen's absence was unexcused.
8. September 14, 2014 (#7) concerned Scharpen working unscheduled overtime. Scharpen stated the home visit meetings, which she had made in the early afternoon to avoid overtime, to transition her clients went longer than expected. Fiedler did not discipline Scharpen.

The Union noted that regarding items 7 through 15, Scharpen's supervisor was Tammy Fiedler who is still employed by the County and who the County chose not to call as a witness. Simonett testified regarding these items although he had had no personal involvement in any of them.

Regarding items 1 through 6, Simonett was Scharpen's immediate supervisor when these occurred and he testified regarding items 1 through 6 which the Union summarized and argued as follows:

9. February 10, 2015 (#6) concerned Scharpen's AMH caseload. Simonett refused to stop assigning her new clients even though she cried and said she was near her breaking point. Scharpen stated she never refused to take a client but that she was not adequately trained in Adult Mental Health and one client had no file. The Union noted Simonett's notes on this item were not contemporaneous.
10. March 17, 2015 (#5) concerned Scharpen e-mailing Sheriff Bartsh on Teen Challenge after Dahlstrom and Simonett told her to let them deal with these issues. Scharpen thought she had followed management's instructions by her March 24th response to Bartsh's e-mail.
11. April, 2015 (#4) concerned an allegation that Scharpen had not updated and sent Simonett the adoption spreadsheet. Scharpen stated the spreadsheet was not on her computer; but Simonett had to send it to her; that she updated it but could not save it so she scanned and e-mailed it to Simonett.
12. April 9, 2015 (#1) concerned Simonett's e-mail to Scharpen regarding sending a home study of the Evers as County foster parents to a California adoption agency. Scharpen stated she was training with Becky Krueger on adoptions, and that Krueger had previously told the Evers they needed to work with a private adoption agency. Scharpen tried to find Simonett

during the day to get clarification. Scharpen never refused to do as Simonett directed and did not intend any disrespect.

- 13a. April 14-15, 2015 (#3) concerned Simonett's after-hours e-mail request to meet with Scharpen on Beth Evers' request. Scharpen refused to meet without a union representative as a witness because of how her April 9th conversation with Simonett had ended. Simonett only replied he wished to reschedule.
- 13b. April 15, 2015 (#3) also concerned Scharpen's conversations with H.R. Director Bedstad who advised Scharpen she could not refuse to meet with her supervisor and she was not entitled to union representation at the upcoming meeting with Simonett. Scharpen denied she ever refused to meet with Simonett, and that Bedstad was loud and insistent. Scharpen stated she told Bedstad she would attend the meeting with Simonett without a union representative in order to end the conversation with Bedstad.
14. April 20, 2015 (#2) concerned Simonett's attempts to schedule a meeting with Scharpen to discuss the Evers matter. Scharpen could not meet on Tuesday due to work on Wednesday she could not meet due to a funeral. The meeting was set for Thursday, April 23rd by agreement. Scharpen was upset and crying after talking to Simonett to set the date of the meeting.

The Union noted that Scharpen stated she brought a Union representative to the April 23rd meeting because she believed the meeting was likely to lead to discipline because of her conversation with Bedstad, how the April 9th conversation with Simonett had ended and because Dahlstrom brushed her off. Also, there was no investigation of any of the 15 items on the May 1st written warning. The Union urged that Scharpen had no warning before May 1st, that any of the conduct listed on the May 1st written warning would subject her to discipline. The Union noted that on her June 3, 2015 performance appraisal, Scharpen was rated "meets expectations plus" on quality of work and although she was rated as "low" in the category, the comment stated she had greatly improved in communications.

In its argument, the Union quoted at length from an award by Arbitrator Jeff Jacobs<sup>17</sup> regarding the use of the Daugherty "Seven Tests of Just Cause" and the definition of just cause. The Union argued that the Seven Tests should be applied here. The Union urged that the County gave Scharpen no forewarning of the possible consequences of her actions. For example, the Union contended, the County never told Scharpen:

1. It would discipline her if she continued to try and enforce her Weingarten rights. (Written Reprimand #'s 1 and 3)

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<sup>17</sup> The Union enclosed the full award with its brief, *Moorehead Public Service Commission and IBEW #1426*, BMS Case 09-PA-0709 (2009).

2. She could not go to her supervisor with a concern regarding her work load (Written Reprimand #6)
3. She could not go to her supervisor and ask how to do something she didn't know how to do (Written Reprimand #1);
4. She could not tell her supervisor what was already on her schedule when the supervisor tried to set up a meeting with her. (Written Reprimand #'s 2, 9, 10, 11 and 12);
5. She must agree to flex hours of overtime worked in spite of the contractual requirement that flex time must be agreed to by both the Employer and Employee (Written Reprimand #15);
6. She can't miss a meeting because she received a phone call regarding placing a client in chemical dependency treatment (Written Reprimand #8);
7. She couldn't use sick leave she had accrued (Written Reprimand #13)

(U. Br. pp. 26-27)

The Union asserted that the County's actions were not reasonably related to the orderly, efficient and safe operations of the County. This was so because Scharpen asserted that on April 9th in the hallway she tried to ask Simonett for information and assistance with the Evers matter and he got angry with her rather than respond. Therefore, the Union urged, Simonett's order that Scharpen fax Evers' foster home study to the California adoption agency was "not reasonably related to the orderly and efficient operation of" the Department. Scharpen lacked the knowledge and experience in adoption to do the work (U. Br., p. 28). Scharpen could have spent hours looking for the study and researching adoption and privacy law. The Union noted that Simonett's April 9th outburst violated Article XV A, page 12 of the collective bargaining agreement which forbids disciplining employees in public or in a manner that will embarrass the employee or other employees.

As detailed in its timeline, the Union asserted the County's investigation "was the antithesis of fair and objective." The Union pointed out at least 3 instances where the written warning contained erroneous dates which it argued showed the County's lackadaisical and sloppy management and further supported its argument that the County's investigation was unfair and subjective. In addition, Dahlstrom's testimony showed he never sought knowledge of how Simonett had gathered the "facts" he stated in the May 1st warning or whether any investigation thereof had been done. Simonett also admitted he was not involved in any way in items 7 through 15, yet he wrote the warning covering these items. The County chose not to call Supervisor Fiedler. Finally, many of the items of discipline were very stale at the time discipline issued (up to 10 months old).

The Union asserted based on its timeline arguments that the County did not have substantial evidence that Scharpen was guilty of insubordination as charged. Furthermore, it was improper to discipline Scharpen because she exercised her Weingarten rights. The Union noted

"that at no time did Ms. Scharpen refuse to participate in a meeting with her supervisor. . .She merely showed up for scheduled meetings. . .accompanied by a union representative and when that happened, the employer cancelled the meetings because it did not want to meet with Ms. Scharpen with a union representative present."

(U. Br. p. 34)

The Union urged that Weingarten does not say that the employer gets to choose when an employee can exercise their right at meetings – it is the employee's option to choose if she reasonably believes an investigatory interview will result in discipline. The Union asserted that Lennox Industries, Inc. v. NLRB, 637 F.2d 340 (5th Cir., 1981) is directly on point when an employee possesses a "reasonable belief". There, the employee was asked questions about his poor work performance and an altercation with a supervisor, which questioning "by its nature" the Court found investigatory where "the risk of discipline reasonably inheres."

In this case, Scharpen had an altercation with Simonett because he became angry with her, waved his hand or finger at her, and cut her off when she tried to ask for help to do as he ordered. Scharpen felt belittled and embarrassed and afraid she would get into trouble for not knowing how to do something. Therefore, the Union argued, Lennox directly applies to this case.

And Scharpen was right to be worried because she then received a written warning listing 15 items of misconduct, some as old as 10 months. The Union observed that items 1 through 3 involved Scharpen bringing her union representative to meetings and this was labelled insubordination in the May 1st letter. Violating Scharpen's Weingarten rights had no reasonable relationship to the orderly and efficient operation of the Department. In the circumstances, the Union concluded:

The piling on in the reprimand issued Teryl Scharpen represents the County's hope that if it threw enough mud at Ms. Scharpen, some of it would stick. But the reprimand fails in so many ways that it is not possible for the County to have just cause to discipline Ms. Scharpen. Ms. Scharpen had no knowledge that many of the things the County alleged she did constituted misconduct. The County did no investigation prior to disciplining Ms. Scharpen much less a fair and objective investigation. As a result, the County did not have substantial proof that Ms. Scharpen was guilty of employee misconduct. Finally, the real reason behind the County actions, Ms. Scharpen exercising her Weingarten rights, cannot be reasonably related to the efficient and orderly running of Wabasha County. The Employer did not have just cause to discipline Ms. Scharpen, the grievance should be upheld and all documents related to the investigation should be removed from her file.

## DISCUSSION

As an initial matter, it is important to note that no transcript was taken in this case. Therefore, there is no official record and no quotations can be made of any witnesses' testimony.

The Union included in its binder two arbitration awards: *City of Winona*, BMS Case 07-PA-0610 (Jay, 2007) and *Wabasha County*, BMS Case 02-PA-1252 (R.J. Miller, 2002). The Union failed to cite or discuss the applicability of these cases in its brief. However, I note that the latter case does support the Union's general assertions herein (and my reading of the contract) that only if a Wabasha County employee and their supervisor mutually agree they will use flex time is the employee required to use flex time rather than receive overtime or comp time for working beyond Departmental work hours.

Regarding the *City of Winona* award, the facts of that case are distinguishable from this one. There, the local union president (also a steward) was given a written warning for "sending personal e-mails and providing legal advice without a license to practice law." The grievant had e-mailed bargaining unit members using the City's computer regarding who to send to a Health Insurance Committee meeting, regarding his analysis of the City's insurance proposal in bargaining and concerning his representation of a member being disciplined. The Arbitrator noted that the contract expressly allowed union officers and representatives to communicate with union members on work premises and during work hours without loss of pay and that the contract prohibited the employer from committing unfair labor practices such as interfering with, restraining or coercing employees in the exercise of statutorily-protected rights and attempting to dominate or interfere with the administration of labor organizations. The Arbitrator ordered expungement of the warning and she ordered the City to rescind any direction to the grievant regarding communication to Union members and to abide by the contract and permit the Union to freely communicate with employees.

The Union submitted Arbitrator Jeff Jacob's award in *Moorehead PSC*, *supra*, with its brief in support of its assertion that Daugherty's "Seven Tests of Just Cause" should be applied in this case. In 1989, Arbitrator John Dunsford presented a paper to the National Academy of Arbitrators at its 42nd Annual Meeting entitled *Arbitral Discretion: The Tests of Just Cause*, The Proceedings, (BNA Books, 1990). There, Dunsford made an in-depth analysis of NAA Arbitrator Carroll Daugherty's "Seven Tests of Just Cause" as he enunciated them in Daugherty's awards beginning in *Grief Bros. Cooperage Corp.*, 42 LA 555 (1964) and culminating in his 1972 award and appendix in *Whirlpool Corp.*, 58 LA 421. Dunsford's analysis of these awards as well as Notes 2 and 4 in the *Whirlpool* appendix caused Dunsford to conclude that the Seven Tests are "misleading in substance and distracting in application . . . and assume controversial positions with regard to the role of the arbitrator," Dunsford at 28, See also, pp. 32-33.

I agree with Dunsford's arguments and conclusions that arbitral customs and practices required in railroad cases should not be applied in private sector and other public sector cases, as

Daugherty recommended in his writings about the "Seven Tests". Dunsford noted that the *Whirlpool* award and its appendix (particularly Notes 2 and 4) show that railroad arbitrators must accept the employer's investigation and findings of fact which railroad arbitrators simply review as appellate judges would do – determining only whether the employer acted arbitrarily, capriciously, unreasonably or discriminatorily in its investigation and in reaching its findings. Railroad arbitrators have no authority to conduct a hearing *de novo* as other arbitrators do. Based on the above analysis of the cases and Dunsford's article, it has been my practice in non-railroad cases to analyze each case on its own facts and only discuss and apply Daugherty's "Seven Tests" when the applicable contract expressly requires me to do so or both parties argue the Tests are applicable.

Having said this, I am nonetheless persuaded based upon the record here that there is insufficient evidence that management ever discussed Items 7 through 15 with Scharpen and told Scharpen her conduct was unacceptable and that future similar conduct would subject her to discipline. Thus, management denied Scharpen the opportunity to amend her behavior and denied her due process. A close reading of the e-mails between Supervisor Fiedler and Scharpen showed that although she told Scharpen three times not to schedule home visits that could fall outside the work week to avoid overtime, she never told Scharpen her scheduling constituted actionable misconduct for which she would be disciplined in the future. Also, Fiedler's e-mails to Scharpen regarding her attendance at stand up meetings, 10 minute meetings and bi-monthly staff meetings never stated that these were mandatory and never required Scharpen to attend these or face discipline. Rather, Fiedler suggested that Scharpen could e-mail her if she had a conflict, that urgent client needs could trump attendance and that Fiedler was willing to change 10 minute meeting days to accommodate Scharpen. As Fiedler was not called as a witness herein (although she is still employed by the County), all we have are e-mails and Scharpen's testimony that Fiedler was never upset or angry with her and never warned or disciplined her regarding Departmental meeting attendance.<sup>18</sup>

In addition, I note that the County's policy requires that disciplinary "actions" must be taken within 10 days after management becomes aware of the violation and a record thereof must be part of the employee's file within two working days after the action is taken. Also, a verbal warning (an informal action) must "identify the unacceptable performance. . .and provide a statement of the desired improvement and consequences for failing to correct the infractions", and any documentation must be signed by the employee. Fiedler failed to follow County disciplinary policy regarding Items 7 through 15. In these circumstances, it is reasonable to conclude that Fiedler never intended these Items to be discipline and therefore, they cannot fairly be used as further support for the written warning herein.

Regarding Item 6 of the written warning, although Supervisor Simonett was personally involved in this item and testified regarding it, this cannot fairly be considered herein as supporting the May 1st written warning. It is important that Item 6 occurred in February, 2015, months before the May 1st warning issued. Crediting Simonett's testimony on this Item, there

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<sup>18</sup> It is hard to believe that after Fiedler's three e-mails on the subject that Scharpen was unaware that she should arrange her schedule to avoid overtime/comp time. In fact, I note that after September, 2014, Scharpen never had another overtime/comp time issue. And Scharpen never had another staff meeting attendance issue after July, 2014 when Fiedler last criticized her meeting attendance.

was no evidence offered to show that Simonett ever discussed this conversation with Scharpen, or that he told her refusal to accept clients when she was burned out constituted misconduct that would result in discipline. Also, no evidence was submitted to show that Simonett timely memorialized his disapproval of this conduct as required by the County's policy. In my view, in these circumstances, Scharpen had no notice that her conduct was unacceptable or that it could be cause for discipline and this Item cannot be used to support the written warning before me.

Regarding Item 5, my conclusions must be the same. This is so although I believe that Simonett and Dahlstrom made it clear to Scharpen that she was not authorized to respond to Sheriff Bartsch regarding Teen Challenge and that she did so against management's directives.<sup>19</sup> However, Dahlstrom and Simonett failed to warn Scharpen that her conduct was unacceptable and that similar future misconduct would subject her to discipline. Also, neither Simonett nor Dahlstrom memorialized the incident within 10 days of the March 17th incident as required by County policy. The County's failure to follow its own policies on Item 5 require a conclusion that this Item cannot be considered as supportive of the written warning issued<sup>20</sup>

However, the above conclusions, in my view, do not preclude me from parsing rejected Items 5 through 15 and considering Items 1 through 4 of the warning, alone, in determining whether there was just cause for some discipline of Scharpen. This is appropriate because the written warning, on its face, makes clear that it was Scharpen's failure to respond to Simonett's April 9, 2015 request to check into Evers' e-mail and her later refusals to meet with Simonett without union representation in Items 1 through 4 that caused the County to issue the warning. Also, the warning stated that Items 5 through 15 were listed show her "prior history" of conduct and asserted as reasons for increased discipline. Therefore, all of the circumstances surrounding the pivotal events described in Items 1 through 4 must be looked at carefully.

What occurred between Scharpen and Simonett on April 9th in the hallway is disputed. What is clear is that no one was in the hallway at the time and that despite the paper-thin office walls, no employee stated that they heard Simonett raise his voice. Therefore, the evidence failed to prove that Simonett embarrassed Scharpen "before the other Employees or the public" as prohibited by Article XV Section C, paragraph two. It is important to note that Article XV Section C does not prohibit embarrassment of an employee unless it is done before witnesses. As the cases discussed below will show, the fact that Scharpen felt embarrassed and belittled after talking to Simonett on April 9th is insufficient evidence in light of the later oral and written assurances she received to prove that Simonett intended to discipline Scharpen.

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<sup>19</sup> Scharpen's explanation that she did what she had been instructed to do just does not ring true. Scharpen could have simply forward the Sheriff's email to her superiors as requested. She did not do this. Rather, she cc'd them on her response to the Sheriff which included her gratuitous, personal comment regarding ethics.

<sup>20</sup> It is also true that the County failed to fully investigate Items 7 through 15 and it failed to seek Scharpen's side of these issues. Had it done these things, it would have found that Scharpen actually returned her 2014 performance evaluation (signed under protest), and Item 14 would not have been listed. Also, there is no indication on this record that the County ever interviewed Supervisor Fiedler on any of these items. It appears that Simonett only reviewed e-mails and Fiedler's supervisory notes in drafting the May 1, 2015 warning on these Items. This "investigation" was completely insufficient to meet the due process requirements underlying proper discipline and a supportable just cause finding.

Regarding Simonett's directive to Scharpen, we have Evers' and Simonett's e-mails. These show that Simonett asked Scharpen to look into whether a home study on the Evers could be provided to an out-of-state adoption agency by the County before the end of the month of April, 2015. It should be noted that there is no evidence to show that Scharpen would have had to create a new home study--one was already in Evers' file. Scharpen asserted herein that after she received Simonett's e-mail, she had investigated the propriety of sending the study and whether releases would be necessary. Scharpen's e-mail response was at 4:07 p.m. (after work hours) on April 9th. Scharpen's e-mail shows that Scharpen did not check into the possibility of giving the Evers the adoption assistance requested. Rather, Scharpen told Simonett that this was not her job. It is important that in her e-mail, Scharpen did not ask Simonett for help or state she did not know how to do the work and she did not e-mail Simonett the results of her alleged investigation earlier that day of the propriety of sending the study and of the necessity of getting a release in her e-mail.

It is undisputed that Scharpen was in training on adoptions with Krueger, that Krueger was absent on April 9th and that Scharpen knew that County employees are to fill in for each other as directed. In addition, Scharpen never took any action to assist Evers with her adoption request. It was Simonett who later found the home study and faxed it to the adoption agency on April 10th. Based on the record evidence it was reasonable for Simonett and Dahlstrom to conclude that they needed to talk to Scharpen. Dahlstrom and Simonett stated herein without contradiction, that they decided not to discipline Scharpen regarding her conduct, to use this as a teaching moment.

Here, Scharpen's first request for a union representative was in an April 15th e-mail, to have a union representative act as a "witness" in a meeting between Simonett and Scharpen which never occurred. Let me be clear. Weingarten and the cases that followed it do not require employers to provide union representatives as witnesses at meetings. Much more is involved, as will be discussed below.

It is of prime importance that Scharpen's subsequent requests for union representation came after April 15th and after she had received Bedstad's verbal assurances and Simonett's written assurance that no discipline would result from a meeting with Simonett. The question arises whether Scharpen could reasonably believe that the April 23rd meeting with Simonett might result in her being disciplined despite Simonett's e-mail assurance and HR Director Bedstad's verbal assurances that the meeting would not result in discipline. In my view, Scharpen's belief that she would be disciplined as a result of the April 23rd meeting with Simonett was unreasonable based on the record here.

An overview of the case law is necessary here. The following cases support a conclusion that an employer may discipline an employee for insubordination for refusing to meet without a union representative present at a non-disciplinary meeting in the following kinds of circumstances:

- 1) Vulcan Materials, 68 LA 1305 (Marlatt, 1977): Arbitrator held grievant had no rational basis for a belief that he'd be disciplined at a counseling meeting when supervisor assured grievant and the Union steward that no

discipline would result from the counseling, which was intended to gain acceptance and end resentment of the supervisor as an outsider at the plant. There was just cause for a written warning issued for grievant's walking out of the counseling session when denied a steward therefor.

- 2) General Electric Co., 240 NLRB 479 (1979): Board found an employee was lawfully suspended for insubordination when he disobeyed an order to stay at his work station and went to consult a Union steward. Employee's foreman previously told him he would not be disciplined for faulty work so employee had no reasonable belief discipline would result from meeting with foreman.
- 3) Anoka County (MN), 84 LA 516 (Jacobowski, 1985): Arbitrator held that grievant had no right to a Union representative in a performance evaluation meeting with her supervisor because the meeting was not a grievable occurrence/event. This was so despite the fact that the grievant had recently been orally counseled by her supervisor about performance problems. In the meeting, the supervisor reviewed grievant's evaluations, stated expectations, and summarized a letter prepared pre-meeting that stated immediate improvement was necessary to avoid discipline.
- 4) Twin Coast Newspapers, 89 LA 799 (Brisco, 1987): Arbitrator held that employer did not violate employee's Weingarten rights when it discharged him for insubordination after employee walked away from manager who had asked employee to go to the office to complete an accident report. (Employee returned with a Union representative instead). Arbitrator found that the supervisor did not intend to ask the employee any questions and the supervisor was not going to the office with the employee, despite the fact that the employee had previously been disciplined twice for being abusive, loud, insubordinate and disrespectful to supervisors.
- 5) St. Regis Paper Co., 71 LA 740 (Williams, 1978): Arbitrator found just cause for the 3 day suspension of grievant where foreman was attempting to direct the grievant and manage the plant and he was not investigating anything. Grievant had asked for light work on a night when the employer was one employee short. When grievant did not get light work she said she was sick. Foreman told her she should punch out and leave but it would be unexcused. Grievant demanded a steward. Foreman ordered her back to work. Grievant refused, screamed at foreman and demanded a steward. Foreman said she could talk to steward at her next break. Grievant left and the Employer issued a 3 day suspension to the grievant for insubordination.
- 6) Tastybird Foods, 88 LA 875 (Goodstein, 1987): Arbitrator held there was just cause for grievant's discharge for insubordination. Grievant initially questioned why he had been ordered to transfer to "whole bird" and said

he did not want to transfer. (Grievant was a utility worker whose job was to work throughout the plant as needed.) Grievant asked for a steward. Grievant was ordered to transfer two more times. He asked for a steward two more times. Upper manager told him he could see a steward on his break and file a grievance but he would be terminated if he refused to transfer. Grievant continued to request a steward. Grievant was then terminated (with stewards present) for insubordination.

The above cases are just a sampling of arbitral and Board precedent in this area. What is clear from the above and from a close reading of the *Weingarten* case is that the employee's belief that discipline may result from a meeting with management must be an objectively reasonable fear of discipline (*General Electric Co., supra*)<sup>21</sup> Here, Simonett waited 5 days, a cooling off period, before he first e-mailed Scharpen asking her to meet. Scharpen e-mailed and asked the purpose of the meeting. Simonett replied by e-mail on April 15th, it was about Evers' request. Scharpen replied that she would be "bringing along a union representative as a witness" to the meeting because of how things had been between them on April 9th. Simonett responded that he was cancelling the meeting and would reschedule.

Later in the day on April 15th H. R. Director Bedstad left several voice mails for Scharpen asking Scharpen to call about her April 9th encounter with Simonett. Scharpen e-mailed Bedstad that she believed such a discussion could lead to discipline so she was requesting a union representative be present under *Weingarten*. Bedstad e-mailed Scharpen again asking her to call so Bedstad could address her concern. Scharpen then called Bedstad in the presence of Steward Loretz. During this conversation, Scharpen repeatedly denied refusing to meet with Simonett. Bedstad repeatedly told Scharpen there was no investigation being conducted and there was not going to be one; that Scharpen would not be written up; that Bedstad would guarantee her conversations would not lead to disciplinary action and that therefore, Scharpen could not have a steward in the meeting with Simonett (U. Exh.15). Scharpen agreed to meet with Simonett without a union representative (even though she admitted that this was untrue) because Bedstad had raised her voice and Scharpen wanted to end the call.

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<sup>21</sup> The County cited two cases in this area which support my conclusions herein. In *Success Village Apartments*, 347 NLRB 1065 (2006), the ALJ held that an interview held solely for the purpose of informing an employee of a previously made non-disciplinary decision met neither of the *Weingarten* tests to trigger protection--that meeting be reasonably believed by the employee to be both investigatory and disciplinary. The ALJ was not persuaded that evidence that the supervisor was agitated and annoyed before the meeting was sufficient to give the employee a reasonable belief of its nature. In *NV Engery, Inc.*, 355 NLRB 41 (2010), The Board found no violation of *Weingarten* rights where the employee, who twice requested union representation, was called into 2 meetings to discuss his complaints about two Training Instructors. Other employees had also complained about these Training Instructors. Before the meetings, H.R. had given the employee assurances that the meetings would not result in discipline. No evidence was presented that other employees were disciplined or retaliated against for their complaints. The Board found the employee had no reasonable belief he would be disciplined as a result of these meetings so no violation of his *Weingarten* rights had occurred.

On April 20th Simonett e-mailed Scharpen that he wanted to meet with her about Evers' request, work assignments, timelines and how the adoption caseload was going. Simonett wrote "this is not a disciplinary meeting; therefore having a union representative is not warranted" (U. Exh. 8). When the meeting started on April 23rd, Scharpen arrived with Steward Loretz and handed Simonett a printed card which asserted for her her Weingarten rights at which point Simonett cancelled the meeting. On May 1st the written warning was issued.

Here according to her own notes, Scharpen had received oral assurances from the County's top Human Resources official, Bedstad, that no investigation was being done and no discipline would be issued from speaking to Bedstad and Simonett. Scharpen also received Simonett's written assurance that his meeting with Scharpen was not disciplinary. As Union Attorney Joppa stated herein, the receipt of such written assurances would have satisfied the Union and required the Scharpen to meet without representation. But it is clear that Scharpen never told any Union official about her receipt of Simonett's e-mail or its contents. Had she done so, this case would likely not have been brought. In these circumstances and given that Scharpen had never received any discipline from the County before May 1st, Scharpen's belief that she would be disciplined as a result of meeting with Simonett was unreasonable and she had no right to continue to insist upon having a steward being present at the meeting with Simonett.

As is clear from the cases listed and described above, an employer may discipline an employee for insubordination if the employee unreasonably and repeatedly insists on union representation in a non-disciplinary meeting. Note that the magic words, "I refuse to meet with my supervisor," are not required for arbitrators and the Board to find discipline for insubordination is warranted. Scharpen's showing up with Steward Loretz on April 23rd and handing Simonett the Weingarten card when she had been told verbally and in writing that no discipline would come out of the meeting and no union representative was called for, constituted clear insubordination. Scharpen had been ordered to attend without representation by both Bedstad and Simonett and she chose to defy those orders.

The Union cited *Lennox Ind.v. NLRB*, 637 F.2d 340 (5th Cir., 1981) in its brief in support of its arguments on this point. I find that case distinguishable on its facts from the instant case. There, the court ruled that Weingarten is triggered only if an interview is intended to elicit answers to work-related questions which affect the employee or the bargaining unit and the employee being questioned must reasonably fear that discipline might result from the interview. The court ruled that a meeting held to ask the employee questions about his poor work performance and about his recent altercation with his supervisor was "by its nature an investigatory confrontation without union representation."

I have removed from consideration Items 5 through 15 of the written warning for the reasons stated above. But Items 1 through 4 have been proved and will stand. In my view, the County is entitled to run its operations efficiently and Scharpen's actions on and after April 20, 2015 denied it that right, tying up her time and Steward Loretz' time. Also, County supervisors are entitled to meet with their subordinates personally in order to convey information and to get and give updates on workloads, assignments and policies and procedures without union representatives being present.

Therefore, the record supports a conclusion that it was appropriate for the County to issue Scharpen some discipline for her insubordination in continuing to unreasonably insist on union representation in the April 23rd meeting with Simonett given Bedstad's oral guarantee and Simonett's written assurance that the meeting would be non-disciplinary. No evidence was submitted to show that either Bedstad or Simonett could not be taken at their word.

Based on the relevant evidence and argument and given that this is Scharpen's first actionable offense of this kind, I believe a verbal warning is appropriate under the contract and County policy. It should be noted that in arriving at this decision, I expect the County to draft and issue Scharpen written confirmation of this verbal warning listing and using only Items 1 through 4 herein. The May 1, 2015 written warning must therefore be expunged from Scharpen's record. I will retain jurisdiction of the remedy on my own motion in accord with Part 6E of the NAA Code of Professional Responsibility.

### AWARD

There was just cause to issue Teryl Scharpen an verbal warning for insubordination for her continued and unreasonable insistence on union representation, from April 20 through April 23, 2015, at a non-disciplinary meeting with Supervisor Simonett scheduled for April 23, 2015.

The County is ordered to expunge the May 1, 2015 written warning and all references thereto from Scharpen's file. The County is further ordered to write up a verbal warning referring to and based on Items 1 through 4 of the May 1, 2015 warning as grounds for said verbal warning. In accord with County Policy 210, the verbal warning shall be signed by the supervisor and by Scharpen, placed in Scharpen's personel file and mintained in her file for three years from the date of its being placed in the file.

The Arbitrator retains jurisdiction of the remedy only.

Dated at Oshkosh, Wisconsin, this 9th day of July, 2016.

  
Sharon A. Gallagher, Arbitrator