Arbitration Award

In the Matter of Grievance Arbitration Between: BMS Case No.: 16PA0897

Minnesota Judicial Branch (Employer) and AFSCME Council 5 (Union)

Termination of Andre Matimba, Grievant

STATEMENT OF THE ISSUE:

Was there "Just Cause" to discharge Andre Matimba?

FACTS:

Andre Matimba, at the time of his termination, was a Senior Court Clerk in Hennepin County District Court, having worked for the court for 19 years. Mr. Matimba was a very well-liked long term employee with no prior documented discipline throughout the course of his employment up until the time of his termination. His 2015 and 2016 performance reviews reflected a successful employee who either met or exceeded expectations. The reviews did identify areas that could use improvement, noting Mr. Matimba needed to work on correcting spelling and grammar deficiencies in his orders. The reviews did not reflect any critical performance concerns.

In 2014 Mr. Matimba was given a new assignment as a Senior Court Clerk for Judge Norris. Management selected Mr. Matimba for this assignment, feeling his personality and knowledge of the Juvenile Court system made him a good match for Judge Norris, who was a relatively new judge in the Juvenile Court system. This was a significant change in duties, as Mr. Matimba was

now working for a judge and in the past had been assigned to a court referee. This distinction is significant as the orders issued by a referee differ greatly from those issued by a judge. Referee orders are generally template orders which require less work and far less writing on behalf of the clerk. The orders issued by a judge are predominately non template orders requiring much more work on behalf of that judge's clerk. To compensate for the additional work imposed by being assigned to a judge there are to be two clerks assigned to the judge, where the referee has only one clerk. The second clerk is a law clerk who can provide assistance with the more legal aspects of written orders. The employer thought this was also a good arrangement for Mr. Matimba since he would be able to work with another clerk, and thus coordinating the work between the two clerks would help keep the work organized.

The two clerk system had limited success. Twice during Mr. Matimba's 2 year stint as Judge Norris' clerk the law Clerks Mr. Matimba was working with were given extended leaves of absence to study for their bar exams thus leaving Mr. Matimba on his own. In addition, it was recognized that when there were two clerks Mr. Matimba's lack of organization made it very difficult to balance out the workload. To address these recognized organizational issues, in the fall of 2016 Ms. Wright, the grievant's supervisor, scheduled weekly check-ins and bi weekly meetings with Mr. Matimba. During these meetings, the grievant never mentioned his outstanding orders. Mr. Matimba was frequently asked if he needed any additional assistance and he consistently refused, indicating he was not falling behind or in need of help.

It was not until Arason Parkman, a new law clerk working for Judge Norris, discovered several cases in which orders had never been entered into the electronic case management system after the cases were heard. This was initially thought to be human error, but additional errors came to light as parties started arguing for dismissals because orders had not been timely filed. This

prompted Judge Norris to request reviews of his cases from the past two months. Ms. Parkman found approximately 20 missing orders over a two-month timespan.

On January 3 of 2016, a 90 day Performance Improvement Plan (PIP) was put in place to correct organizational deficiencies that had caused Mr. Matimba to fall behind in his work. As concerns were raised due to the missing orders, a more extensive audit was conducted during the first few weeks of January to determine if there were any more orders that needed to be completed. That extensive audit revealed that there were not merely 20 orders that had not been completed by Mr. Matimba, but rather 350 orders which were not completed over a two year period. In addition to the orders not being completed, the audit revealed that on at least 10 occasions Mr. Matimba used Judge Norris' stamp to approve orders that never had been approved by Judge Norris, and that Mr. Matimba had falsely coded events as completed in Minnesota Court Information System (MNCIS) so that they would not reveal that he had not completed orders that were due.

On February 3, 2016 the grievant was terminated from employment, only one month into the PIP plan. The employer based the termination on the following three performance concerns:

1) The grievant had 350 orders that had not been completed.
2) The grievant used Judge Norris' approval stamp on orders that had not been approved by the judge.
3) The grievant fraudulently coded events in MNCIS, the court information system.

The employer concluded that these behaviors constituted violations of the following:

1) Juvenile Court- Chambered Clerks Job Duties and Expectations (Writing/processing orders)

2) Minnesota Rules of Juvenile procedure, *Rule 10.01*

3) Court Employee Code of Ethics

4) HR Rule 8.1

UNION'S POSITION:

The grievant, Andre Matimba is a well-liked, well respected, long term Senior Court Clerk in Hennepin County District Court who was terminated from employment without "Just Cause." Mr. Matimba had no documented discipline over his 19 year career and was now being terminated without any progressive discipline in violation of Article 17 of the CBA, Discipline Discharge and Resignation. While there is no dispute that Mr. Matimba did fall behind in his work, closer examination of the facts provide a very reasonable explanation for this occurrence.

Prior to 2014 there never were any significant concerns with Mr. Matimba's performance. In 2014, Mr. Matimba was selected by the employer to be the new clerk for Judge Norris. Mr. Norris was relatively new to Juvenile Court and thus the employer felt that Mr. Matimba would be a good fit based on his understanding of the Juvenile Court system and his personality. The opening in Mr. Matimba's courtroom was the result of a previous clerk asking to be reassigned to another judge, as working with Mr. Norris proved to be very difficult. Mr. Matimba accepted the new responsibilities without hesitation as he said he was a court employee willing to do what the employer wanted.

This new assignment proved to be problematic for reasons beyond Mr. Matimba's control. The work of a clerk in a Judge's courtroom was far more demanding than the previous work Mr. Matimba had done with court referees. The employer recognizes this and assigns two clerk per judge where only one clerk is assigned to a referee. However, during much of the tenure with Judge Norris, Mr. Matimba worked without the assistance of a law clerk as they were often on leave for extended periods of time to study for the bar. In addition, Judge Norris' practice was to talk at length in his hearings and to take many matters under advisement making the process for finalizing orders on behalf of the clerk very difficult.

As a result of the above, Mr. Matimba fell behind in writing his orders. Mr. Matimba testified he thought he could catch up with the orders. He had taken pride in the fact that he always had been able to get his work completed in the past and was confident he could do so again. He therefore resisted offers for additional help to get his work completed. In addition, Mr. Matimba testified that he was not aware of the level he had fallen behind.

In January of 2014 Mr. Matimba was placed on a 90 day Performance Improvement Plan (PIP) and he was working hard to get his orders written and get his work back to the level expected of him. The employer, however, never allowed Mr. Matimba an opportunity to make the changes required of the PIP as he was fired not even one full month into the 3 month PIP. A PIP is a tool used by employers as a way to coach and assist an employee to correct deficiencies so that discipline can be avoided. This employer acted impulsively and in early February 2016 chose to ignore the PIP they had created and terminated a 19 year employee without ever giving him a chance to rectify the concerns addressed in the PIP and without any progressive discipline, in direct violation of Article 17 section 3 *Progressive Discipline* of the CBA.

While an audit, during the same time period the PIP was in place, did reveal that significantly more orders were not completed, Mr. Matimba testified that he was not aware that he had fallen that far behind and had not intended to deceive the employer when he indicated he was getting caught up. However, as a result of falling behind in his orders, Mr. Matimba, out of desperation, used the Judge Norris' stamp to approve orders which the judge had never approved. In addition, he coded in MNCIS events as completed that had not yet been completed. This was not done to deceive but rather to work through the issues of getting caught up.

The PIP was put in place by the employer to correct issues regarding falling behind on the written orders and the other performance concerns that resulted from that situation. The employer, however, never gave the PIP nor Mr. Matimba, an opportunity to succeed. The PIP was a commitment to work through issues and correct deficiencies but the employer chose to terminate Mr. Matimba before the PIP had a chance to be successful. The employer's action not only violated their own performance improvement plan, but more importantly violated Article 17 of the CBA by terminating a 19 year employee without just cause.

EMPLOYER'S POSITION:

Mr. Matimba was terminated on February 3, 2016 for violations of several department policies and procedures, specifically:

1) Court Employee Code of Ethics:
    a. *Paragraph F which prohibits altering, falsifying, destroying, mutilating, backdating or failing to make required entries into records, and prohibits making false statements.*

b. Paragraph H which requires employees to promote the growth and development of professional court management by improving their work skills and supporting research and development in the field.

Juvenile Protection Procedure Rule: *The law that requires written orders within 15 days of every juvenile protection hearing.*

Human Resources Rule 8.1: *The rule states that employees may be disciplined for unsatisfactory work performance and for misconduct.*

Fourth Judicial Districts Core Values- *Core Value of Integrity was violated.*

Mr. Matimba was a Senior Court Clerk with 19 years of employment with Hennepin County District Court. Mr. Matimba's performance was good, recognizing, however, that there were ongoing performance issues relating to accuracy and spelling errors in his written orders. In addition, it was recognized that that he lacked good organizational skills, which impacted his performance. These performance issues were identified in performance reviews however they did not rise to the level of discipline.

In 2014 Mr. Matimba was assigned to work with Judge Norris, a move that was believed would be beneficial to both the court and Mr. Matimba. Judge Norris, a relatively new Juvenile Court Judge, would benefit from Mr. Matimba's Juvenile Court knowledge and in turn Mr. Matimba would now have a law clerk to assist with completing the judges' orders as two clerks were assigned to Judges, whereas Mr. Matimba was the only clerk when he worked for a court referee. The expectation was that coordinating the work and the written orders with another clerk would help with the lack of organization that had been an ongoing issue for Mr. Matimba.

Due to law clerks taking leaves to study for the bar exam, Mr. Matimba was periodically working without the assistance of a second clerk. In light of that, Mr. Matimba was consistently offered additional resources, i.e., another clerk, by his supervisor, to make sure the work got done. Mr. Matimba consistently rejected any assistance, assuring his supervisor that he was able to keep up with the work. Unfortunately Mr. Matimba was not able to complete his work and he fell behind on writing up his orders. Late in 2015 significant concerns were raised by a law clerk, Arason Parkman, regarding orders for Judge Norris' cases that were not completed. This prompted Judge Norris to request reviews of his cases from the past two months, Ms. Parkman found approximately 20 missing orders over a two-month timespan. Mr. Matimba confirmed that he had fallen behind and that he would get the work completed. To address the issue of orders not being completed and to improve future performance Mr. Matimba was placed on a 90 day PIP which would provide time to get caught up and to clarify with Mr. Matimba the importance of complying with Juvenile Protection Procedure Rule requiring orders be completed within 15 days of the hearing. The PIP commenced on January 3, 2016.

In January 2016, coinciding with the ongoing PIP , Judge Norris, due to his concern over the 20 incomplete orders, asked Mr. Matimba's supervisor, Ms. Wright, to check every one of his cases to determine how many orders hadn't been completed. Ms. Wright then explained this to Mr. Matimba and asked him to come clean with any issues that would show up on the audit. Mr. Matimba did not offer any information about other missing orders. In addition, Ms. Wright also explained that the judge had to sign an order acknowledging that the order was late.

In January, an extensive audit was conducted by Christa Bentson, Operations Manager, which revealed a much more extensive problem with incomplete orders than was known at the time of

the PIP. Even though in January Mr. Matimba had indicated he was getting caught up, the audit showed not 20 orders that were incomplete, but actually 350 orders over the two year period in which Mr. Matimba had worked with Judge Norris. Even more concerning, the audit revealed that Mr. Matimba, in an effort to cover up the number of incomplete cases, fraudulently and in direct violation of court policies, used Judge Norris' stamp and approved orders for which Judge Norris never approved. Finally, the audit also revealed that on at least 10 occasions Mr. Matimba entered into the MNCIS orders as complete that were not complete. This was done to cover up the fact that he had not completed them in direct violation of court policy and contradictory to the training he had received and understood.

As a result of the audit, it was clear that Mr. Matimba's performance issues were far worse than was contemplated at the time he was given the PIP. The 350 incomplete orders were far in excess of all other clerks' incomplete orders. The audit showed this problem was unique to Mr. Matimba, as no other clerk had more than 8 incomplete orders. Of equal or greater concern was the fraud and deception used by Mr. Matimba when he inappropriately used the judge's stamp and fraudulently entered information into the MNCIS. Had this information been known at the beginning of January of 2016 the employer would not have implemented a PIP, but rather a termination would have been imposed at that time.

Mr. Matimba left the employer with no other option but termination. His performance was inexcusable. He had been continually offered assistance to make sure he was keeping up with his work. He refused help every time it was offered. He was well trained and knew what his obligations were with getting his orders completed within 15 days. He failed to meet his obligation and refused to let his supervisors know. When it was discovered that he had fallen far

behind in his work he tried to deceive his employer from discovering the extent of his failure through deceptively and fraudulently manipulating documents. The result of his actions have severely jeopardized the integrity and reputation of the court and created an environment in which he could not be trusted. Termination of Mr. Matimba was for "Just cause."

ANALYSIS AND DISCUSSION:

This case is about a well-liked long term employee who for at least 17 years had been successful in his career within the Hennepin County Court System. The parties, to their credit, have left few facts in dispute. I find that the employer did a fair and thorough investigation and Mr. Matimba was honest and straightforward during the investigation and in his testimony at the hearing. With no pivotal facts in question the issues left to be determined are whether Mr. Matimba was given an adequate opportunity to succeed in his new position with Judge Norris and, if so, was his performance so inexcusable that there was "Just Cause" to terminate a 19 year employee with no documented previous discipline to support the termination.

Was Mr. Matimba given an adequate opportunity to suceed?

The union presented clear and uncontradicted evidence that the position Mr. Matimba took on with Judge Norris was far more demanding than the work he had previously done while working with a court referee. The work in Judge Norris' courtroom requires two clerks where Mr. Matimba's previous work with a court referee had only one clerk. It is also clear that Mr. Matimba took on this work when asked to by his employer he had not sought out this work. It is also worth noting that the position was vacant due to a previous clerk's request to leave Judge

Norris' courtroom. All this set up a scenario that requires management attention to make sure Mr. Matimba could succeed.

The evidence presented showed that Mr. Matimba received excellent training from lead worker Mary Thies and that Mr. Matimba had no concerns about his training and was made well aware of the expectations of his role. Further, the evidence revealed that he had been told that he should go to his supervisor whenever he needed assistance to complete his job responsibilities. This was not the only time Mr. Matimba was offered additional assistance. Ms. Wright testified that she was constantly offering additional assistance to Mr. Matimba, who rejected the offer every time one was made. Ms. Wright was aware that Mr. Matimba was often working without the assistance of a law clerk so she kept questioning whether additional assistance was needed and inquiring if he was able to keep up. He always refused any support and gave the impression that he was doing just fine keeping up. While it might be very understandable for an employee to fall behind when doing the work of two employees it is hard to use that as an excuse when you are given ample opportunity to receive help to keep up and you refuse every time. Therefore I conclude that he was given adequate opportunity to succeed and if not, he only has himself to blame as help was there if he wanted it.

Was there "Just Cause" to terminate?

Article 17 (3) Discipline, Discharge and Resignation states:

> "Disciplinary action shall include only the following forms and depending on the seriousness of the offense shall normally be administered progressively in the following order … Oral reprimand, Written reprimand, Suspension, Demotion, Discharge…"

In this case no evidence was presented to show that Mr. Matimba ever received any discipline. It is true that he was, at the time of his termination, under a PIP but the contract is clear regarding the types of discipline to be imposed by the employer, and a PIP is not one of them. Further, in this case I see the PIP as a non-disciplinary tool used by the employer in an effort to avoid discipline by changing employee behavior before discipline becomes necessary, much like a coaching. Therefore, not only is there no progressive discipline but there is no prior discipline at all. In this contract, however, progressive discipline is not mandatory. Rather this contract provides that discipline "Depending on the seriousness of the offense shall normally be administered progressively."

The next question is whether Mr. Matimba's behaviors were such that a deviation from the normal progressive discipline is warranted. The employer appropriately concluded that the behaviors violated:

> **Court Employee Code of Ethics** through making false statements,
> **Juvenile Protection Procedure Rule** by failing to complete orders within 15 days of every Juvenile Protection hearing
> **Fourth Judicial Districts Core Values**- *Core Value of Integrity was violated*
> **Human Resources Rule 8.1**: *which provides for discipline when employee engages in misconduct or unsatisfactory work performance*

To determine whether discharge is warranted pivots on the egregiousness of the behavior and impact of the violations. It is easy to see that Mr. Matimba's actions were egregious. He continued to indicate to his superiors that he was keeping up with his work and even after it was identified that he had fallen behind and had many unwritten orders, he continued to express his opinion that he was getting caught up on the unwritten orders. That certainly was not the case. It is not possible for me to believe that Mr. Matimba did not have a better understanding of how far behind he was. He sat in the hearings and he must have known he had not written orders for

many of those hearings. While he may not have known he was behind on 350 orders he did know he was way behind and should have known it was time to accept help when offered. Whether it was personal pride or an unrealistic belief he could get his work back on track or inadequate organizational skills, this was no excuse for his performance. While I find the egregiousness clear when falling behind on 350 orders it only becomes more obvious when analyzing the deceptive and fraudulent efforts of Mr. Matimba to cover up his unfinished work. Using a Judge's approval stamp without the requisite approval and falsely documenting work as complete merely for the purpose of obscuring how far behind in his work he had fallen met the egregiousness threshold as well.

The impact on the employer and citizens accessing this court is also profound. Critical life issues are at stake in Juvenile Court and the determinations of the court need to be imposed without delay. People's lives revolve around these decisions and justice was certainly delayed for many court participants. That is not acceptable. Further, this has a devastating impact on the court's reputation and integrity. When the court does not follow through in a timely manner to the issues that brought citizens to the courtroom these participants lose faith in the process and the court. This impact on the court's integrity and reputation is likewise unacceptable.

The analysis of "Just Cause" is not complete until the behaviors that brought about the termination are balanced against the many years of long term, successful employment of Mr. Matimba. Behaviors that might otherwise lead to termination can occasionally be set aside as they reflect an aberration from an otherwise solid carreer and the understanding that the career can once again return to success. In this case what has happened over the past two years, and

more significantly what happened in the last month of Mr. Matimba's employment can be seen as a clear aberration from his performance over the many other years. Unfortunately, the impact of the misconduct and the deceitfulness does make it difficult to conclude that Mr. Matimba can once again be successful in this court. Mr. Matimba's trustworthiness has suffered a devastating blow. The supervisors and judges have expressed serious concerns with being able to trust Mr. Matimba in the future. Mr. Matimba in his own testimony said, in fact, that he understood why others could not trust him. He also admitted that he understood why the court could not have him come back. In fact, when he was asked directly if he thought he could be successful, he was less than convincing. Responding to that question at the hearing, after a long pause, Mr. Matimba said "I would like to say yes, but how could I go back in good conscience after my performance." Further, when asked if he thought there was "Just Cause" for his termination he responded "Under the circumstances I could see why it would happen." On this point I agree with Mr. Matimba. Even though there had been a long successful career, Mr. Matimba's performance during the last two years of his employment and more specifically the last month of his employment cause me to conclude a successful return to work is not possible. Therefore discharge of Mr. Matimba was for Just Cause.

AWARD:

Based on the discussion above the Union's grievance is denied and therefore the termination is upheld.

Respectfully,
Robert Altman, Arbitrator

September 12, 2016