BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CUNA MUTUAL INSURANCE SOCIETY

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 39

American Arbitration Association Case No. 51-300-01079-10

Case 25
No. 70218
A-6425

Appearances:

Thomas R. Crone, Melli Law, Inc., Attorneys at Law, Ten East Doty Street, Madison, Wisconsin, appeared on behalf of the Employer.

Marilyn Townsend, Attorney at Law, 122 West Washington Avenue, Madison, Wisconsin, appeared on behalf of the Union.

ARBITRATION AWARD

Office and Professional Employees International Union, AFL-CIO, Local 39, herein referred to as the "Union," and CUNA Mutual Insurance Society, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators supplied by the American Arbitration Association and also from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission (herein "WERC") to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Madison, Wisconsin, on January 14, 2011. The parties agreed to file post-hearing briefs, the last of which was received March 11, 2011

ISSUES

The parties stipulated to the following statement of the issues:

1. Did the Employer have just cause to discharge Grievant Ako?

2. If not, what is the appropriate remedy?

FACTS

The Employer is a mutual insurance society which provides insurance products to credit union members. It is located in Madison and Middleton, Wisconsin and employs about 4,000 employees. The Union represents employees in its classified and professional pay categories, including the position in dispute (sales representative). There are about 700 employees in the bargaining unit.

Grievant Larissa Ako was first employed by the Employer on May 5, 2008, as a sales representative (licensed insurance agent). She worked in the Employer's Sales and Marketing Interaction Center (herein "SMIC") after she obtained her state insurance license until her discharge on February 5, 2010 for not meeting the Q A metric (Quality Assurance). She was a member of the bargaining unit represented by the Union. Other than not meeting the Q A metric she was a good employee and performed well at making sales.

Sales representatives work as part of sales team. They solicit, sell and service the Employer's insurance products and insurance products from other brokers. They and the Employer must comply with Wisconsin and other states' insurance laws. Employees are required to also comply with the Employer's standards for ethical sales.

The Employer's disciplinary system as it relates to the proficient performance of employees' sales duties is based upon a system of measurement known as "metrics." Metrics include requirements for premium production, quality assurance and referrals to the Liberty Mutual Insurance Group. The metrics are measured separately over different periods of time, some being a monthly metric and others being quarterly. The premium production metric is measured on a quarterly basis essentially measuring the total premiums of policies of life insurance and accidental death and dismemberment sold.

The Q A part of the Employer's metric system is the metric which led to the disputed discharge. It is the second most important metric after sales goals. This metric is used to assess the conduct of the telephone calls by the sales representative for the purpose of meeting regulatory requirements and maintaining business relationships.[1] It measures, among other things, the sales representative's proper business conduct, assessment of the customer's individual insurance needs, properly informing the customer about the terms of the policy and properly qualifying the customer for underwriting, financially, and for the appropriate policy premium rate.

[1] See tr. pp 58 and 65.

The Q A part of the metric system is applied in such a manner as to encourage sales representatives to strive to achieve regular high quality performance. Employees are required to maintain an 85% average rating on calls which are evaluated. The 85% requirement has been in effect since 2006, but there have been periodic changes to the underlying standards.

The procedure for measuring the Quality Assurance metric is that Q A evaluators review about four randomly selected sales calls each month. There are various sections in the guidelines which are each assigned a specific number of points. The total is 100. The sections are; greeting, assessing needs, sales-resolving the customers needs, professional communication, efficient handling of the call, closing. Some sections are subdivided and points assigned to the subdivision rather than the whole section. In addition there are specific critical elements, confidentiality, regulatory compliance, unacceptable or rude behavior and asking for the sale. If the employee fails in meeting any critical element, he or she receives a zero for the entire call.

The Employer also uses these evaluations to teach better performance through regular positive coaching sessions between the employee and his or her team leader. The employee and his or her team leader plays back calls which were evaluated and discusses what went right and how those parts which were missed could be done better. The Employer also provides other opportunities for employees to "shadow" fellow employees or the team leader during calls.

The Employee must maintain an average of 85% in a three-month rolling period or is deemed to have failed that metric that period. If the employee fails to maintain the 85% average, the Employer then increases the number of calls per month reviewed by an evaluator from four to six and the metric is measured monthly. The number of positive coaching sessions per month is also increased. If the monthly average then drops below 85%, the Employer then imposes discipline. It is unclear how long an employee must be successful to return to the three-month rolling evaluation period.

If the sales representative disagrees with the scoring of any call, he or she can ask to have his team leader "appeal" the telephone call and have it rescored by a different evaluator. The appeal process is not part of the grievance process. The employee's team leader makes the decision to appeal. Under the Employer's system scores can only be increased, but not decreased once they have been issued. Ms. Ako used the appeal process once in early 2009, but not at any time during the period in dispute.

The sales representative has access to his or her scores in addition to the periodic "coaching" sessions with his supervisor. He or she has direct access to the NICE system and can play back his or her call himself. Ms. Ako was treated at least as well as other employees through the evaluation, coaching and disciplinary process in terms of services received from her team leader.

Employees have complained that the scoring system is not fair because they lose all of the points in a scoring section if they have one error. The call appeal system does not allow appeals of other than individual calls. The Union must file a grievance if it wishes to challenge the scoring system.

The Employer maintains a progressive discipline policy under the terms of the parties' Agreement. It provides employees with an oral warning, a written warning, disciplinary probation and discharge.

The following is chronology of the events relating to Ms. Ako's discipline. The Employer placed her on a corrective action plan because she had not met her Liberty Mutual referral metric in January, 2009. In April, 2009, Ms. Ako voluntarily reduced her hours at the Employer's request for budgetary reasons from full-time to part-time. She remained part-time until July, 2009.

Ms. Ako received several reminders that she was falling short of her Q A metric prior to May, 2009. She continued to fall short and received an oral warning on May 19, 2009, for falling short of the 85% Q A metric requirement.

In July, 2009, the Employer gave her a written warning for being under 80%. At the same time, she met her production goals. She received a Gold Stretch award in August, 2009, for having done so.

Ms. Lori Westphal became Ms. Ako's team leader at the beginning of November, 2009. She worked with Ms. Ako in positive coaching and otherwise at least as much as she did with other employees.

In August, 2009, The Employer changed its Q A script from 8 pages to 11 pages. It provided training to Ms. Ako and all other employees as to the new Q A guidelines. It applied the 85% standard to the new guidelines. The Employer used the evaluation and coaching process to evaluate the new guidelines and to make any necessary changes. There is no evidence as to whether any changes were actually required.

Ms. Ako missed her Q A metric for November because she achieved only an average of 84%. Ms. Westphal and a Human Resources representative met with Ms. Ako and her steward on December 16, 2009 to give Ms. Ako an opportunity to raise any concerns she had as to why she failed to meet that metric in November. The Employer placed her on "disciplinary probation" on December 16, 2009. This was the last step before discharge. Ms. Westphal told her she would be terminated if she failed to meet it again. Ms. Ako did not grieve the fact that she was placed on disciplinary probation. Ms. Westphal continued her positive approach at all relevant times thereafter with Ms. Ako and continued to provide coaching services at or in excess of that provided to other similarly situated sales representatives.

The Employer scored six of Ms. Ako's calls in January, 2010. Those calls are detailed below. Ms. Ako met with Ms. Westphal in biweekly "coaching" sessions. They reviewed each of these calls. Ms. Westphal met in one such session with Ms. Ako on January 27 and discussed the five calls that had been scored to date and the fact that their average was 84.2%. Ms. Westphal told Ms. Ako she had to obtain a score of 89% on the next scored call to reach 85%. However, the final call scored for January was one which had occurred the day before that meeting, January 26, 2010.

Ms. Westphal held a positive coaching session with Ms. Ako on February 3, 2010. Only two days later, Ms. Westphal and a Human Resources representative met with Ms. Ako and her steward to inform Ms. Ako that she had only an 84.3% score, slightly less than the 85% required. They gave Ms. Ako an opportunity to explain why she missed the metric, but Ms. Ako did not then identify any specific cause. They then told her she would be discharged and the Employer confirmed the discharge by letter of that same date.

The Union filed the instant grievance and it was properly processed through the grievance procedure.

RELEVANT AGREEMENT PROVISIONS [2]

. . .

ARTICLE I

MANAGEMENT RIGHTS

> The management of the Employer and the discretion of the working force are vested exclusively in the Employer. Such management and discretion shall include rights to hire, recall, transfer, promote, demote, suspend and discharge for just cause, and to layoff Employees because of lack of work or for other legitimate reasons.
>
> The Employer shall have the prerogative to establish rules of employment, assignments of work including temporary assignments, to change or modify methods, procedures and controls for the performance of work, and to establish work standards. Monitoring work standards will be at the sole discretion of the Employer; provided that such monitoring shall not be unreasonable.
>
> **SECTION 1 – WORKPLACE RULES**
>
> CUNA Mutual Group's workplace rules are intended to protect the health and safety of all Employees, as well as the good will and property of the company.

[2] The language of the predecessor agreement was the same, except work rule 24 was added.

The rules are published to ensure that Employees are aware of personal standards of conduct expected at work. The list, while not all-inclusive, is provided as a guide to Employees. Failure to follow the rules or maintain proper conduct may result in disciplinary action.

Key Components

The following list of work rules pertains to all Employees of the CUNA Mutual Group:

. . .

24. Monitoring may be used to measure individual performance and the Employer may exercise its right under Article XII of this Agreement.

These rules are not intended to be all-inclusive. CUNA Mutual Group may, when it deems appropriate, establish additional rules to govern Employees' conduct as deemed reasonable and appropriate to meet operational requirements.

. . .

ARTICLE XII

DISCHARGE AND DISCIPLINE

SECTION 1 – DEFINITIONS

A. Discipline – The Employer's normal disciplinary process will progress from oral warning, to written warning, to disciplinary probation to discharge. Management may enter the disciplinary process at any step depending on the severity of the situation. The Employer agrees to notify the Chief Steward of the Union of any disciplinary action, written warning or greater.

B. Discharge – It is hereby agreed that the Employer has the right to discharge for sufficient and just cause, but no Employee will be dismissed with less than two (2) weeks pay unless the discharge is due to dishonesty, physical assault, threat of physical harm or felony on the job. Absences without authority for a period of five (5) consecutive working days shall be grounds for immediate discharge without pay. The Employer agrees to notify the Chief Steward of the Union, or designee, of any discharge and the reasons therefor within one (1) working day.

. . .

ARTICLE XIX

GRIEVANCES

SECTION 1 – DEFINITION

A grievance within the meaning of this Agreement shall be a dispute arising between the parties hereto relating to matters of wages, hours and working conditions, involving interpretation or application of any provision of this Agreement.

. . .

SECTION 5 – ARBITRATION

When a grievance is appealed to arbitration, the parties shall first meet within 10 working days of the date of the written notice of desire to arbitrate and try to agree upon an arbitrator. Failing such agreement, the parties shall, within five (5) working days of the meeting, jointly request the American Arbitration Association to submit a panel of seven (7) arbitrators. Each party shall have the right to reject one panel of arbitrators. On an alternate basis, each party shall strike one (1) name from the list, and the other party shall then strike one (1) name, and so on in succession. The person whose name remains shall be the arbitrator. The arbitration service shall be notified within 10 working days of the selection by a joint letter from the parties or the grievance will be deemed to have been withdrawn.

The decision of the arbitrator shall be final and binding upon the Employer, the Union and the Employee(s) presenting the grievance. The arbitrator's fees shall be borne equally by the Employer and the Union. The filing fee shall be borne equally by the Employer and the Union.

It is agreed between the Employer and the Union that the arbitrator shall not change, but shall interpret only, the terms of this Agreement.

. . .

SECTION 7 – DISCHARGE GRIEVANCE

If a discharged Employee files a grievance claiming the discharge as unjust, the grievance shall commence with the third step of the procedure.

. . . ."

POSITIONS OF THE PARTIES

Employer

The Employer discharged Ms. Ako for just cause. The Employer followed its progressive discipline policy. The propriety of prior discipline is not in issue in this matter. Ms. Ako did not grieve any of the prior discipline. The prior discipline related to her failure to meet the Q A metric repeatedly. Ms. Ako received regular guidance and assistance. For example, a month before her first oral warning, she was told she was not meeting the Q A metric. That warning was issued May 19, 2009. The Employer issued a written warning on August 11, 2009, for not meeting metric. In November, 2009, she was again advised that she was not meeting the Q A metric. Ms. Westphal, her new team leader provided some additional training to Ms. Ako to assist her to meet the metric. Ms. Ako still failed to meet her Q A metric and was placed on disciplinary probation on December 16, 2009. She still failed to meet her Q A metric and was terminated in January 2010.

The Employer has the right under the management rights provision of the agreement to use the metric system which was in place. It provides that the Employer has the right to "establish work standards" and that "Monitoring work standards will be at the sole discretion of the Employer, provided that such monitoring shall not be unreasonable." This latter provision replaced a former, weaker provision. It was first added (by mutual agreement of the parties) to this agreement. The 85% Q A standard has been in effect since 2006. The Union has never challenged the standard as unreasonable. There is no evidence that the Employer has ever failed to strictly enforce the standard. Thus, it is not required by the agreement to deviate from that standard. There is no evidence to support Grievant's contention that she thought that she would have at least to the end of the quarter to improve her performance. Her contention is flatly contradicted by Ms. Westphal's express comments to the contrary on Union Exhibit 10. The record does not establish that Ms. Ako was an excellent producer. The testimony establishes that she was average or below in premium production under ordinary circumstances. She is a short term employee with less than two years' service.

Union

The Employer has not met it burden to demonstrate just cause for discharging Ms. Ako for unacceptable performance. The Employer has identified certain "opportunities" for improvement in the six calls that it evaluated in January, 2010. None of these "opportunities" were in areas defined by the Employer as "critical." In general, the Employer has repeatedly evaluated Ms. Ako as performing well, if not outstanding, in all her other areas rated by the Employer. The Employer's sole case rests on miniscule difference between the 84.33% she received and the 85% minimum required by the Employer. There is no evidence that the rating of 84.33% actually equates to a level of performance which is "unacceptable."

Ms. Ako's performance was more than satisfactory. She met her sales goals in 2008 and 2009. In some cases, she far exceeded it. Ms. Ako performance was more than satisfactory with respect to the "critical elements" of quality assurance. The guidelines for quality assurance evaluation changed in late 2009. The new guidelines were longer. They also added some items and deleted some items. The critical elements remained the same for both the old and the new guidelines. Ms. Ako met the critical guidelines. They are:

1. regulatory compliance requirements;
2. corporate privacy and confidentiality guidelines
3. the agent ask for a sale
4. acceptable behavior toward the caller

Ms. Ako's supervisor admitted at hearing that Ms. Ako was doing well with respect to meeting the critical elements.

The Employer did not meet its burden to prove that the score of 84.33% with respect to the non-critical aspects of quality assurance relates to unsatisfactory performance. Ms. Westphal admitted during cross-examination that the score of 84.33% would not necessarily explain in what way Ms. Ako's performance was substandard. Prior to the hearing the Union sought all documents from the Employer demonstrating a basis for setting the 85% mark as passing. The Employer's answer did not provide productive information.

The Employer also did not meet the burden of proof to demonstrate that the six sales calls it did grade were, in fact, unsatisfactory. The Union asked for a copy of the recording of the six disputed calls and a transcript of those calls. The Employer produced only a transcript of four without the dates they were recorded. The Union did not receive a satisfactory explanation of why the other material was not produced. At hearing, the Employer's counsel stated that the four calls were calls which were a basis of Ms. Ako's discharge.

In any event, the calls were not unsatisfactory. Indeed, each of the four calls resulted in sales.

The Employer failed to specifically identify any conduct of Ms Ako's in those calls which it deemed as "unsatisfactory." The scoring sheets do not identify any "unacceptable" performance.

The scoring sheets for the six calls do not support a finding of unacceptable performance. Under the Employer's system, if the evaluator rates an area as "needs improvement" the employee is given no credit for whatever portion of that area the employee did correctly. This manner of scoring results in the possibility that an employee's performance was better than 85% and possibly even above average even though the rating given was less than 85%. The employee receives no credit when the rater perceives that the employee's performance in an area presented an "opportunity for improvement." There were sixteen items in which the scorer gave Ms. Ako that rating. This does not demonstrate that her performance was less than satisfactory. Instead, this form was merely designed to provide opportunities for improvement.

The quality assurance metric is designed to identify "opportunities" for improvement and to serve as a focus for what the Employer calls "positive coaching" from the employee's supervisor. There is no document which reflects that they should be used punitively against the employee. Alternatively, there is nothing on these forms which reflects unsatisfactory performance.

The Employer did not permit Ms. Ako to use the January 4, 2010, coaching to improve because it terminated her before she could do so. On the January 4, 2010, call she lost six points because the evaluator believed that she should have asked the caller for "details" concerning his "amount of debt." It was not until January 18, 2010, that Ms. Westphal met with Ms. Ako to discuss the call. Her notes also do not show that she did anything wrong. These six points made the difference between passing and failing.

While the Employer emphasized the right of an employee to "appeal" a score, an appeal would generally be futile because it would require the agreement of the supervisor that there was no "room for improvement." Additionally, any appeal might appear to be less than cooperative with her supervisor.

The Employer has failed to meet the Seven Tests. The Employer did not give Ms. Ako adequate notice that if she failed to achieve the 85% standard in January that she would be discharged. Ms. Ako credibly testified that she did not know that she would be terminated. The written disciplinary probation notice sent to Ms. Ako did not inform her she would be discharged if she did not meet the 85% standard in January. There wasn't anything in her most recent performance rating to indicate that she would be discharged. The Employer's use of the minor variation of 84.3% versus 85% was not reasonably related to the orderly, efficient and safe operation of the business because there is no evidence that the Employer's system of quality assurance is designed to distinguish between substandard performance and performance that is minimally adequate but provides an "opportunity" for improvement. The Employer made no effort to discover whether this employee did actually engage in any instance of "unacceptable" performance. Instead, the Employer simply made an arbitrary assumption that 84.33% was equivalent to unacceptable performance rather than obtaining proof. The Union seeks to have Ms. Ako reinstated and made whole for all lost wages and benefits.

Employer Reply

The Union essentially makes three arguments. First, it argues that the Employer did not prove that the 85% Q A standard was reasonable. Second, there is no evidence that the Grievant's performance was actually unacceptable. Third, that the Grievant was never put on notice that obtaining less than 85% was grounds for discharge. All three arguments are meritless.

Article 1 of the Agreement provides that the Employer has the right "to establish work standards," "to monitor work standards [at the] sole discretion of the Employer," and to discipline for the failure to meet those standards. Arbitrators have recognized employers' right to set reasonable production standards even in situations in which there were no express terms like those in Article 1. The Q A standard has been in effect and consistently applied since 2006. There is no evidence that the Union has ever objected to this standard. The Employer previously discharged D.E. in November, 2007, when he averaged only 83 point something after having received a full progressive discipline process. His discharge preceded this labor agreement. If the Union objected to the standard, it could have sought a change in the agreement to remedy it. It did not.

It is not up to the Employer to establish that its system is reasonable. It is the Union's burden to prove that it is unreasonable. It is not the arbitrator's role to second-guess the system.

Grievant knew that her failure to meet the Q A standard would result in her discipline and ultimately in her dismissal. She effectively acknowledged this in her November, 2009 e mail. The positive coaching format is used to address problems and Grievant was fully aware of this. As early as April, 2009, Grievant was put on notice that she was not meeting her Q A standard and that she needed to obtain an 85% Q A score or better. The Employer provided Ms. Ako progressive discipline and there can be no doubt she knew she was on her last chance at the time of discharge.

The Union's remaining arguments are without merit. Ms. Ako may not now claim that her calls were screened inadequately because she did not appeal those determinations at the time. Ms. Westphal reviewed each of the scored calls with Ms. Ako. The Union's suggestion that she did not realize she would be terminated is flatly contradicted by the testimony that Ms. Westphal told her on January 27, 2010, that she had to obtain a score of 89% on her last call to stay employed. Ms. Ako's termination is clearly consistent with similar situations and she received the same or better on-going coaching as other employees.

The Union makes much of the fact that Ms. Ako lost six points on a call made January 4, 2010 claiming that this was something new to her. While Ms. Westphal did not remember if that issue had come up before, the fact is that Grievant had successfully performed on that same issue at least once before. As the Grievant, herself, admitted, she just "was not getting it." Grievant's evaluations show that she was given adequate notice of her Q A problems and that she recognized that she needed to improve in that area.

Union Reply

The Employer has not identified any evidence which would establish that a score of 84.33% in January is in any way equivalent to unsatisfactory performance. The Employer does not dispute the fact that Ms. Ako regularly met the elements of the job determined to be "critical." The Employer never identified why the six calls graded in January justified discharge. By contrast, the Union's brief demonstrates that the scoring for the six calls in dispute do not demonstrate unsatisfactory performance, but rather opportunities to improve. The employee losses all the points in section even if they get some part of it right. The

Employer's argument that it has retained the right to "establish work standards" somehow justifies the discharge of an employee for a score of 84.33% is without merit. That right does not exceed its obligation to show "just cause." In this case, the Union is contending that the Employer does not have just cause to discharge Ms. Ako because she had exceptional performance on the critical elements of quality assurance, her sales record is adequate if not outstanding and other factors are adequate. The Employer also appears to suggest that the Union cannot challenge the application of the quality assurance standards to the discharge of Ms. Ako because the Union did not grieve the discharge of another allegedly similarly situated employee. The Employer points to no authority for that proposition. The Employer's suggestion that there is just cause for the discharge of Ms. Ako because she did not grieve her prior discipline is without any basis. This discharge was not based on the facts and circumstances which resulted in the prior discipline, but the January reviews.

DISCUSSION

Under Article 12 and Article 1, the Employer must show that it has "sufficient and just cause" to discharge Ms. Ako. The Union has made a number of arguments including, but not limited to, those directed at the validity of that system, validity of that system under the new rating system, and whether the metric system did show as a practical matter that Ms. Ako failed to meet the Employer's reasonable minimum standards for quality work and, if so, whether discharge was the only appropriate remedy. It is unnecessary to address any of the other issues because I conclude that the Q A metric system demonstrated that in January, 2010, Ms. Ako did not meet a reasonable standard of minimum performance. The disciplinary and training history further demonstrates that it is highly unlikely she will develop those essential skills to a point of being able to reliably perform those duties. I conclude at this point in Ms. Ako's career discharge was the only appropriate remedy.

Under Article 1, the Employer has retained the right to establish work standards as follows:

> The Employer shall have the prerogative to establish rules of employment, assignments of work including temporary assignments, to change or modify methods, procedures and controls for the performance of work, and <u>to establish work standards</u>. <u>Monitoring work standards will be at the sole discretion of the Employer; provided that such monitoring shall not be unreasonable</u>. [Emphasis supplied.]

The fact that the Employer may, in general, use a Q A metric system is underscored by the fact that the system has been in effect since 2006 without challenge and the fact that the parties added work rule 24 in this most recent contract.

One of the fundamental assumptions of the Union's position is that only the items labeled as "critical" of the Q A metric system are elements relating to the Employer's minimum standards of performance. These include confidentiality, following regulatory requirements for replacing existing insurance, and minimally acceptable behavior. This assumption is incorrect. The other sections also involve the Employer's reasonable minimum requirements for a suitable and affordable sale.

The Union has also challenged whether the scoring of those other sections properly leads to a conclusion that an employee is not meeting the Employer's reasonable minimum expectations. It contends that they only show that the employee is not meeting the Employer's aspirations for optimum performance. I conclude that the Q A metric system did identify a situation with Ms. Ako in which she has failed to maintain the Employer's reasonable minimum standards for reliably handling suitability and affordability issues.

The Q A metric system is reasonably related to the Employer's interest in determining that products sold to customers are suitable for the customer, meet the customer's legitimate needs, and are economically sustainable by the customer. A fundamental function of a sales representative to his or her customer is to sell that customer a policy which is suitable for the customer (one which he or she really needs and which he or she can really afford). Thus, one of the essential functions of the sales position is the ability to gather all of the information necessary to determine that a certain product is one that the customer needs and can really afford. This sounds easier than it is. Making these determinations require that the sales representative obtain very personal information from potential customers over the telephone. It is not a skill easily attained. However, an experienced sales representative must regularly and reliably make these inquiries. One of the goals of the Q A portion of the metric system as part of the Employer's overall management system is to facilitate new employees in learning those Q A skills as well as uncovering failures to meet minimum performance standards. The metric system's as it is applied by the Employer is evaluated on a subjective basis in assessing points. The scoring system essentially ultimately requires that sales representatives develop a relatively high degree of proficiency and consistency in meeting the Employer's standards. The scoring system as it is applied herein is therefore, reasonably related to the Employer's legitimate business interests in making only those sales which are suitable for customers.

Ms. Ako was moved from disciplinary probation to discharge because the calls which were rated in January averaged 84.33%, slightly less than the required 85%. The following are the calls which were reviewed in January to create Ms. Ako's Q A score of 84.3% for the month of January:

Exhibit	***Call Date***	***Review Date***	***Old/New Standards***	***%***	***Demerit Sections***
10	12/16/2009	1/5/2010	new	95%	2.3
11	1/4/10	1/12/10	new	100%	no loss

12	1/4/10	1/18/10	new	80%	loss on 2.2 and 2.3, 5.1, 5.4
13	1/8/2010	1/22/10	new	79%	3.2, 5.3, 5.4
14	1/25/10	1/26/10	new	67%	2.2, 2.3 3.1, 3.2
15	1/26/10	1/28/10	new	85%	2.3, 3.2 6.2

Contrary to the testimony of Ms. Westphal, the indications are that the calls were evaluated under the new standards.[3] A review of the January 25, 2010, call (exhibit 14) demonstrates that Ms. Ako lost 15 points of 100 in Section 3 by failing to determine if the customer was a tobacco user prior to quoting the non-tobacco user rate. She lost an additional 7 points for failing to ask essential underwriting questions. The failure to determine the appropriate rate puts the Employer in the untenable position of having to correct the situation with the customer. A similar result occurred during the January 8, 2010, call in which she failed to make adequate underwriting inquiries and lost seven points. Although the January 8 error appears to be a more understandable error, it still put the Employer in the same position. The better view of these errors is that they did not meet the Employer's reasonable expectations for minimally adequate work on these occasions.

Ms. Ako also failed to consistently make the appropriate suitability inquiries in the calls which were rated in January. In calls December 16, 2009, January 4, 2010 (12), January 25, 2010 (14), and January 26, 2010 (15), Ms. Ako lost points in the components of Subsection 2 in the evaluation guidelines. The mere fact that Ms. Ako has successfully met or exceeded her sales goal is insufficient to conclude that she is performing adequately. Section 2 involves information necessary to determine which product is suitable for the customer. Making suitable sales is essential if the Employer is to maintain its long term relationships with customers and credit unions. It also requires an explanation of the suitability to the customer in the recommendation phase of the sale. The latter is essential to demonstrate that the customer understands why the product is suitable and has accepted it on that basis. It is unclear if this is a legal requirement, but it is clearly a legitimate minimum sales expectation of the Employer. A review of these three calls together indicates that Ms. Ako made serious errors in not gathering enough suitability information. These actions were a failure to meet reasonable minimum standards of the Employer on these occasions.

The remaining issues which occurred in calls reviewed in January involve internal procedures and cannot be evaluated without a better understanding of the system as a whole. The Union correctly points out that without the points lost in these areas, Ms. Ako would have obtained an 85% rating in January.

---

[3] The fact that they were evaluated on the new standards does not affect the result in this specific matter. See, tr. p. 29 for testimony of Ms. Westphal.

It is important to note that the preponderance of the evidence supports the conclusion that the foregoing errors were properly evaluated. I note that all of the calls which formed the basis of the January rating were reviewed between Ms. Westphal and Ms. Ako with the possible exception of the last call.[4] Neither disagreed with any ratings involving the portion of calls in which Ms. Ako lost points. It appears that historically neither Ms. Westphal nor Ms. Ako have challenged the ratings of calls they have reviewed beyond the one call discussed in the record. Thus, the preponderance of the evidence supports the conclusion that the calls were properly rated.

Although the Union correctly pointed to situations in which Ms. Ako did not have an adequate opportunity to respond to some corrections, those situations do not affect the conclusion herein. The first call scored in January related to a call actually made on December 16. Ms. Ako was moved to disciplinary probation on December 16. Thus, she did not have a reasonable opportunity to make any change based upon the December 16 discipline before she was disciplined again. Ms. Westphal warned Ms. Ako on January 27 that she needed to obtain a very high score on the last call to be scored in January to meet the minimum average of 85% for January. This was virtually at a point when Ms. Ako could do nothing about it. The last call which was, in fact, rated for January was actually performed the day before the January 27 warning.

The December call which was rated in January received a rating of 95% of 100%. The call essentially helped Ms. Ako's average for the calls rated for January. The error which Ms. Ako did make also related to suitability and it is not likely one more disciplinary warning would have had an effect on the one error in that call.

Technically, the January 27 "warning" was not a requirement of the disciplinary system and the fact that the call which was ultimately selected for the last call to be rated had occurred the day before is irrelevant to issues over the propriety of the level of progressive discipline. In any event, that last call rated had a score of 85% and was not a contributing factor to the calls which led to the lower than 85% average. The errors which did occur in this call relate to a long standing pattern of inconsistency on the missed points. Accordingly, it is unlikely that the one last opportunity would have affected the error.

Discharge was the only appropriate action the Employer could take. Ms. Westphal has credibly testified that Ms. Ako has had difficulty with suitability issues throughout her career. Ms. Ako has admitted that she has trouble understanding those standards. The record of calls on December 17, 2008, December 29, 2008, August 25, 2008, January 19, 2009, January 27, 2009, April 27, 2009, May 19, 2009 and June 11, 2009 corroborates Ms. Westphal's testimony on this point. A review of the record, including, but not limited to Ms. Ako's own admissions demonstrates that she lacks a fundamental understanding of this part of her function and it is highly unlikely she will be able to develop the required consistency. Accordingly,

---

[4] See, tr. pp. 47-9, Employer exhibits 9, 16, and 17.

discharge is the only appropriate disciplinary choice the Employer has. The Employer did not violate the agreement because it had just cause to discharge Ms. Ako.

AWARD

The Employer had just cause to discharge Ms. Ako and, therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 28th day of April, 2011.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

SHM/gjc
7723